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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 16, 2018 and MAY 17, 2018

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCXCIX

PEGGY POLACEK
OFFICIAL REPORTER

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John F. Wright, Associate Justice[1]
Lindsey Miller-Lerman, Associate Justice
William B. Cassel, Associate Justice
Stephanie F. Stacy, Associate Justice
Jeffrey J. Funke, Associate Justice
Jonathan J. Papik, Associate Justice[2]

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

Frankie J. Moore, Chief Judge
Michael W. Pirtle, Associate Judge
Francie C. Riedmann, Associate Judge
Riko E. Bishop, Associate Judge
David K. Arterburn, Associate Judge
Lawrence E. Welch, Jr., Associate Judge[3]

Peggy Polacek . . . . . Reporter
Teresa A. Brown . . . . . Clerk[4]
Erika Schafer . . . . . Acting Clerk[5]
Wendy Wussow . . . . . Clerk[6]
Corey Steel . . . . . State Court Administrator

[1]Until March 18, 2018
[2]As of April 11, 2018
[3]As of March 28, 2018
[4]Until March 2, 2018
[5]As of March 3, 2018 until April 1, 2018
[6]As of April 2, 2018

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
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
Christopher E. Kelly	Omaha
Vernon Daniels	Omaha
Matthew R. Kahler	Omaha
Chad M. Brown	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 298

Oluwatomilayo Eniola Ajibodu
Hannah Mae Archuleta
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Matthew Ryan Chouinard
Carola Andrea Cintron-Arroyo
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Erin Elizabeth Edwards
Kaylee Rudd Engel
Tami Lynette Fleek
Kaylie Sue Fogle
Kevin Matthew Gambee
Noah Daniel Glover-Ettrich
Carl Franz Haberstick III
Jerry Norris Higgins
Cheryl Lynn Horst
Aaron Kevin Jansen
Renee Symone Just
Natalie Jean Killion
John Michael Kivett
Matthew Lewis
Anne Elizabeth Maly
Albert Asher Mannari
Erick Anthony Martin
William Michael McDonnell
Blake Christopher Miller
Nicole Kathryn Nobbe
Rachel Ranae O'Toole
Michael Christian Pettis
Stephany Paulette Pleasant Maness
Laura Denise-Marie Schmitt
Peter Joseph Sitzmann
Abigail M. Stark
Abby Christine Stenek
Andrew John Stokes
Scott Roman Straus
Michael G. Thelen
Alexis Marie Trout
Chellsie Lynn Weber
Jacquelyn Elizabeth Whelan

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No. S-17-1103: **State v. Jones**. Affirmed. Heavican, C.J.

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No. S-17-240: **Kaiser v. Allstate Indem. Co**. Cause having not been shown, appeal dismissed. See § 2-107(A)(2).

No. S-17-821: **State v. Reiner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-17-915: **Nebraska Co-op Rep. Platte Proj. v. Lincoln Cty. Bd. of Equal**. Stipulation allowed; appeal dismissed.

No. S-17-1118: **State v. Harris**. Cause having not been shown, case dismissed. See § 2-107(A)(2).

No. S-17-1216: **State v. Bain**. Appeal dismissed. See § 2-107(A)(2).

No. S-17-1269: **Collins v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

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No. S-15-1014: **In re Henry B. Wilson, Jr., Revocable Trust**. Petition of appellee for further review sustained on February 23, 2018.

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No. A-16-727: **N.P. Dodge Mgmt. Co. v. Eltouny**. Petition of appellant for further review denied on March 1, 2018, as untimely.

No. A-16-844: **Walker v. Probandt**, 25 Neb. App. 30 (2017). Petition of appellee for further review denied on May 8, 2018.

No. A-16-846: **James-Estenson v. Estenson**. Petition of appellant for further review denied on April 24, 2018.

No. A-16-934: **State v. Vance**. Petition of appellant for further review denied on March 1, 2018, as untimely. See § 2-102(F)(1).

No. A-16-964: **State v. Heng**, 25 Neb. App. 317 (2017). Petition of appellant for further review denied on February 27, 2018.

No. A-16-1044: **In re Guardianship & Conservatorship of Hunt**. Petition of appellant for further review denied on February 22, 2018.

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No. A-16-1201: **Holen v. Holen**. Petition of appellee for further review denied on March 14, 2018.

No. A-16-1230: **Suthar v. Bryan**. Petition of appellant for further review denied on May 8, 2018.

No. A-16-1231: **State v. Saldivar**. Petition of appellant for further review denied on March 14, 2018.

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Nos. A-17-003 through A-17-007: **In re Interest of Breanna F. et al**. Petitions of appellee Jerry F. for further review denied on March 27, 2018.

No. A-17-008: **Moyers v. International Paper Co.**, 25 Neb. App. 282 (2017). Petition of appellant for further review denied on March 2, 2018.

No. A-17-018: **Schurman v. Wilkins**. Petition of appellant for further review denied on April 25, 2018.

No. A-17-055: **State v. Fletcher**. Petition of appellant for further review denied on April 19, 2018.

No. S-17-061: **State v. McCurdy**, 25 Neb. App. 486 (2018). Petition of appellant for further review sustained on April 25, 2018.

No. S-17-074: **Shawn E. on behalf of Grace E. v. Diane S**. Petition of appellant for further review sustained on March 16, 2018.

No. A-17-079: **State v. Sysel**. Petition of appellant for further review denied on March 1, 2018.

No. A-17-099: **Telford v. Smith County, Texas**. Petition of appellants for further review denied on February 9, 2018.

Nos. A-17-144, A-17-145: **State v. Walker**. Petitions of appellant for further review denied on March 1, 2018.

No. A-17-154: **State v. Lindberg**, 25 Neb. App. 515 (2018). Petition of appellant for further review denied on March 27, 2018.

No. S-17-187: **State v. Ratumaimuri**. Petition of appellant for further review denied on February 14, 2018.

No. S-17-187: **State v. Ratumaimuri**. Petition of appellee for further review sustained on February 14, 2018.

No. A-17-252: **State v. Capone**. Petition of appellant for further review denied on April 12, 2018.

No. A-17-317: **In re Interest of Antonio J. et al**. Petition of appellant for further review denied on February 23, 2018.

No. A-17-317: **In re Interest of Antonio J. et al**. Petition of appellee Cordell S. for further review denied on February 23, 2018.

No. A-17-342: **Gray v. Hansen**. Petition of appellant for further review denied on March 14, 2018.

No. A-17-365: **State v. Brown**. Petition of appellant for further review denied on April 3, 2018.

No. A-17-399: **Campbell v. Hansen**. Petition of appellant for further review denied on May 8, 2018.

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No. A-17-420: **State v. Miguel**. Petition of appellant for further review denied on April 18, 2018.

No. A-17-462: **State v. James**. Petition of appellant for further review denied on April 30, 2018.

No. A-17-472: **Castonguay v. Jorgenson**. Petition of appellant for further review denied on March 28, 2018.

No. A-17-482: **Gray v. Hansen**. Petition of appellant for further review denied on February 27, 2018.

No. A-17-565: **State v. Price**. Petition of appellant for further review denied on March 22, 2018.

No. A-17-578: **State v. Corado Diaz**. Petition of appellant for further review denied on March 5, 2018.

No. S-17-638: **McEwen v. Nebraska State College Sys**. Petition of appellant for further review sustained on May 9, 2018.

No. A-17-651: **Sanford v. Lincoln Poultry & Egg Co**. Petition of appellant for further review denied on February 23, 2018.

Nos. A-17-652, A-17-653: **In re Interest of Hunter L. & Opie L**. Petitions of appellant for further review denied on March 16, 2018.

No. A-17-717: **State v. Jones**. Petition of appellant for further review denied on February 9, 2018.

No. A-17-798: **In re Interest of Armani W. et al**. Petition of appellant for further review denied on May 8, 2018.

No. A-17-832: **Edwards v. Madsen**. Petition of appellant for further review denied on March 1, 2018. See § 2-102(F)(1).

No. A-17-858: **Alford v. Hansen**. Petition of appellant for further review denied on February 9, 2018.

No. A-17-883: **In re Interest of Michael M**. Petition of appellant for further review denied on April 30, 2018.

No. A-17-902: **State v. Rogers**. Petition of appellant for further review denied on April 18, 2018.

No. A-17-933: **Applied Underwriters v. All American School Bus Corp**. Petition of appellant for further review denied on March 22, 2018.

No. A-17-977: **State v. Fox**. Petition of appellant for further review denied on April 17, 2018.

No. A-17-1035: **State v. Hatch**. Petition of appellant for further review denied on April 12, 2018.

No. A-17-1043: **State v. Castonguay**. Petition of appellant for further review denied on February 15, 2018.

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No. A-17-1145: **State v. Harden**. Petition of appellant for further review denied on March 1, 2018, as untimely. See § 2-102(F)(1).

No. A-17-1169: **Standley v. Sprague**. Petition of appellant for further review denied on March 8, 2018.

No. A-17-1228: **Gray v. Hansen**. Petition of appellant for further review denied on April 12, 2018.

No. A-17-1242: **Gray v. Department of Corr. Servs**. Petition of appellant for further review denied on April 18, 2018.

No. A-17-1263: **Guerry v. Frakes**. Petition of appellant for further review denied on April 25, 2018.

No. A-17-1295: **Hernandez v. Frakes**. Petition of appellant for further review denied on May 4, 2018.

No. A-17-1305: **State v. Valentino**. Petition of appellant for further review denied on March 27, 2018.

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

Tom Houser, appellant and cross-appellee, v. American Paving Asphalt, Inc., appellee and cross-appellant.

907 N.W.2d 16

Filed February 16, 2018. No. S-16-778.

1. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **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.
4. **Courts.** The district court has certain inherent powers by virtue of being a court.
5. ____. Nebraska courts, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice.
6. **Courts: Judgments: Jurisdiction: Appeal and Error.** An intermediate appellate court may timely modify its opinion, which is consistent with the generally recognized common-law rule that an appellate court has the inherent power to reconsider an order or a ruling until divested of jurisdiction.
7. **Courts: Appeal and Error.** In cases where no statement of errors was filed, but the record showed that the district court considered an issue that was also assigned to a higher appellate court, the Supreme Court or the Court of Appeals may consider that issue.

8. **Courts: Time: Appeal and Error.** The district court has discretion to extend the time for filing a statement of errors.
9. ____: ____: ____. On appeal from the county court, a district court's ruling on a motion to extend the time for filing a statement of errors will be reviewed for an abuse of discretion.

Appeal from the District Court for Douglas County, Leigh Ann Retelsdorf, Judge, on appeal thereto from the County Court for Douglas County, Marcena M. Hendrix, Judge. Judgment of District Court affirmed in part, and in part reversed and remanded with directions.

David J. Koukol, Sharon A. Hansen, and Michael W. Milone, of Koukol & Johnson, L.L.C., for appellant.

James B. McVay, of Tiedeman, Lynch, Kampfe, McVay & Respeliers, for appellee.

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

Per Curiam.

I. NATURE OF CASE

A homeowner brought a breach of contract action against the company that laid his asphalt driveway, after the driveway prematurely began to deteriorate. The county court entered judgment in favor of the homeowner, but on appeal, the district court significantly reduced the award. The parties dispute whether review of the county court's verdict is limited to plain error, because the asphalt company failed to timely file its statement of errors to the district court. The parties also dispute whether there was sufficient evidence that it was reasonable and necessary for the homeowner to contract for a stopgap repair of patchwork replacement of broken sections and, subsequently, for a 2-inch overlay of the entire driveway. Finally, the asphalt company contests attorney fees awarded to the homeowner in relation to the company's late production of documents that were the subject of an order to compel in county court.

II. BACKGROUND

In 2008, Tom Houser entered into a written contract with American Paving Asphalt, Inc. (American Paving), to convert his 1,440-foot limestone driveway into an asphalt driveway. Houser had negotiated the contract with Mark Hall, the co-owner of American Paving. Hall had proposed a 3-inch asphalt overlay on top of the existing limestone, at a cost of $16,000.

According to Houser, after signing the contract with American Paving for a 3-inch overlay, he discussed with Hall concerns about the lack of traction during the winter on the steepest part of the driveway. According to Houser, Hall proposed traction indentations in about 300 feet of the driveway that would be made by raking through the asphalt. According to Houser, Hall proposed that they lay an extra 2 inches of asphalt depth where the traction strips would be placed.

There was no written contract regarding the traction strips, but it is undisputed that American Paving charged $1,500 for the added work. In addition, there was evidence that Hall had recommended to Houser that he seal-coat the driveway.

Several months after the installation of the asphalt overlay, Houser paid Hall an additional $1,500 to seal-coat the driveway and repair some cracks that had already occurred. The invoice for the repair and seal-coat stated that American Paving "[w]ill fill any cracks that surface from sealcoating job at no cost to homeowner." In total, Houser paid American Paving $19,000 for the asphalt driveway.

More cracks continued to occur in the asphalt driveway. By 2010, larger chunks of the driveway began to break apart and cracks of various sizes were visible on the majority of the driveway. American Paving stopped responding to Houser's requests for repairs, and Houser sued American Paving in county court for breach of contract.

1. Evidence of Breach

Houser presented the expert testimony of Douglas Dreessen, a registered professional civil engineer, who opined that the

driveway was defective and did not substantially conform to the contract. Dreessen explained that there are two important elements to asphaltic cement paving. First, the subgrade must be compacted. Second, the thickness of the pavement must be adequate to support the type of traffic anticipated. With regard to thickness, Dreessen also testified that it is important for the pavement to be uniform so that there are not weak areas that will tend to give out.

Dreessen testified that absent instruction to the contrary, his goal as a professional engineer is to design asphalt driveways with a 20-year design life. Over American Paving's parol evidence objection, Houser also testified at trial that Hall told him the driveway would last at least 20 years. At trial, Hall denied making such a guarantee or that it was an industry standard.

Dreessen visually inspected the driveway in 2013. He observed numerous "alligatored" areas where failure was occurring. Given that the driveway was only 5 years old at the time of the inspection, this was considered a "premature failure" of the driveway. A report prepared by Dreessen's civil engineering firm noted significant weathering, oxidization, raveling, and wearing away of the surface.

Dreessen had his staff conduct tests to determine the pavement thickness and compaction. They bored into six different areas throughout the length of the driveway where it appeared to be thickest and not yet cracked or broken. The samples demonstrated a thickness ranging from 1¾ to 2½ inches, with an average measurement of 2 inches. Based on the results of the tests conducted, Dreessen opined that the cracking and distress of the asphalt driveway occurred because the asphalt was too thin and was placed on an inadequate base due to nonuniform and subgrade compaction.

Dreessen opined that Houser's driveway was not constructed in substantial compliance with the specifications of the contract. In his work, Dreessen regularly supervised contractors to ensure that their work was in substantial compliance with the

specifications and plans. In his experience, contract specifications for asphalt depth referred to the depth after it was rolled and compacted. He stated that the depth of the asphalt would never be measured before it was compacted, because "[w]hen we specify for an asphalt project, we need to be able to go back and verify what is on the plans . . . ." Further, Dreessen stated that the work did not comply with the specifications in the contract that it be graded and compacted to maximum strength.

2. Evidence of Damages

Houser testified that for a couple of years after American Paving stopped making repairs, Houser sealed the cracks himself as they continuously appeared. Then, in 2012, Houser hired Asphalt Maintenance, Inc., to replace several large sections that had begun to break apart into larger chunks. Houser paid Asphalt Maintenance $5,110 for replacing the severely damaged sections of the driveway, plus $550 for sealing various cracks in the remaining lengths of the driveway. Houser had obtained more than one bid and chose Asphalt Maintenance because it had presented the lowest bid.

But Houser considered Asphalt Maintenance's work only a "stopgap measure before the winter of 2012." Houser was attempting only to address the areas of the driveway that were the most damaged and might come up in more large pieces when he used a snowplow. Over American Paving's objection, Houser testified that he thought that the repairs by Asphalt Maintenance were necessary.

After the 2012 repairs, the driveway continued to deteriorate. The 2013 report by Dreessen's firm noted that the oxidation and raveling observed at the time of the report would combine to allow for additional pathways for water and air to continue the weathering process and extend the cracking during freeze-thaw cycles. Houser also testified that with various repaired patches, the driveway "looked terrible" overall, with a variegated light-and-dark pattern.

As a solution to this continuing deterioration and the patchwork appearance due to previous repairs, Houser chose to have a 2-inch asphalt overlay placed on the entire length of the driveway. Houser generally indicated, over objection, that he had reached the 2-inch overlay solution after consultation with others. And Houser testified, over objection, that without adding a 2-inch overlay, he would have continued to have to pay to replace additional sections.

The asphalt company Houser contracted with charged $26,189.09 for the 2-inch overlay. Again, Houser had obtained more than one bid and chose the contractor who presented the lowest bid. Even with the 2-inch overlay, Houser anticipated additional cracking and costs associated with repairs in the future.

On cross-examination, Houser admitted that certain areas of the driveway, approximately 150 to 200 feet, were still in relatively good condition and not "defective." However, he believed that most of the driveway was unacceptable and he did not "feel like taking a roller coaster ride going up my driveway where its two inches higher and not."

At the time of trial, it had been about 1½ years since the overlay had been installed. Houser testified that there had been a noticeable change in the amount of deterioration. He said: "[It l]ooks like a nice, smooth asphalt driveway. It has a small handful of cracks in it in a couple of areas where apparently the deterioration underneath is continuing, but otherwise the driveway has held up very well."

Houser testified that he anticipated having to seal-coat the driveway. Houser explained that he had paid to seal-coat the original asphalt driveway per American Paving's instructions. Over American Paving's hearsay, relevance, and discovery objections, Houser testified that he had recently entered into a contract to seal the driveway at a cost of $3,250.

Houser submitted evidence of the cost of Dreessen's inspection, testing, and analysis, which was $1,705. He also submitted evidence of the cost of Dreessen's time testifying as an expert

witness, $2,886.10. Houser entered into evidence the costs of deposing an American Paving employee and Hall, $371.50 and $421.25, respectively, in preparation for trial. Houser sought court costs in the amount of $69. Houser asked for a total of $40,551.94 in damages. The court ordered the parties to submit briefs after trial. American Paving did not submit a brief.

3. Verdict, Attorney Fees, and Sanctions

American Paving moved to disqualify the trial judge and for a mistrial on the ground that the judge had allegedly engaged in activities on her cell phone during trial. The court overruled American Paving's motion.

American Paving later filed a second motion to disqualify and for a mistrial, asserting the same conduct of the trial judge engaging with her cell phone during trial. But the second motion further alleged that Hall had filed a complaint with the Nebraska Commission on Judicial Qualifications, which complaint was under investigation. The court overruled the motion.

On June 17, 2015, the county court entered judgment in favor of Houser in the amount of $40,551.94. In its order, the court set a hearing for Houser's oral motion for attorney fees. After the judgment, Houser submitted an affidavit supporting costs and fees incurred with respect to the discovery delays, motion for sanctions, and the motions to disqualify. On September 22, the court ordered $1,514 in sanctions and attorney fees to be paid to Houser. On October 22, the court overruled American Paving's motion for new trial.

4. Appeal to District Court

American Paving filed a notice of appeal to the district court on November 10, 2015.[1] On that same date, it filed its praecipe for the bill of exceptions and transcript.

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[1] See Neb. Rev. Stat. § 25-2729 (Reissue 2016).

(a) Filing Statement of Errors Out of Time

American Paving did not timely file its statement of errors. Neb. Ct. R. § 6-1518 provides in relevant part:

> Within 10 days of filing the bill of exceptions in an appeal to the district court, the appellant shall file with the district court a statement of errors which shall consist of a separate, concise statement of each error a party contends was made by the trial court. Each assignment of error shall be separately numbered and paragraphed. Consideration of the cause will be limited to errors assigned and discussed, provided that the district court may, at its option, notice plain error not assigned.

Neb. Ct. R. § 6-1452(A)(7) (rev. 2011) is virtually identical.

The bill of exceptions in American Paving's appeal was filed with the district court on January 7, 2016. Court rules do not require that any notice be given to the parties when the bill of exceptions has been filed in the district court, and thus, the parties did not receive notice when the bill of exceptions was filed.

On February 1, 2016, the district court sent the parties a notice of intent to dismiss the appeal in the event that they failed to submit a proposed scheduling order within 30 days. On March 21, American Paving filed its brief with the district court and served it on Houser.

Thereafter, on April 15, 2016, American Paving filed a motion for leave to file a statement of errors out of time. A hearing was held on the motion on April 21. American Paving relied on Neb. Ct. R. § 6-1519, which allows courts to suspend applicable local rules upon good cause in order to prevent manifest injustice: "Upon the showing of good cause, a rule may be suspended in a particular instance in order to avoid a manifest injustice."

American Paving's attorney asserted that he did not learn until March 2, 2016, that the bill of exceptions had been filed. On that date, he "happened to check with the Clerk of the

District Court." The attorney explained that he was under the mistaken impression that the district court would notify him when the bill of exceptions had been filed. In an affidavit, the attorney averred that "in prior years," notice was sent to the parties when the bill of exceptions had been filed. Furthermore, American Paving's attorney explained that he did not realize the legal impact that failing to timely file a statement of errors could have.

American Paving's attorney argued that the rule regarding filing a statement of errors within 10 days of the filing of the bill of exceptions should be kept "in perspective":

> The rule is simply a procedural tool designed to frame the issues to be addressed in the appeal to the district court. It's not designed for anything other than to allow you, as the judge, as the sitting judge, and the Appellee, as a responder, to know what the heck I'm going to talk about at this hearing and what the issues are in terms of the appeal.

The court stated that it had sent out a notice of intent to dismiss on February 1, 2016. In light of that fact, the court found it "frustrating" that American Paving did not bother to inquire whether the bill of exceptions had been filed until March 2.

American Paving's attorney acknowledged that he could have checked every week to see whether the bill of exceptions had been filed and that he failed to do so. But as to the delay between the letter of February 1, 2016, and the filing of the statement of errors, the attorney argued that, either way, the April 15 filing of the statement of errors was late. On May 4, the court sustained American Paving's motion to file the statement of errors out of time.

(b) Statement of Errors

In its statement of errors, American Paving asserted that the county court had erred by (1) finding that Houser offered sufficient evidence to show that American Paving breached the contract for installation of the asphalt driveway, (2) finding

that Houser offered sufficient evidence as to the reasonableness and necessity of the cost of repairs, (3) awarding certain costs to Houser that are not permitted by law, (4) failing to recuse herself as requested given her improper actions during trial and her bias in favor of Houser, (5) finding that sanctions against American Paving were appropriate, and (6) awarding attorney fees to Houser.

(c) Order

The district court concluded that the county court did not abuse its discretion in denying American Paving's motion to disqualify and for a mistrial.

Citing to Neb. Ct. R. Disc. § 6-337, the district court found no error in the county court's order of attorney fees as a sanction for failing to produce the requested records in a timely fashion. Section 6-337(b) allows the court to order "reasonable expenses, including attorney fees, caused by the failure [to comply with a discovery order], unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

The district court found there was competent evidence to support the county court's determination that American Paving had breached its contract with Houser and that such breach was the proximate cause of damage to Houser.

The court affirmed damages in the amount of only $5,660. The court found that the photographs and testimony established the necessity of the patchwork repair by Asphalt Maintenance of sections of the driveway that had broken into chunks. But it found the evidence insufficient to support the reasonableness and necessity of the 2-inch overlay.

The court concluded that the county court abused its discretion in awarding as costs[2] expenditures for expert reports and testimony. The court found that only $861.75 for depositions and court costs was properly awarded as costs. It remanded the

[2] See Neb. Rev. Stat. § 25-1708 (Reissue 2016).

case to the county court with directions to enter a judgment reflecting damages in the amount of $6,521.75.

Subsequently, a hearing was held on Houser's motion for attorney fees incurred in responding to American Paving's motion to file its statement of errors out of time and for a continuance. Houser submitted into evidence an affidavit supporting a total of $2,756.75 in costs and fees. The district court overruled the motion.

Houser appeals, and American Paving cross-appeals.

III. ASSIGNMENTS OF ERROR

Houser assigns that the district court erred in (1) granting American Paving's motion for additional time to file its statement of errors and allowing anything other than plain error review, (2) failing to find that a 2-inch asphalt overlay was a reasonable procedure to make the driveway conform to the contract, and (3) ruling that the $26,189.09 cost of the overlay was unreasonable and unsupported by competent evidence.

On cross-appeal, American Paving assigns that the district court erred in finding (1) that there was sufficient evidence to sustain damages in the amount of $5,660 and (2) that the county court did not abuse its discretion in awarding to Houser $1,514 in attorney fees.

IV. STANDARD OF REVIEW

[1,2] The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.[3] 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.[4]

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[3] See, *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 295 Neb. 419, 889 N.W.2d 596 (2016). See, also, Neb. Rev. Stat. § 25-2733 (Reissue 2016).

[4] *Id.*

[3] 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.[5]

V. ANALYSIS

1. Plain Error Review

American Paving filed a statement of errors in the district court, but only after the district court granted its motion to extend the 10-day window established by the statement of errors rule.[6] In arguing that the district court erred in granting the extension, Houser relies upon the suspension rule[7] empowering a district court to "suspend[]" another uniform district court rule. In the district court, American Paving cited the suspension rule in support of its motion. Houser contends that the district court's review should have been limited to plain error.

But both parties' arguments are based on a flawed premise—that a district court, sitting as an intermediate appellate court, has no power to grant a motion to extend the time to file a statement of errors, except pursuant to the suspension rule. In the sections that follow, we will expose the flaws in that premise, review our case law, and apply the correct rule to settle the standard of review.

(a) Flaws of Premise

The first flaw is the lack of any textual support in the statement of errors rule. It contains no language suggesting the

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[5] *State ex rel. Unger v. State*, 293 Neb. 549, 878 N.W.2d 540 (2016); *Zwygart v. State*, 270 Neb. 41, 669 N.W.2d 362 (2005).

[6] § 6-1518.

[7] § 6-1519.

district court lacks the power to extend the 10-day window. It simply states:

> Within 10 days of filing the bill of exceptions in an appeal to the district court, *the appellant shall file* with the district court a statement of errors which shall consist of a separate, concise statement of each error a party contends was made by the trial court. Each assignment of error shall be separately numbered and paragraphed. Consideration of the cause will be limited to errors assigned and discussed, provided that the district court may, at its option, notice plain error not assigned. This rule shall not apply to small claims appeals.[8]

The 10-day provision in the first sentence is addressed to the appellant, not the district court. There is no language expressly or impliedly prohibiting a district court from extending the time.

Reading a prohibition into the rule would require us to add words to the third sentence, as if it read, "Consideration of the cause will be limited to errors assigned and discussed in a timely filed statement of errors, provided that the district court may . . . ." Just as it is not within the province of the courts to read a meaning into a statute or regulation that is not warranted by the language,[9] rules should be read likewise. We must limit the rule's meaning to its plain language.

The second flaw is the absence of any statutory basis for the premise. The right of appeal in Nebraska is purely statutory.[10] Statutes in chapter 25, article 27, establish the power of a district court to hear appeals from county court. And these statutes teach three lessons.

One dictates that the district court's standard of review shall be for "error appearing on the record made in the county

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[8] § 6-1518 (emphasis supplied).

[9] See, *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006); *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002).

[10] *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

court."[11] The statement of errors rule must be interpreted to operate within the context of these statutes. And our discussion of case law will demonstrate that we have done so.

Another permits this court to establish rules but does not support the premise. It authorizes the Nebraska Supreme Court to prescribe rules governing the "ordering, preparing, signing, filing, correcting, and amending of the bill of exceptions."[12] But this language does not permit us to artificially limit the district court's discretion to extend the time for filing of a statement of errors.

Another statute makes it clear that timely filing of a statement of errors cannot be deemed jurisdictional. It specifies that filing of the notice of appeal and deposit of the docket fee are the only steps required to vest the district court with jurisdiction of the appeal.[13] Our discussion of the case law will show that we have characterized the statement of errors rule in full accord with this statutory command.

Another flaw is the premise's inconsistency with other uniform district court rules. There are other sections of the Uniform District Court Rules of Practice and Procedure which specify procedures but where the district court undoubtedly has power to grant relief without relying on the suspension rule. For example, even though a rule requires that "citation of Nebraska cases shall include the . . . North Western Reporter citation,"[14] a court can surely exercise its discretion to accept a brief containing only citations to the Nebraska Reports or the Nebraska Appellate Reports. This illustrates the absurdity of applying the suspension rule to matters generally within the district court's discretion.

[4,5] The final flaw, and perhaps the most important one, is its implicit characterization of district courts. The district

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[11] § 25-2733(1).

[12] § 25-2733(2).

[13] § 25-2729(2).

[14] Neb. Ct. R. § 6-1505(C).

court has certain inherent powers by virtue of being a court.[15] "The term 'inherent power of the judiciary' means that which is essential to the existence, dignity and functions of the court from the very fact that it is a court."[16] Nebraska courts, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice.[17]

[6] And when sitting as an intermediate appellate court, the district court has inherent power common to appellate courts. For example, in *State v. Hausmann*,[18] we reiterated that an intermediate appellate court may timely modify its opinion, which is "consistent with the generally recognized common-law rule that an appellate court has the inherent power to reconsider an order or [a] ruling until divested of jurisdiction." And the Nebraska Court of Appeals found no error in a case where the district court, sitting as an appellate court, accepted a supplemental bill of exceptions on rehearing.[19] Surely, an appellate court has inherent authority to regulate such things as timing of record preparation, extension of brief dates, and argument dates.

(b) Lessons From Case Law

Finally, several lessons can be drawn from this state's reported decisions. First, and foremost, this court has never held that a district court lacks the power to extend the time for filing a statement of errors or that its power to do so is limited

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[15] See, e.g., *Putnam v. Scherbring*, 297 Neb. 868, 902 N.W.2d 140 (2017); *In re Interest of Luz P. et al.*, 295 Neb. 814, 891 N.W.2d 651 (2017); *Jacob v. Nebraska Dept. of Corr. Servs.*, 294 Neb. 735, 884 N.W.2d 687 (2016); *In re Adoption of Jaelyn B.*, 293 Neb. 917, 883 N.W.2d 22 (2016); *Carrel v. Serco Inc.*, 291 Neb. 61, 864 N.W.2d 236 (2015); *Marcuzzo v. Bank of the West*, 290 Neb. 809, 862 N.W.2d 281 (2015).

[16] *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 288, 275 N.W. 265, 267 (1937).

[17] *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

[18] *State v. Hausmann*, 277 Neb. 819, 826, 765 N.W.2d 219, 225 (2009).

[19] *State v. Osborne*, 20 Neb. App. 553, 826 N.W.2d 892 (2013).

by the suspension rule. This is not surprising given that early on, we characterized the rule as "simply a procedural tool designed to frame the issues to be addressed in the appeal to the district court."[20]

Second, in cases where no statement of errors was filed and the district court reviewed for plain error, the higher appellate court likewise reviewed for plain error only.[21]

[7] Third, in cases where no statement of errors was filed, but the record showed that the district court considered an issue that was also assigned to a higher appellate court, the Supreme Court or the Court of Appeals may consider that issue.[22] Thus, in a case where the defendant did not file a statement of errors, the Court of Appeals looked to the "proceedings and argument before the district court"[23] to see whether a claimed error was mentioned. In another case, the defendant's notice of appeal from county court stated that she was appealing due to an excessive sentence.[24] Based on an assignment of error in the defendant's brief, the district court considered whether the county court abused its discretion in sentencing the

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[20] *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 648, 508 N.W.2d 820, 823 (1993) (referring to predecessor version of current county court rule).

[21] See, *Federal Nat. Mortgage Assn. v. Marcuzzo*, 289 Neb. 301, 854 N.W.2d 774 (2014); *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997); *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995); *State v. Harper*, 19 Neb. App. 93, 800 N.W.2d 683 (2011); *State v. Burns*, 16 Neb. App. 630, 747 N.W.2d 635 (2008); *State v. Fiedler*, 5 Neb. App. 629, 562 N.W.2d 380 (1997).

[22] See, *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005); *Lindsay Ins. Agency v. Mead, supra* note 20; *State v. Zimmerman*, 19 Neb. App. 451, 810 N.W.2d 167 (2012); *First Nat. Bank of Omaha v. Eldridge*, 17 Neb. App. 12, 756 N.W.2d 167 (2008); *State v. Boye*, 1 Neb. App. 548, 499 N.W.2d 860 (1993). See, also, *State v. Cardona*, 10 Neb. App. 815, 639 N.W.2d 653 (2002) (considering issue not raised in timely filed statement of errors, because district court's order showed it considered and ruled upon issue).

[23] *State v. Engleman*, 5 Neb. App. 485, 489, 560 N.W.2d 851, 856 (1997).

[24] *State v. Griffin, supra* note 22.

defendant. On appeal to this court, the State argued that appellate review was limited to plain error due to the defendant's failure to file a statement of errors. We disagreed with the district court that an assignment of error in a brief to the district court could constitute compliance with the rule, but we treated the issue of excessive sentence as assigned error because the defendant "specifically raised the issue of excessive sentence in her notice of appeal which was filed in the county court . . . and included in the transcript filed in the district court."[25]

Fourth, the review conducted when a statement of errors is filed, but not within the 10-day window, has varied. In a case where the district court reviewed the record for plain error only, the Court of Appeals similarly conducted a plain error review.[26] But in a case where the district court considered the errors raised in the untimely filed statement of errors, the Court of Appeals likewise considered those errors.[27] In that case, the district court granted a motion to file the statement of errors out of time, and the Court of Appeals stated that "it was within the district court's discretion to allow [the appellant] to file its statement of errors and to consider the issues raised therein."[28]

In an appeal in a criminal case, this court determined that "an exception to the rule . . . was necessarily in order."[29] There, the defendant's new counsel filed an untimely statement of errors which did not contain a claim of ineffectiveness of trial counsel. The Court of Appeals reversed the district court's judgment based on ineffectiveness of counsel. The State sought further review by this court, claiming that the Court of Appeals erred in considering ineffectiveness of counsel, because it was not contained in the statement of errors and because the statement

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[25] *Id.* at 584, 705 N.W.2d at 57.

[26] *State v. Harlan*, 1 Neb. App. 184, 488 N.W.2d 374 (1992).

[27] *General Serv. Bureau v. Moller*, 12 Neb. App. 288, 672 N.W.2d 41 (2003).

[28] *Id.* at 295, 672 N.W.2d at 47.

[29] *State v. Gerstner*, 244 Neb. 508, 513, 507 N.W.2d 490, 493 (1993).

of errors was untimely filed. We reasoned that "[n]ew defense counsel's failure to assign the claim of ineffectiveness of counsel and the resultant delay in submitting the statement of errors were excusable."[30]

On the other hand, in *Miller v. Brunswick*,[31] this court refused to consider the errors assigned on appeal, stating that no errors were properly assigned to the district court due to the untimely filing of the statement of errors. There is no indication in *Miller* that the district court gave permission to file the untimely statement of errors.

[8] On the whole, our case law teaches that there is flexibility in applying the statement of errors rule. The district court has discretion to extend the time for filing a statement of errors.[32] It has discretion to consider errors brought to its attention in ways other than a timely filed statement of errors. And in light of the purpose of this "procedural tool," we see no reason to unduly constrict the district court's discretion. Of course, this discretion is not unlimited. And we provide some guidance for the exercise of this discretion.

The situation here is analogous to one where an appellant's brief in the Supreme Court or the Court of Appeals does not contain an assignments of error section. One of our court rules requires a section of the appellant's brief to contain, under an appropriate heading, "[a] separate, concise statement of each error a party contends was made by the trial court . . . ."[33] Like the district court's statement of errors rule, our rule cautions that "consideration of the case will be limited to errors assigned and discussed," but that "[t]he court may, at its option, notice a plain error not assigned."[34] In contrast to the district court's rule, our rule is grounded in statute, which

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[30] *Id.*

[31] *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

[32] See *General Serv. Bureau v. Moller, supra* note 27.

[33] Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2014).

[34] *Id.*

requires that "[t]he brief of appellant shall set out particularly each error asserted . . . ."[35]

We have never interpreted § 2-109(D)(1)(e) to leave us powerless to consider errors that were not properly presented. But we have repeatedly stated that we may proceed as though the party failed to file a brief entirely or, alternatively, may examine the proceedings for plain error.[36] We believe that the district court should have the same flexibility.

[9] Thus, we hold that on appeal from the county court, a district court's ruling on a motion to extend the time for filing a statement of errors will be reviewed for an abuse of discretion. Numerous situations are possible. For example, an appellant may recognize the omission before an opponent or the court has responded. An opponent may have responded, but only in a summary fashion. An opponent may have submitted a full brief relying on the omission. Or the omission may not have been noted until after the appeal was submitted to the district court. The specific circumstances should drive the court's exercise of discretion. And it is important whether the circumstances are rooted in the moving party's own neglect.

(c) Resolution

Here, American Paving submitted a brief to the district court, which brief set out the errors it alleged were made by the county court. Houser then filed its responsive brief, evidently noting American Paving's failure to file a statement of errors. Only then did American Paving seek permission to file the statement of errors out of time.

The circumstances were ordinary and rooted in American Paving's own neglect. The bill of exceptions was filed on January 7, 2016. And on February 1, the district court's letter

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[35] Neb. Rev. Stat. § 25-1919 (Reissue 2016).

[36] See, *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014); *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 839 N.W.2d 265 (2013); *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007).

notified the parties of the hearing date and briefing deadlines. While the letter did not expressly state that the bill of exceptions had been filed, at a minimum, it should have alerted the parties to inquire. American Paving admitted that it did not do so until March 2, and it provided no explanation not rooted in its own neglect. Although American Paving submitted a brief to the district court on March 21, even then it did not file the statement of errors. It was not until after Houser's brief was submitted that it dawned on American Paving to seek extension of the time. And by then, Houser had briefed the merits of the appeal.

We conclude that under these circumstances, the district court abused its discretion in granting the motion to extend the time for filing of a statement of errors. Because the district court abused its discretion, its review in this case should have been limited to plain error. In turn, our review of the county court's judgment will be limited to plain error.

2. Houser's Appeal

Houser appeals the district court's reversal of the county court's determination that $26,189.09, the cost of the 2-inch overlay, was recoverable as part of Houser's damages for the breach of contract. Houser asserts that under the proper, plain error standard of review, there was no plain error in this aspect of the county court's award. We agree and find that there was no plain error in the county court's assessment of $26,189.09 in damages for the 2-inch overlay. Thus, the district court erred in reversing that portion of the county court's verdict.

We note that Houser did not assign as error in this appeal the district court's reversal of the county court's inclusion in its determination of damages the amount of the cost for seal-coating the driveway. Nor did Houser assign as error the district court's reversal of the county court's award as costs Houser's expenditures for his expert reports and testimony. Finally, Houser did not assign as error the district court's denial of his motion for attorney fees incurred responding to American Paving's motion to file its statement of errors out of

time. He does not argue that we should revisit these aspects of the district court's opinion. Therefore, we do not.

3. American Paving's Cross-Appeal

In its cross-appeal, American Paving asserts that the district court erred in affirming the county court's assessment as damages the cost of patchwork repairs prior to the 2-inch overlay and in affirming the award of $1,514 in sanctions in relation to American Paving's late production of discovery materials. As discussed, these errors were not properly assigned to the district court and we therefore limit our review to plain error.

We find no plain error in the county court's determination that the evidence supported as damages reimbursement for Houser's expenditures in patchwork repairs prior to the 2-inch overlay. Neither do we find plain error in its award of $1,514 in sanctions for American Paving's failure to timely turn over certain discovery materials. We accordingly affirm the district court's judgment inasmuch as it affirmed the award of $1,514 in discovery sanctions and $5,660 in repairs.

American Paving did not raise in its cross-appeal any issue pertaining to the district court's determination to affirm the county court's award of $861.75 in costs. We therefore also affirm this aspect of the district court's judgment.

VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court with respect to the county court's determination that damages included $5,660 in patchwork repairs, that Houser should be awarded $1,514 as discovery sanctions, and that Houser should be awarded $861.75 in costs. We reverse the district court's judgment with respect to its reversal of the county court's determination that Houser's damages included $26,189.09 for the 2-inch overlay. We remand the cause to the district court with directions to remand to the county court with directions to enter a judgment in accordance with this opinion.

Affirmed in part, and in part reversed and remanded with directions.

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

State of Nebraska, appellee, v.
Gerard Bridgeford, appellant.

State of Nebraska, appellee, v.
Judith Bridgeford, appellant.

907 N.W.2d 15

Filed February 16, 2018. Nos. S-16-1032, S-16-1035.

SUPPLEMENTAL OPINION

Appeals from the District Court for Saunders County: Mary C. Gilbride, Judge. Former opinion modified. Motion for rehearing overruled.

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.

Per Curiam.

Cases Nos. S-16-1032 and S-16-1035 are before this court on the appellee's consolidated motion for rehearing concerning our opinion in *State v. Bridgeford*.[1] We overrule the motion, but we modify the original opinion as follows:

[1] *State v. Bridgeford*, 298 Neb. 156, 903 N.W.2d 22 (2017).

(1) We withdraw syllabus point 7[2] and the second to the last sentence in the seventh paragraph under the subheading "Statutory Right"[3] and substitute the following wording in both instances:

> The excludable period attributable to an indefinite continuance of trial granted by the trial court upon the defendant's motion 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.[4]

(2) We withdraw the entirety of the 10th paragraph under the subheading "Statutory Right"[5] and substitute the following:

> Judith extended her December 3, 2014, speedy trial date when, on August 18, she filed a motion for an indefinite continuance of her trial. The period of delay attributable to 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 new trial date of June 25, 2015, exceeded the 6-month period calculated at the time of her motion to continue, which expired on December 3, 2014.

(3) We withdraw the entirety of the 11th paragraph under the subheading "Statutory Right"[6] and substitute the following:

> Judith's indefinite continuance resulted in a trial date that exceeded the 6-month period as calculated with the

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[2] *Id.* at 157, 903 N.W.2d at 24.

[3] *Id.* at 163, 903 N.W.2d at 27.

[4] See, Neb. Rev. Stat. § 29-1207(4)(a) and (b) (Reissue 2016); *State v. Wells*, 277 Neb. 476, 763 N.W.2d 380 (2009); *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009) (Wright, J., concurring; Heavican, C.J., and Connolly, J., join); *State v. Schmader*, 13 Neb. App. 321, 691 N.W.2d 559 (2005).

[5] *State v. Bridgeford, supra* note 1, 298 Neb. at 164, 903 N.W.2d at 28.

[6] *Id.*

excludable periods up to the date of the motion. Judith permanently waived her statutory speedy trial right by virtue of the August 18, 2014, motion to continue.

The remainder of the opinion shall remain unmodified.

Former opinion modified.

Motion for rehearing overruled.

Wright, J., not participating in the supplemental opinion.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

In re Trust of Jennie Shire, deceased. Wells Fargo Bank, National Association, Successor Trustee, appellee, and Shirley Smith Gronin, beneficiary, appellant, v. Unknown/Undiscovered Heirs et al., appellees.

907 N.W.2d 263

Filed February 16, 2018. No. S-17-263.

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 on the matters at issue.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
5. **Statutes.** Absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous.
6. **Legislature: Statutes.** When the Legislature provides a direct reference to a section of a uniform law code when adopting that code, it incorporates the comments explaining that section.
7. **Trusts: Proof.** Under Neb. Rev. Stat. § 30-3837(b) (Reissue 2016), the party seeking a modification of a trust must affirmatively demonstrate that all beneficiaries have consented to the modification.
8. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the

intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.

9. **Trusts.** Under Neb. Rev. Stat. § 30-3837(b) (Reissue 2016), the issue of consent for unknown beneficiaries is governed by Neb. Rev. Stat. §§ 30-3825 and 30-3826 (Reissue 2016).
10. **Trusts: Intent.** At common law, a trust can be modified upon the consent of the settlor and all the beneficiaries, regardless of whether the purpose of the trust is satisfied, or upon the consent of all beneficiaries if not inconsistent with the trust's purpose.
11. **Statutes: Legislature: Intent: Appeal and Error.** In construing a statute, an appellate court should consider the statute's plain meaning in pari materia and from its language as a whole to determine the intent of the Legislature.
12. **Statutes: Intent.** The construction of a statute which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.
13. **Trusts: Courts: Intent.** Under Neb. Rev. Stat. § 30-3837(e) (Reissue 2016), for the interests of nonconsenting beneficiaries to be adequately protected, the court must determine that modification will not affect those interests and impose safeguards to prevent them from being affected, when deemed necessary.
14. **Appeal and Error.** An issue not presented to or decided by the trial court is not appropriate for consideration on appeal.

Appeal from the County Court for Lancaster County: Holly J. Parsley, Judge. Affirmed.

Daniel E. Klaus, of Rembolt Ludtke, L.L.P., for appellant.

John C. Hurd and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee Wells Fargo Bank.

Chris Blomenberg, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellees Unknown/Undiscovered Heirs.

J.L. Spray, of Mattson Ricketts Law Firm, for appellees Robert Banner et al.

Heavican, C.J., Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

This appeal concerns a petition for trust proceeding, filed by the trustee, Wells Fargo Bank (Wells Fargo), to provide increased disbursements from the trust of Jennie Shire (Trust) to the remaining lifetime beneficiary, Shirley Smith Gronin. The county court for Lancaster County ruled that a modification of the terms of the Trust was not authorized by the Nebraska Uniform Trust Code.[1] We affirm.

BACKGROUND

The Trust was created by the last will and testament of Shire, executed on September 10, 1947. Paragraph IV of Shire's will provided that the Trust would be funded with $125,000 and that the trustees would pay $500 monthly to Shire's daughter, Ruth Banner Gronin (Ruth), during her life and to Shire's granddaughter, Gronin, upon Ruth's death and Gronin's attaining the age of 25 years. Further, paragraph IV states: "Upon the death of the survivor of [Ruth and Gronin], the balance of the trust fund (including any addition from Paragraph V) shall be added to the residue of my estate and be distributed, as provided in Paragraph VI."

Gronin was born in 1945. Shire died in 1948. After Ruth passed away in 1983, the monthly $500 payments from the Trust were made to Gronin.

At the time of trial, Gronin was also receiving monthly payments of $564 from Social Security and $88.38 from a casino pension plan. Her total monthly income was $1,152.38. Further, she had two bank accounts, each with a negligible balance. She testified that neither she nor Ruth had ever been able to save any money, because their income never exceeded their living expenses.

A trust officer for Wells Fargo testified that as of September 26, 2016, the Trust had a principal balance of $981,874.58. He further testified that the expected annual return for the

[1] Neb. Rev. Stat. § 30-3801 et seq. (Reissue 2016 & Supp. 2017).

Trust, before fees and taxes, ranged from 6.40 percent to 8.10 percent. Consequently, the Trust could expect income and appreciation to be between approximately $64,000 and $81,000 annually. Evidence was also adduced that based on the rate of inflation, the present value of a $500 payment in 1948 would be either $4,997 or $5,400.29 today.

Before filing the petition, Wells Fargo attempted to identify potential heirs of the beneficiaries identified in paragraph VI of Shire's will. In its petition, Wells Fargo specifically identified 12 individuals and entities that may have an interest in the residuary and requested the court to notify them of the proceeding. The petition requested that the court determine the beneficiaries under paragraph VI, which was bifurcated from the present proceeding and set for later consideration.

The following known beneficiaries were present at the hearing on the Trust's modification: six individual beneficiaries participated by counsel, one individual beneficiary participated pro se, and the Nebraska Attorney General's office participated on behalf of charitable beneficiaries. At Wells Fargo's request, the court appointed an attorney to represent the "Unknown/Undiscovered Heirs," if any, of the beneficiaries under paragraph VI of Shire's will (unknown beneficiaries).

After the hearing, the parties had the opportunity to submit posttrial briefs. Counsel for the unknown beneficiaries was the only party that opposed Wells Fargo's motion. Neither the assistant attorney general nor the pro se beneficiary submitted any brief supporting or opposing the modification of the Trust. Counsel for the six beneficiaries submitted a brief which concluded: "On behalf of our clients, we respectfully request the Court enter an Order adjusting the monthly distribution to . . . Gronin consistent with the Trustee's evidence in such a fashion so as to not jeopardize the corpus of the Trust." No other beneficiaries expressed consent or an objection.

In February 2017, the court ruled that the requested modification of the trust was not warranted. Specifically, it ruled that

the plain language of the Trust did not permit an increased distribution; § 30-3837(b) did not authorize a modification, because not all beneficiaries had consented; § 30-3837(e) did not permit a modification, because increasing Gronin's annual payments would have a detrimental effect on the Trust's residue, which would not adequately protect the nonconsenting beneficiaries; and § 30-3838 did not allow a modification, because there was not an unanticipated change in circumstances.

Gronin filed a timely appeal. We removed the case to our docket on our own motion pursuant to our authority to regulate the caseloads of the Nebraska Court of Appeals and this court.[2]

ASSIGNMENTS OF ERROR

Gronin assigns, restated, that the court erred in concluding that modification of the Trust, to provide increased disbursements to her, was not appropriate under § 30-3837(b) and (e) and the doctrine of deviation. Gronin also assigns, restated, that the court erred in concluding that her current living circumstances were not unanticipated by Shire and that the purpose of the Trust did not include providing a reasonable income to Gronin.

STANDARD OF REVIEW

[1,2] 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.[3] 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.[4]

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[2] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

[3] *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017).

[4] *Id.*

[3,4] Statutory interpretation presents a question of law.[5] We independently review questions of law decided by a lower court.[6]

ANALYSIS

Beneficiaries Did Not Unanimously Consent to Modification

Gronin and Wells Fargo argue that we should interpret § 30-3837(b), requiring the "consent of all of the beneficiaries," to allow a modification when no known beneficiary has objected to the modification after receiving notice of it. Regarding unknown beneficiaries, they argue that—based on the Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code[7]—we should follow Neb. Rev. Stat. §§ 30-24,123 and 30-24,124 (Reissue 2016) of Nebraska's Uniform Probate Code and permit the lack of objection by known beneficiaries with a commonality of interest with unknown beneficiaries to satisfy the statutory requirement. They argue that the objection by the attorney appointed to represent the unknown beneficiaries was only theoretical and should not bar application of this subsection here, because all residuary beneficiaries share a common interest.

The unknown beneficiaries argue that the plain language of § 30-3837(b) requires the consent of all beneficiaries and does not permit a commonality of interest representation for unknown beneficiaries.

Section 30-3837(b) provides, in relevant part, that "[a] noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust."

[5,6] Absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look

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[5] *Gillpatrick v. Sabatka-Rine*, 297 Neb. 880, 902 N.W.2d 115 (2017).

[6] *Id.*

[7] See, 2002 Neb. Laws, L.R. 367; Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code (2002).

beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous.[8] We have held that when the Legislature provides a direct reference to a section of a uniform law code when adopting that code, it incorporates the comments explaining that section.[9]

The Legislature has incorporated the comment to § 411 of the Uniform Trust Code (UTC) to § 30-3837, upon which it was modeled.[10] In the UTC comment to § 411, subsection (b) is described as requiring "unanimous consent," while subsection (e) is described as being the applicable procedure "when the consent of less than all of the beneficiaries is available."[11]

[7] Based on the plain language of § 30-3837(b) and the comment to § 411, the party seeking a modification of a trust must affirmatively demonstrate that all beneficiaries have consented to the modification. Gronin and Wells Fargo's argument that this requirement is satisfied when no known beneficiary has objected after receiving notice of a modification is not supported by either the plain language of the statute or the comment to § 411.

The language of § 30-3837(b), however, is not clear regarding the effect of potential unidentified beneficiaries, who might not even exist, on the consent requirement. But the comment to § 411 provides that "[t]he provisions of Article 3 on representation, virtual representation, and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section."[12]

The Nebraska Uniform Trust Code also contains the provisions of article 3 of the UTC. Section 30-3825 provides:

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[8] *Hopkins v. Hopkins*, 294 Neb. 417, 883 N.W.2d 363 (2016).

[9] See, e.g., *In re Estate of Fuchs*, 297 Neb. 667, 900 N.W.2d 896 (2017); *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017).

[10] See § 30-3837.

[11] Unif. Trust Code § 411, 7C U.L.A. 499 (2006).

[12] *Id.*

> (UTC 304) Unless otherwise represented, a minor, incapacitated, or unborn individual, or *a person whose identity or location is unknown and not reasonably ascertainable*, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

(Emphasis supplied.) Further, § 30-3826 states:

> (UTC 305) (a) If the court determines that an interest is not represented under sections 30-3822 to 30-3826, or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, *or a person whose identity or location is unknown*. A representative may be appointed to represent several persons or interests.
>
> (b) A representative may act on behalf of the individual represented with respect to any matter arising under the Nebraska Uniform Trust Code, whether or not a judicial proceeding concerning the trust is pending.
>
> (c) In making decisions, a representative may consider general benefit accruing to the living members of the individual's family.

(Emphasis supplied).

[8,9] These provisions comprehensively resolve any consent issues concerning individuals who cannot consent on their own behalf. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[13] Based on the comment to § 411

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[13] *County of Webster v. Nebraska Tax Equal. & Rev. Comm.*, 296 Neb. 751, 896 N.W.2d 887 (2017).

and our well-established principle of statutory construction, we must determine the issue of consent for unknown beneficiaries in § 30-3837(b) pursuant to §§ 30-3825 and 30-3826.

While Gronin and Wells Fargo argue that we should rely on a reference contained in the Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code, we have not previously considered whether that source is incorporated into the sections of the Nebraska Uniform Trust Code. The Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code was created as a result of an interim study by the Legislature's Banking, Commerce and Insurance Committee, as required by L.R. 367. Accordingly, we consider the Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code to be legislative history. In further support of this conclusion, we note that unlike the comments to the UTC, the Legislature did not reference the Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code in the text of the sections of the Nebraska Uniform Trust Code.

In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.[14] Because § 30-3837 is not ambiguous, we do not consider the language of the Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code.

Here, Wells Fargo specifically identified 12 living individuals and entities that were known beneficiaries of the Trust. The record contains a brief filed by six of these individual beneficiaries, which affirmatively consent to the modification therein. The record, however, does not contain any evidence that the other known beneficiaries affirmatively consented to the modification. Therefore, the court did not err in ruling that no modification was warranted under § 30-3837(b).

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[14] *Doe v. McCoy*, 297 Neb. 321, 899 N.W.2d 899 (2017).

Further, while the court could have allowed any unknown beneficiaries to be represented and bound by the unanimous consent of the known beneficiaries, under § 30-3825, the court instead appointed a separate representative—upon Wells Fargo's motion—with the full authority to act on behalf of any unknown beneficiaries, under § 30-3826. Therefore, the representative's objection to modification was not theoretical and also precludes the application of this section.

Modification of Trust Would Not Have Adequately Protected Nonconsenting Beneficiaries

Gronin and Wells Fargo contend that § 30-3837(e) applies because the modification was not inconsistent with the purpose of the Trust and it would adequately protect the nonconsenting beneficiaries. Gronin argues that we should interpret the term "'adequate'" to mean sufficient, rather than absolute.[15] Accordingly, an increase that does not affect the principal of a trust would adequately protect the interests of nonconsenting beneficiaries. Further, Gronin and Wells Fargo contend that interpreting the subsection to preclude a modification that only slows the growth of the principal would create an absurd result.

The unknown beneficiaries argue that any increase in distributions to Gronin affects their interest in the future growth of the Trust, even if it does not affect the Trust's principal. They argue that we should interpret the phrase "adequately protected" to impose a high standard when a modification would take money from one beneficiary for the benefit of another.[16]

Subsection (e) of § 30-3837 provides:

> If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b) of this section, the modification or

[15] Brief for appellant at 23.

[16] Brief for appellees unknown beneficiaries at 5.

> termination may be approved by the court if the court is satisfied that:
>
> (1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
>
> (2) the interests of a beneficiary who does not consent will be adequately protected.

In this case, subsection (a) is not applicable because it would require the consent of Shire, who died in 1948.[17] As decided above, subsection (b) is also not applicable because there was not unanimous consent of the beneficiaries. In order to satisfy the second requirement of subsection (e), there must be a showing that the interests of nonconsenting beneficiaries will be adequately protected by a modification—which has not been met.

The comment to § 411 indicates that subsection (e) is "similar to Restatement (Third) of Trusts Section 65 cmt. c (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Sections 338(2) & 340(2) (1959)."[18]

[10] These sections of the Restatements adopted the common-law principle that a trust can be modified upon the consent of the settlor and all the beneficiaries, regardless of whether the purpose of the trust is satisfied, or upon the consent of all beneficiaries if not inconsistent with the trust's purpose.[19] However, regarding holders of contingent interests that do not consent, the Restatements depart from the common law by permitting a modification that is neither inconsistent with the settlor's intent nor prejudicial to the nonconsenting beneficiaries' interests.[20]

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[17] See § 30-3837(a).

[18] Unif. Trust Code, *supra* note 11, 7C U.L.A. 501.

[19] See *Hubbard v. Buddemeier*, 328 Ill. 76, 159 N.E. 229 (1927). See, also, *Commissioner of Internal Revenue v. Bacher*, 102 F.2d 500 (6th Cir. 1939); *Smith v. Mass. Mutual Life Ins. Co.*, 116 Fla. 390, 156 So. 498 (1934).

[20] See *Hubbard, supra* note 19.

Comment *c*. to § 65 of the Restatement (Third) of Trusts[21] states:

> [I]f the court is satisfied that the best interests of the beneficiaries as a whole would be served by a proposed termination or modification and [the modification would not be inconsistent with the material purpose of the trust], a court may order a partial termination of the trust (or other arrangement that might involve bonding, insurance, or impounding of some trust property) in a manner that will not prejudice the interests of nonconsenting beneficiaries.

The referenced sections of the Restatement (Second) of Trusts also both require that nonconsenting beneficiaries are "not prejudiced" by a modification.[22] The comments to these sections indicate that absent unanimous consent, modification is permitted only if it does not impact nonconsenting beneficiaries.[23] This is evidenced by the following illustration to § 340:

> 8. A transfers land to B in trust to pay the rents and profits to C for life and upon C's death to convey the land to D. If D does not consent or is under an incapacity, C cannot insist that B convey to him a legal life estate.[24]

That section of the Restatement provides an additional relevant illustration:

> 11. A transfers securities worth $200,000 to B in trust to pay each of several persons an annuity for life and subject to such payments in trust for C. All of the annuitants die except D who is entitled to an annuity of $500. The court may order B to transfer to C a part of

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[21] Restatement (Third) of Trusts § 65, comment *c*. at 476 (2003).

[22] Restatement (Second) of Trusts § 338(2) at 167 (1959). Accord *id*., § 340(2).

[23] *Id*., § 338, comment *h*.

[24] *Id*., § 340, comment *g*., illustration 8 at 175.

> the securities, B retaining enough to constitute ample security for the payment of D's annuity.[25]

Accordingly, in departing from the common law to permit modification without unanimous consent, the Restatements have steadfastly protected the rights of nonconsenting beneficiaries. For, even in instances where prejudice to a nonconsenting beneficiary are not foreseeable, a court maintains authority to safeguard those beneficiaries from prejudice by requiring, for example, bonding or insurance. As evidenced by the illustrations, the exception to unanimous consent is narrow in scope.

[11] In construing a statute, an appellate court should consider the statute's plain meaning in pari materia and from its language as a whole to determine the intent of the Legislature.[26] Further, as mentioned above, we must construe a statute in pari materia with other sections of the same act and in light of UTC comments when the Legislature has incorporated them. Accordingly, in interpreting the phrase "adequately protected," we must consider the comment to § 411 of the UTC and both § 30-3837 and the entirety of the Nebraska Uniform Trust Act as a whole.

First, while the comment to § 411 states that it is only similar to the Restatements' provisions, rather than modeled after them, this appears to be a result of § 411's being more broad and encompassing than any of the referenced sections in the Restatements. Despite the use of the phrase "adequately protected" in § 30-3837(e), rather the Restatements' phrase "not prejudiced," nothing in the statute or the comment to § 411 indicates that the change in terminology was intended to effectuate a change in the meaning of the common-law principle regarding the rights of nonconsenting beneficiaries.

Instead, we interpret the phrase "adequately protected" as incorporating the safeguards discussed in the Restatements

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[25] *Id*., § 340, comment *h*., illustration 11 at 176.

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

to prevent prejudice to nonconsenting beneficiaries. The Restatements' use of the phrase "not prejudiced" required the additional explanation that modifications could be made by a court if the nonconsenting beneficiaries' rights would be adequately protected with appropriate safeguards.[27] Conversely, the use of the phrase "adequately protected" clearly conveys a court's ability to modify a trust upon determining that it will not likely harm nonconsenting beneficiaries' interests, with or without safeguards.

[12] The construction of a statute which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.[28] Therefore, because the statute does not clearly convey that it intended to limit the rights that nonconsenting beneficiaries had at common law and we can reasonably construe the statute in a way that avoids limiting such rights, we must do so.

Second, the context of § 30-3837 and the Nebraska Uniform Trust Code implies that the phrase "adequately protected" should not be construed to limit the rights of nonconsenting beneficiaries. Section 30-3837 is focused on modifications of trusts with the consent of the beneficiaries and the settlor, either by actual consent or by being consistent with the purpose of the trust. The context of this statute does not suggest that a court may force a modification upon beneficiaries that will negatively affect their interests.

The comment to § 411 sets forth that subsection (e) allows the court to fashion an appropriate order protecting the interests of the nonconsenting beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction. The order of protection for the nonconsenting beneficiaries might include partial continuation of the trust, the purchase of an annuity, or the valuation and cash out of the interest. Additionally, a court may order

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[27] See Restatement (Third), *supra* note 21.

[28] *Tadros v. City of Omaha*, 273 Neb. 935, 735 N.W.2d 377 (2007).

a partial termination of the trust (or other arrangement that might involve bonding, insurance, or impounding of some trust property) in a manner that will not prejudice the interests of nonconsenting beneficiaries.[29]

Further, the comment to § 411 explains that modification may also be pursued through the UTC's §§ 412 to 416 without the need for beneficiary consent.[30] The Legislature also adopted these sections of the UTC by enacting §§ 30-3838 to 30-3842.

Section 30-3838(a), for example, permits modification of a trust, without any consent requirement, "if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust." Both §§ 30-3837 and 30-3838 essentially require that a modification be consistent with the terms of the trust. However, the difference between the two statutes—to a nonconsenting beneficiary—is that interests must be "adequately protected" versus a proof of circumstances unanticipated by the settlor.

Interpreting the phrase "adequately protected" to mean that a nonconsenting beneficiaries' interests are not harmed too significantly would create a lessened burden for modifying trusts that is not focused on the cardinal rule of trust construction: the settlor's intent.[31]

[13] Accordingly, adopting the standard proposed by Gronin and Wells Fargo would not be consistent or harmonious with the structure of § 30-3837 or the Nebraska Uniform Trust Code. Therefore, for the interests of nonconsenting beneficiaries to be adequately protected, the court must determine that modification will not affect those interests and impose safeguards to prevent them from being affected, when deemed necessary.

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[29] Restatement (Third), *supra* note 21.

[30] Unif. Trust Code, *supra* note 11.

[31] See *In re Family Trust Created Under Akerlund Trust*, 280 Neb. 89, 784 N.W.2d 110 (2010).

Here, Wells Fargo requested a modification of the Trust's terms that would increase monthly distributions to Gronin. However, any such increase would be at the direct expense of the eight known and the unknown beneficiaries' interests, because they have an interest in both the principal of the Trust and its future growth. Accordingly, the requested modification cannot satisfy the requirement that the interests of nonconsenting beneficiaries be adequately protected. Therefore, the court did not err in determining that modification was not appropriate under this subsection.

Gronin and Wells Fargo are correct in arguing that an appellate court should try to avoid, if possible, a statutory construction that would lead to an absurd result.[32] However, a construction is not absurd simply because it is narrow. Under our construction, subsection (e) still permits modification or termination of trusts as envisioned in the Restatements.

For example, in the context of the Trust, there are two scenarios where this subsection could apply. First, the terms of the Trust could have been modified to allow Gronin to receive the $500 monthly payment before Ruth's death if both women consented and Ruth was otherwise taken care of, even if the residuary beneficiaries did not consent.

Second—similar to illustration 11 above[33]—if only one residuary beneficiary of the Trust remained, then a court could modify or partially terminate the Trust to provide that beneficiary a portion of the residuary before Gronin's death, without her consent, if the court determined it was not inconsistent with the Trust's terms and the remainder of the principal was sufficient to fund Gronin's monthly payments. In that case, the court could require the beneficiary to obtain insurance or post a bond to ensure that Gronin's interests would be adequately protected in the event of unlikely circumstances.

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[32] See *Adair Asset Mgmt. v. Terry's Legacy*, 293 Neb. 32, 875 N.W.2d 421 (2016).

[33] See Restatement (Second), *supra* note 21, § 340, comment *h*.

Common-Law Doctrine of Deviation Was Not Presented to County Court

As the parties acknowledge, the court was not presented with the issue of whether the Trust could be modified under the common-law doctrine of deviation. Instead, the parties argued and the court ruled on whether the Trust could be modified under § 30-3838. After the court's order, however, Gronin realized that § 30-3838 did not apply to the Trust, under § 30-38,110(d), because the Trust became irrevocable before January 1, 2005.

Nevertheless, Gronin and Wells Fargo argue that we can reverse the court's decision that modification was not warranted under § 30-3838 by considering the common-law doctrine of deviation. They argue that § 30-3838 is the codification of the doctrine of deviation; so, the court's decision was sufficient to present the issue on appeal. Further, they argue that the doctrine of deviation applies to trusts under § 30-3806.

[14] An issue not presented to or decided by the trial court is not appropriate for consideration on appeal.[34] As the parties argued, before we can consider the application of the common-law doctrine of deviation, we must determine both whether it applies to trusts in Nebraska, under § 30-3806, and whether its principles were modified by the Legislature in § 30-3838. Because the trial court was neither presented with nor ruled upon these issues, whether modification is warranted under the common-law doctrine of deviation is not appropriate for consideration on appeal. Therefore, we do not consider this assignment of error or Gronin's related assignments of error concerning findings that relate to the doctrine of deviation's application.

CONCLUSION

We find that the court did not err in determining that the Trust could not be modified, under § 30-3837, because the

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[34] *Wayne L. Ryan Revocable Trust v. Ryan*, 297 Neb. 761, 901 N.W.2d 671 (2017).

beneficiaries did not unanimously consent to the modification and the modification would not adequately protect the interests of the nonconsenting beneficiaries. Further, the doctrine of deviation was not appropriate for consideration on appeal. Therefore, we affirm.

Affirmed.

Wright and Miller-Lerman, JJ., not participating.

Cassel, J., concurring.

A path for relief may exist. The crux is how to "adequately protect[]"[1] the unknown beneficiaries, because *any* additional payment to Gronin would reduce their proceeds without their consent.

Some parties argue that no unknown beneficiaries actually exist. If the known beneficiaries believe that to be true and, based on that belief, are willing to pledge part of their shares, a path appears. By doing so, they could empower the trustee to hold the unknown beneficiaries harmless.

If no other beneficiaries were found, the known beneficiaries would have accommodated a needy lifetime beneficiary at no additional cost. If any were found, the known beneficiaries would suffer only what would appear to be a modest reduction in their future payout.

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[1] See Neb. Rev. Stat. § 30-3837(e) (Reissue 2016).

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

Woodmen of the World Life Insurance Society, a Nebraska not-for-profit fraternal benefit society, appellant, v. Nebraska Department of Revenue, an agency of the State of Nebraska, and Tony Fulton, Tax Commissioner, appellees.

907 N.W.2d 1

Filed February 16, 2018. No. S-17-319.

1. **Administrative Law: Judgments: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
6. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
7. ____. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.

8. **Taxation: Proof.** The burden of showing entitlement to a tax exemption is on the applicant.
9. **Statutes: Taxation.** Statutory tax exemption provisions are to be strictly construed, and their operation will not be extended by judicial construction.
10. ____: ____. An exemption from taxation must be clearly authorized by the relevant statutory provision.
11. **Taxation: Presumptions.** An exemption from taxation is never presumed.
12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
13. **Taxation: Words and Phrases.** Sales and use taxes are imposed on the activity of retail transactions, measured by gross receipts. It is a tax upon the sale, lease, rental, use, storage, distribution, or other consumption of tangible personal property in the chain of commerce.
14. **Taxation: Sales.** A sales tax is not imposed on the article sold, but, rather, upon the transaction called the sale.
15. **Taxation: Words and Phrases.** Both occupation taxes and sales taxes are excise taxes for the purpose of raising revenue. An excise tax is a tax imposed on the manufacture, sale, or use of goods or on an occupation or activity, and is measured by the extent to which a privilege is exercised by the taxpayer, without regard to the nature or value of the taxpayer's assets. An excise tax is imposed upon the performance of an act.
16. **Statutes: Taxation.** The plain language of Neb. Rev. Stat. § 44-1095 (Reissue 2010) exempts taxes on the "funds" of a fraternal benefit society, but it does not exempt the fraternal benefit society from sales and use taxes, because such taxes are imposed on its retail purchase activity, not on its funds.
17. **Due Process.** The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. If there is a protected interest at stake, the question then becomes what process is due.
18. ____. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.
19. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
20. **Expert Witnesses: Evidence.** Expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or determine a fact issue, and expert testimony concerning a question of law does not tend to accomplish either of these goals. Consequently,

expert testimony concerning a question of law is generally not admissible in evidence.

21. **Trial: Expert Witnesses: Testimony: Statutes.** Expert testimony from legal scholars on the proper legal interpretation of statutes is generally irrelevant and should not reach a judge's attention by way of the witness stand.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Mark E. Novotny, John M. Walker, and Daniel J. Hassing, of Lamson, Dugan & Murray, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellees.

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

Stacy, J.

This appeal requires us to determine whether the Legislature has exempted fraternal benefit societies from sales and use taxes imposed by the State of Nebraska. Woodmen of the World Life Insurance Society (Woodmen) requested an exemption from sales and use taxes and sought a refund of more than $2 million in such taxes previously paid. The Nebraska Department of Revenue (NDOR) denied Woodmen's request, and after a hearing, the Tax Commissioner affirmed that denial. Woodmen sought judicial review, and the district court affirmed. Because we agree no statute exempts fraternal benefit societies from paying sales and use tax, we affirm the judgment of the district court.

I. FACTS

1. General Background

Nebraska's statutes regulating and relating to fraternal benefit societies are codified at Neb. Rev. Stat. §§ 44-1072 to 44-10,109 (Reissue 2010 & Cum. Supp. 2016). A fraternal benefit society is defined to include:

> Any incorporated society, order, or supreme lodge, without capital stock, . . . conducted solely for the benefit of its members and their beneficiaries and not for profit, operated on a lodge system with ritualistic form of work, having a representative form of government, and which provides benefits in accordance with sections 44-1072 to 44-10,109 . . . .[1]

Fraternal benefit societies operate "for one or more social, intellectual, educational, charitable, benevolent, moral, fraternal, patriotic, or religious purposes for the benefit of its members."[2] They may enter into contracts to provide benefits to their members, including death, endowment, annuity, disability, medical, and life insurance benefits.[3] A fraternal benefit society may "invest its funds only in such investments as are authorized by the laws of this state for the investment of assets of life insurers."[4] All assets must be held, invested, and disbursed for the use and benefit of the society.[5]

It is undisputed that Woodmen is a Nebraska fraternal benefit society. The primary issue in this appeal is whether Woodmen is exempt from paying Nebraska sales and use taxes. The answer to this question generally requires consideration of two statutes: § 44-1095 and Neb. Rev. Stat. § 77-2704.12 (Reissue 2009).

(a) § 44-1095

With two exceptions not relevant here, the "funds" of a fraternal benefit society are exempt from taxation pursuant to § 44-1095 (Reissue 2010) which, until recently, provided: "Every [fraternal benefit society] shall be a charitable and benevolent institution, and all of its funds shall be exempt

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[1] § 44-1072.

[2] § 44-1076.

[3] § 44-1087.

[4] § 44-1092.

[5] § 44-1093.

from all and every state, county, district, municipal, and school tax other than taxes on real estate and office equipment."

The version of § 44-1095 quoted above was in effect when Woodmen applied for the tax exemption and refund at issue in this appeal, and we confine our analysis to this statutory language. However, for the sake of completeness, we note the Legislature amended the statute in 2015.[6] Section 44-1095 now provides that "all of [a charitable benefit society's] *funds and property* shall be exempt from all and every state, county, district, municipal, and school tax."[7]

(b) § 77-2704.12(1)

The Nebraska Revenue Act of 1967[8] imposes a sales tax on the gross receipts of retail sales of tangible personal property sold in this state[9] and a use tax when tangible personal property purchased outside of Nebraska is stored, used, or consumed in Nebraska.[10] Generally speaking, the sales tax applies when tangible personal property is purchased in Nebraska and the use tax applies when it is purchased outside Nebraska.[11]

The Legislature has exempted certain sales and uses from taxation.[12] As relevant to this appeal, certain nonprofit organizations are exempt from sales and use taxes under § 77-2704.12(1). The nonprofit organizations enumerated in § 77-2704.12(1) include, for example, those created exclusively

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[6] See 2015 Neb. Laws, L.B. 414, § 1 (operative January 1, 2016).

[7] § 44-1095 (Cum. Supp. 2016) (emphasis supplied). See, also, Neb. Rev. Stat. § 77-202(1)(d)(iii)(B) (Cum. Supp. 2016) (adding "fraternal benefit society" to enumerated exemptions for property owned by "charitable organization").

[8] See Neb. Rev. Stat. § 77-2701 (Supp. 2017).

[9] See Neb. Rev. Stat. § 77-2703(1) (Supp. 2017).

[10] § 77-2703(2).

[11] *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990).

[12] See, generally, Neb. Rev. Stat. §§ 77-2704.02 to 77-2704.30 (Reissue 2009, Cum. Supp. 2016 & Supp. 2017).

for religious purposes,[13] private educational institutions,[14] hospitals and health clinics,[15] and certified organizations providing community-based services for persons with disabilities.[16] To be exempt from sales and use tax, an "organization listed in [§ 77-2704.12(1)]" must apply for exemption using forms provided by the Tax Commissioner and, if approved, a certificate of exemption is issued.[17] Fraternal benefit societies are not listed among the nonprofit organizations enumerated in § 77-2704.12(1).

2. Procedural Background

In October 2013, Woodmen filed an application for exemption from sales and use tax with NDOR, relying exclusively on § 44-1095. Woodmen used a standard NDOR form to seek the exemption. Because the standard form did not identify § 44-1095 as a basis for seeking exemption from sales and use tax, Woodmen attached a letter explaining its position. NDOR denied Woodmen's application using a standard letter which also did not reference § 44-1095. Instead, the reason given for denying the exemption was that Woodmen did not qualify as a religious organization. NDOR gave this reason because it concluded that of the available nonprofit exemptions, that one "fit the closest."

In January 2014, Woodmen filed a claim for overpayment, seeking a refund of more than $2 million in sales and use tax, again relying on § 44-1095. NDOR denied this claim. Woodmen petitioned for redetermination of both its exemption application and its reimbursement claim. In response, counsel for NDOR sent Woodmen a letter explaining the legal basis for NDOR's conclusion that § 44-1095 did not exempt Woodmen

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[13] § 77-2704.12(1)(a).

[14] § 77-2704.12(1)(c).

[15] § 77-2704.12(1)(e)(i) and (ii).

[16] § 77-2704.12(1)(h).

[17] § 77-2704.12(2).

from sales and use tax. The parties agreed to consolidate Woodmen's requests and hold a single hearing before the Tax Commissioner on both the application for an exemption and the claim for overpayment.

Prior to such hearing, the parties conducted discovery, exchanged exhibit and witness lists (including witnesses' expected testimony), and met to discuss the legal bases for their differing positions. The parties also filed prehearing motions that were ruled on by the hearing officer. As relevant to the issues on appeal, the hearing officer sustained NDOR's motion in limine to exclude the testimony of Woodmen's expert witness, a tax law professor. The hearing officer reasoned that although the professor was an accomplished and recognized legal scholar, his opinions on the proper interpretation of Nebraska law were more properly characterized as legal argument than testimony. The hearing officer invited Woodmen to include the tax law professor's opinions in its posthearing briefing, but did not permit the professor to testify.

(a) Tax Commission Hearing

The hearing before the Tax Commissioner was held April 13, 2015. The rules of evidence were not invoked.[18] The parties stipulated that Woodmen was a fraternal benefit society, that it timely submitted both its application for an exemption and its request for a refund, and that both were properly before the hearing officer. The Tax Commissioner observed that because the parties presented no factual disputes: "Resolution of this dispute depends entirely upon the answer to the following question of law: Is the language of § 44-1095 sufficient in itself to confer [on Woodmen] an exemption from the Nebraska sales and use taxes . . . .?"

Evidence was adduced, and Woodmen made an offer of proof regarding the tax law professor's excluded testimony. After posthearing briefing, the Tax Commissioner entered an

[18] See 316 Neb. Admin. Code, ch. 33, § 12.04A (2010) (request to be bound by rules of evidence must be served 3 days before hearing).

order finding Woodmen was not exempt from sales and use tax under § 44-1095, and thus was not entitled to a refund.

The Tax Commissioner's order analyzed each party's proffered definitions of the term "funds" in § 44-1095, and ultimately rejected them all. Instead, he determined the meaning of "funds" by considering how the term was used in other statutes governing fraternal benefit societies.[19] The Tax Commissioner noted that under § 44-1093(2), fraternal benefit societies are authorized to "create, maintain, invest, disburse, and apply any special fund or funds necessary to carry out any purpose permitted by the laws of such society." Relying on § 44-1093, the Tax Commissioner concluded that "funds" under § 44-1095 must refer to "those same special funds allowed in § 44-1093." He thus reasoned that fraternal benefit societies were not exempt from sales and use taxes under § 44-1095, because that exemption applies only to taxes imposed on the "special funds themselves, not to the actions or transactions taken with respect to the funds."

(b) Administrative Appeal

Woodmen sought judicial review of the Tax Commissioner's final decision pursuant to the Administrative Procedure Act.[20] The Lancaster County District Court conducted a de novo review and affirmed the Tax Commissioner's denial of the exemption and refund.

After noting that fraternal benefit societies are not among the nonprofit organizations exempt from sales and use tax under § 77-2704.12(1), the district court confined its analysis to whether the language of § 44-1095 conferred an exemption from Nebraska sales and use tax.

First, the district court rejected Woodmen's argument that § 44-1095 conferred an entity-based tax exemption on fraternal benefit societies generally, as opposed to an exemption on just

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[19] See §§ 44-1092 and 44-1093.

[20] See Neb. Rev. Stat. §§ 77-27,128 (Reissue 2009) and 84-917 (Reissue 2014).

its funds. The district court noted the difference between the language used in § 44-1095 and the language used in statutes that provide entity-based tax exemptions[21] and concluded that a plain reading of § 44-1095 indicated the Legislature intended to confer a tax exemption on the "funds" of a fraternal benefit society, but not on the entity itself.

Next, like the Tax Commissioner, the district court looked to other statutes governing fraternal benefit societies to discern the meaning of "its funds" in § 44-1095. The court observed that under § 44-1092, a fraternal benefit society is authorized to invest "its funds" only in certain investments, and that under § 44-1093, a society may "create, maintain, invest, disburse, and apply any special fund or funds" necessary to carry out its permitted statutory purpose. Harmonizing these statutes, the district court reasoned that the "funds" exempted under § 44-1095 must be the same funds referenced in §§ 44-1092 and 44-1093.

Finally, the court examined the essential nature of sales and use taxes, including this court's opinion in *Anthony, Inc. v. City of Omaha*,[22] and concluded that sales and use taxes are "'a tax upon *the privilege of buying* tangible personal property'" and not a tax on funds. The district court reasoned that the tax exemption on funds in § 44-1095 did not apply to taxes on the retail transactions of fraternal benefit societies. As such, the court generally concluded there was no conflict between §§ 44-1095 and 77-2704.12(1), in that the former addressed exemptions for taxes on particular funds, while the latter addressed exemptions for taxes on retail transactions. Alternatively, the district court reasoned that if the two statutes

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[21] Compare § 44-1095, with Neb. Rev. Stat. § 44-4232 (Reissue 2010) ("[t]he [Comprehensive Health Insurance Pool Distributive Fund] shall be exempt from any and all taxes assessed by the State of Nebraska"), and Neb. Rev. Stat. § 44-2715 (Reissue 2010) ("[t]he [Nebraska Life and Health Insurance Guaranty Association] shall be exempt from payment of all fees and all taxes levied by this state . . . except taxes levied on real property").

[22] *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

were in conflict, then § 77-2704.12(1), as the more specific statute applying to sales and use tax, would control over the general exemption in § 44-1095.

The district court also addressed—and found meritless—several procedural and evidentiary errors assigned by Woodmen. As relevant to the errors assigned before this court, the district court rejected Woodmen's claims that it was denied due process before the Tax Commissioner, and found no merit to Woodmen's argument that the tax law professor should have been permitted to testify as an expert witness at the hearing.

Woodmen timely appealed from the district court's order, and we granted its petition to bypass the Nebraska Court of Appeals.

II. ASSIGNMENTS OF ERROR

Woodmen assigns, restated, that the district court erred in failing to find Woodmen was (1) exempt from sales and use taxes under § 44-1095, (2) entitled to a refund for sales and use taxes previously paid, (3) denied due process when NDOR changed its rationale for denying the exemption, and (4) entitled to present expert testimony on the proper interpretation § 44-1095.

III. STANDARD OF REVIEW

[1,2] In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.[23] 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.[24]

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[23] *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012).

[24] *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

[3] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[25]

IV. ANALYSIS

[4-7] This appeal involves statutory interpretation, and our analysis is guided by familiar principles. In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[26] Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.[27] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[28] Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.[29]

[8-11] And because the statute at issue involves a tax exemption, our analysis is guided by additional principles. The burden of showing entitlement to a tax exemption is on the applicant.[30] Statutory tax exemption provisions are to be strictly construed, and their operation will not be extended by judicial construction.[31] An exemption from taxation must

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[25] *Bridgeport Ethanol v. Nebraska Dept. of Rev., supra* note 23.

[26] *J.S. v. Grand Island Public Schools, supra* note 24.

[27] *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015); *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

[28] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015); *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

[29] *In re Interest of Katrina R.*, 281 Neb. 907, 799 N.W.2d 673 (2011); *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011).

[30] *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000).

[31] See *Archer Daniels Midland Co. v. State*, 290 Neb. 780, 861 N.W.2d 733 (2015).

be clearly authorized by the relevant statutory provision.[32] An exemption from taxation is never presumed.[33]

With these principles in mind, we consider the relevant statutes to determine whether Woodmen, as a fraternal benefit society, is exempt from sales and use tax under Nebraska law.

1. § 77-2704.12(1) Does Not Exempt Woodmen From Sales and Use Tax

Section 77-2704.12(1) provides that sales and use taxes "shall not be imposed" on certain nonprofit entities, and it lists the types of nonprofit organizations subject to this exemption. Fraternal benefit societies are not among the enumerated nonprofit entities identified in § 77-2704.12(1), and Woodmen does not claim to fit the description of any other organization enumerated in that subsection.

An exemption from taxation must be clearly authorized by the relevant statutory provision.[34] There is nothing in the plain language of § 77-2704.12 that exempts fraternal benefit societies from sales and use taxes, and the district court correctly concluded Woodmen is not exempt under this statute.

2. § 44-1095 Does Not Exempt Woodmen From Sales and Use Tax

Section 44-1095 provided: "Every [fraternal benefit society] shall be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal, and school tax other than taxes on real estate and office equipment."

In urging a construction of this statutory language that excludes it from paying sales and use taxes, Woodmen generally presents two theories. First, Woodmen argues that § 44-1095 creates an entity-based exemption that necessarily includes sales and use taxes. Alternatively, Woodmen argues

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[32] See *Bridgeport Ethanol v. Nebraska Dept. of Rev., supra* note 23.

[33] *Lackawanna Leather Co. v. Nebraska Dept. of Rev., supra* note 30.

[34] See *Bridgeport Ethanol v. Nebraska Dept. of Rev., supra* note 23.

that the term "funds" in § 44-1095 should be construed broadly to exempt fraternal benefit societies from using its funds to pay any tax. We reject both these theories as inconsistent with the plain language of the statute and contrary to settled principles of statutory interpretation. We note the parties' briefing focused on the term "funds." Because the statutory phrase is actually "its funds," we at times use that phrase in our analysis.

(a) § 44-1095 Is Not Entity-Based Exemption

Woodmen argues it

> is exempt from "all and every state" tax. Because the sales and use tax is a tax imposed by the state, it falls within the ambit of § 44-1095. And because it falls within the ambit of § 44-1095, [Woodmen] is exempt from the sales and use tax. This case really is that simple.[35]

This argument urges a construction of § 44-1095 that effectively reads the phrase "its funds" out of the statutory language altogether and replaces it with "fraternal benefit society." But the plain language of § 44-1095 does not exempt fraternal benefit societies from taxation; rather, it exempts fraternal benefit societies from taxes imposed on "its funds."

A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[36] Like the Tax Commissioner and the district court, we expressly reject Woodmen's invitation to render meaningless the phrase "its funds" in order to judicially rewrite § 44-1095 into an entity-based exemption from all taxation.

Instead, we must strictly construe the exemption provisions of § 44-1095 and not extend their operation through judicial construction.[37] When the Legislature has intended to create

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[35] Brief for appellant at 19.

[36] *Stick v. City of Omaha, supra* note 28; *Holdsworth v. Greenwood Farmers Co-op, supra* note 28.

[37] See *Archer Daniels Midland Co. v. State, supra* note 31.

an entity-based exemption, it has used plain and simple language.[38] The Legislature did not exempt fraternal benefit societies in § 44-1095, but, rather, exempted "its funds." This court will not write into a statute what the Legislature did not.

(b) Exemption for "[I]ts [F]unds" Does Not Impact Sales and Use Tax

Much of the parties' briefing debates what the Legislature meant when it exempted a fraternal benefit society's "funds" from "all and every state, county, district, municipal, and school tax other than taxes on real estate and office equipment."[39] The term "funds" is used throughout the statutes governing fraternal benefit societies, but no specific definition of the term is provided. The parties have not cited to legislative history discussing the intended meaning of the phrase "its funds" as used in § 44-1095, and until now, no Nebraska appellate court has been called upon to consider the issue.

[12] The parties advance alternative interpretations of the phrase "its funds" and each party argues that the rules of statutory construction support their preferred interpretation. Ultimately, however, we conclude it is not necessary to determine—in this case—a precise definition of "funds" or "its funds" under § 44-1095. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[40] In this case, determining the precise definition of "its funds" under § 44-1095 is not necessary to resolve the issues on appeal, because no definition of "its funds" has been advanced that could plausibly implicate or apply to sales and use taxes.

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[38] See, e.g., § 44-4232 ("[t]he [Comprehensive Health Insurance Pool Distributive Fund] shall be exempt from any and all taxes assessed by the State of Nebraska"), and § 44-2715 ("[t]he [Nebraska Life and Health Insurance Guaranty Association] shall be exempt from payment of all fees and all taxes levied by this state . . . except taxes levied on real property").

[39] § 44-1095.

[40] *Greenwood v. J.J. Hooligan's*, 297 Neb. 435, 899 N.W.2d 905 (2017).

[13-15] Sales and use taxes are not imposed on funds, they are imposed on the activity of retail transactions, measured by gross receipts.[41] It is a tax upon the sale, lease, rental, use, storage, distribution, or other consumption of tangible personal property in the chain of commerce.[42] A sales tax is not imposed on the article sold, but, rather, upon the transaction called the sale.[43] As we explained in *Anthony, Inc. v. City of Omaha*:

> Both occupation taxes and sales taxes are "excise taxes" for the purpose of raising revenue. An excise tax is a tax imposed on the manufacture, sale, or use of goods or on an occupation or activity, and is measured by the extent to which a privilege is exercised by the taxpayer, *without regard to the nature or value of the taxpayer's assets*. An excise tax is imposed upon the performance of an act.[44]

Because sales and use tax is imposed on the performance of a transaction, such taxes have nothing to do with the value or nature of Woodmen's funds. In other words, sales and use taxes are taxes imposed on Woodmen's retail purchase activity, not on Woodmen's funds.

Woodmen tries to get around this distinction by urging an interpretation of "its funds" that would include the activity of spending its funds. Woodmen argues that in order for § 44-1095 to have meaning, "it must mean that [Woodmen] may not be required to spend its funds paying taxes on the purchase of goods. In other words, [Woodmen], as an entity, is exempt from the sales and use taxes."[45] We disagree.

For the reasons stated earlier, we reject Woodmen's argument that § 44-1095 confers an entity-based exemption on

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[41] See *Anthony, Inc. v. City of Omaha, supra* note 22.

[42] See *id*.

[43] 316 Neb. Admin. Code, ch. 1, § 001.02 (2003).

[44] *Anthony, Inc. v. City of Omaha, supra* note 22, 283 Neb. at 876-77, 813 N.W.2d at 475-76 (emphasis supplied).

[45] Brief for appellant at 21.

fraternal benefit societies. Woodmen's similar suggestion—that § 44-1095 should be construed to exempt not just taxes *on* "its funds," but also to exempt payment of any taxes *using* "its funds"—is also rejected. Such a construction would be contrary to the plain language of the statute, would impermissibly expand the statute through judicial construction, and would recognize an entity-based exemption that has not been clearly authorized by the statute.

Woodmen also argues that unless the phrase "its funds" is construed broadly to create "an exemption for all fraternal benefit societies that exempts the societies from paying sales and use taxes out of their funds,"[46] then § 44-1095 provides no exemption at all from any current tax and "is nothing more than an ink blot in Nebraska's statutes."[47]

It is true that during oral argument before this court, the parties were not able to identify any current tax that, but for the exemption in § 44-1095, would be levied or imposed on a fraternal benefit society's "funds." NDOR and the Tax Commissioner argue that in 1931, when the tax exemption on a fraternal benefit society's "funds" was first enacted,[48] it effectively exempted such societies from taxes on intangible personal property in their funds, but the tax on intangible personal property was later repealed.[49] NDOR and the Tax Commissioner describe § 44-1095 as "antiquated." We express no opinion on whether this observation is correct, because whether a statute as written has become antiquated presents a question of tax policy more properly directed to the Legislature.[50]

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[46] *Id.* at 16.

[47] *Id*. at 20.

[48] See 1931 Neb. Laws, ch. 86, § 31, p. 246 (codified at Comp. Stat. § 44-1261 (Supp. 1931)).

[49] See 1967 Neb. Laws, ch. 498, § 3, p. 1691 (repealing Neb. Rev. Stat. § 77-201.01 (Reissue 1966)).

[50] See *State, ex rel. Beatrice Creamery Co., v. Marsh*, 119 Neb. 197, 227 N.W. 926 (1929).

It is the role of this court to declare the law as it finds it, and we decline Woodmen's invitation to modernize statutory language through judicial legislation.

In summary, Woodmen asks us to either read "its funds" out of § 44-1095 altogether, and thereby create an entity-based exemption which the Legislature has not authorized, or construe the phrase "its funds" so broadly as to include the activity of spending funds. It is not the proper role of this court to do either.[51]

[16] For the reasons stated previously, we hold that the plain language of § 44-1095 exempts taxes on the "funds" of a fraternal benefit society, but it does not exempt the fraternal benefit society from sales and use taxes, because such taxes are imposed on its retail purchase activity, not on its funds.[52] Other courts to have considered statutes similar to § 44-1095 have arrived at the same conclusion.[53]

In fact, Ohio has applied similar analysis to a similar statute. The Ohio statute provides: "'Every fraternal benefit society organized or licensed under this chapter is hereby declared to be a charitable and benevolent institution, and *all of its funds* are exempt from all state, county, district, municipal, and school taxes other than franchise taxes and taxes on real estate.'"[54] In *United Transp. Union v. Tracy*,[55] a fraternal benefit society contended this statute exempted it from the Ohio use tax. The court disagreed. In its analysis, the court

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[51] See, *J.S. v. Grand Island, supra* note 24; *Stick v. City of Omaha, supra* note 28; *Holdsworth v. Greenwood Farmers Co-op, supra* note 28.

[52] See *Anthony, Inc. v. City of Omaha, supra* note 22.

[53] See, *United Transp. Union v. Tracy*, 82 Ohio St. 3d 333, 695 N.E.2d 770 (1998); *Dept. of Rev. v. Woodmen of the World*, 919 P.2d 806 (Colo. 1996); *Supreme Council of the Royal Arcanum v. State Tax Commission*, 358 Mass. 111, 260 N.E.2d 822 (1970). But see *The State of Texas v. The Praetorians*, 143 Tex. 565, 186 S.W.2d 973 (1945).

[54] *United Transp. Union v. Tracy, supra* note 53, 82 Ohio St. 3d at 334, 695 N.E.2d at 771, quoting Ohio Rev. Code Ann. § 3921.24 (2002).

[55] *United Transp. Union v. Tracy, supra* note 53.

emphasized that statutes relating to tax exemptions had to be strictly construed. It concluded the plain language of the statute exempted only a society's funds from taxation and did not exempt a society from transactions on which Ohio imposed a use tax. It emphasized that a use tax was issued "'upon the various items of office materials that were needed and utilized by the society,'" not the society's funds, and thus, the exemption on funds did not apply to the use tax.[56]

Nebraska's sales and use tax is a transactional tax, imposed on purchases, not on funds. We therefore agree with the district court that § 44-1095 does not exempt Woodmen from Nebraska's sales and use tax. For the same reason, we conclude the district court did not err in denying Woodmen's refund claim.

3. No Due Process Violation

Woodmen claims it was denied due process before the Tax Commissioner. Specifically, Woodmen argues it was not provided adequate notice of the legal grounds on which NDOR would rely at the hearing, because NDOR initially denied Woodmen's application for exemption on the basis that Woodmen was not a religious organization. The Tax Commissioner rejected this due process argument, as did the district court, finding the record showed that Woodmen had been provided ample notice of NDOR's legal theories and reasoning well in advance of the hearing. We agree Woodmen has shown no due process violation.

[17,18] The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections.[57] If there is a protected interest at stake, the question then becomes what process is due.[58] The fundamental

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[56] *Id.* at 335, 695 N.W.2d at 772.

[57] *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001).

[58] See *id.*

requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.[59]

Woodmen's right to apply for a tax exemption is a property interest entitled to due process. The question, then, is whether the process Woodmen received gave it an opportunity to be heard in a meaningful time and manner. Woodmen does not contest that the opportunity to be heard was timely—it suggests, however, that the opportunity was not meaningful, because Woodmen did not have adequate notice of the legal basis on which NDOR was relying to oppose the exemption. The record refutes this contention.

Although NDOR originally denied the application for exemption because Woodmen was not a religious organization, the record shows the parties were aware, well in advance of the hearing, of one another's legal theories and reasoning regarding the interpretation of § 44-1095. Specifically, in a letter dated before the formal hearing was even requested, NDOR responded to Woodmen's legal arguments and provided an explanation of its legal basis for concluding § 44-1095 did not provide Woodmen an exemption from sales and use tax. The record further reflects that before the hearing, the parties conducted discovery, exchanged witness and exhibit lists, and met to discuss their differing interpretations of § 44-1095. The record amply supports the conclusion that prior to the hearing, Woodmen was aware of the legal basis on which NDOR was opposing the sales and use tax exemption. The district court correctly found no due process violation, and Woodmen's arguments to the contrary are meritless.

4. Exclusion of Tax Law Professor's Testimony

Woodmen argues the hearing officer abused her discretion in excluding the expert testimony of the tax law professor retained by Woodmen. Woodmen argues the professor is

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[59] See *id.*

a "renowned expert in the tax laws of Nebraska" and "was willing to assist [the] Hearing Officer with his opinion."[60] Woodmen's offer of proof indicates that, if permitted, the professor would have testified about "statutory construction" and "about the law in Nebraska and the plain language of the law in Nebraska and his research and study of that area, [and] how [§] 44-1095 suggests a broad meaning for funds."[61] The hearing officer allowed Woodmen to include the professor's opinions as authorities in its posthearing briefing, but excluded the professor's testimony. Woodmen contends this was an abuse of discretion and argues the district court erred in failing to recognize as much.

[19] Generally, a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.[62] Here, the rules of evidence were not invoked at the hearing before the Tax Commissioner[63]; but under the Nebraska Administrative Code, the hearing officer could "exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence."[64]

[20,21] Expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or determine a fact issue, and expert testimony concerning a question of law does not tend to accomplish either of these goals.[65]

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[60] Brief for appellant at 28.

[61] *Id*. at 31.

[62] *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012); *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010).

[63] See 316 Neb. Admin. Code, ch. 33, § 12.04A (request to be bound by rules of evidence must be served 3 days before hearing).

[64] *Id*., § 12.04.

[65] *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013), *disagreed with on other grounds, State v. Merchant*, 288 Neb. 440, 848 N.W.2d 630 (2014); *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995).

Consequently "'expert testimony concerning a question of law is generally not admissible in evidence.'"[66] In the past, this court has been critical of admitting expert testimony from legal scholars on the interpretation of statutes, reasoning that such evidence is irrelevant and "'should not reach a judge's attention by way of the witness stand.'"[67]

Here, the parties stipulated to the pertinent facts and there were no factual disputes presented at the hearing—only a question of law regarding statutory interpretation. Under these circumstances, the district court found the hearing officer did not abuse her discretion in excluding the tax law professor's opinion testimony, particularly when Woodmen was permitted to present the professor's opinions as authority and argument in its posthearing brief. The district court's decision in this regard conformed to the law, was supported by the record, and was neither arbitrary, capricious, nor unreasonable. There is no merit to this assignment of error.

V. CONCLUSION

The Legislature did not include fraternal benefit societies among those entitled to be exempt from sales and use tax under § 77-2704.12(1), and the exemption from taxes on a fraternal benefit society's "funds" in § 44-1095 does not encompass sales and use tax. We find no merit to the remaining assignments of error and therefore affirm the judgment of the district court.

Affirmed.

Wright, J., not participating.

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[66] *State v. Merchant, supra* note 65, 285 Neb. at 465, 827 N.W.2d at 481, quoting *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991)).

[67] *Id.*, quoting *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984).

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

Jayson H. Tilson, appellant, v. Erica M. Tilson, appellee, and Kimberly L. Hill, Intervenor-appellee.

907 N.W.2d 31

Filed February 16, 2018. No. S-17-468.

1. **Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decision made by the lower court.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Time: Appeal and Error.** To vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (1) an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding; and (3) an order made upon a summary application in an action after judgment.
5. **Actions: Modification of Decree.** Proceedings regarding modification of a marital dissolution are special proceedings.
6. **Actions: Divorce.** An application to modify the terms of a divorce decree is not the commencement of an action. It constitutes a continuation of the suit for dissolution of marriage.
7. **Final Orders: Appeal and Error.** An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.
8. **Divorce: Jurisdiction: Final Orders: Appeal and Error.** Generally, when multiple issues are presented to the district court for simultaneous disposition in the same separate yet connected proceeding within

the court's continuing jurisdiction over a dissolution decree, the court's determination of fewer than all the issues presented is not a final order for the purpose of an appeal.

9. **Final Orders.** An order merely preserving the status quo pending a further order is not final.

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

Matt Catlett, of Law Office of Matt Catlett, for appellant.

David P. Kyker for appellee Kimberly L. Hill.

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

Miller-Lerman, J.

I. NATURE OF CASE

In this appeal, Jayson H. Tilson addresses the March 31, 2017, denial of that portion of his "complaint" and associated motion asking the district court for Lancaster County to declare void a dissolution decree that it had issued more than a year before. He argues that the decree is void because prior to the entry of the decree, he had filed a motion to dismiss the petition for dissolution, which he asserts was self-executing under Neb. Rev. Stat. § 25-602 (Reissue 2016). But Jayson's notice of appeal is from an order issued on April 4, denying his requests for various temporary orders and retaining for decision Jayson's application to modify the custody provisions of the decree. We conclude that the April 4 order was not final. Therefore, we dismiss this appeal for lack of jurisdiction.

II. BACKGROUND

1. Dissolution

In September 2014, Jayson filed a complaint for dissolution of his marriage to Erica M. Tilson. The record does not reflect that Erica filed an answer, but she made a general appearance before the court. Following a hearing, the court issued

a temporary order awarding custody of the parties' minor children to Erica's mother, Kimberly L. Hill (Kimberly). The court granted Jayson and Erica supervised parenting time and ordered them both to pay Kimberly temporary child support.

The court allowed Kimberly to intervene and appointed a guardian ad litem for the minor children. Kimberly and her husband filed a complaint, asking for grandparent visitation and custody of the children. There is no certificate of service attached to the complaint.

Subsequently, on November 16, 2015, at 9 p.m., Jayson filed a motion to dismiss his complaint for dissolution. The next morning, on November 17, Kimberly filed a praecipe asking the court to issue summons and deliver to Jayson a copy of the complaint for grandparent visitation, at the hearing scheduled at 10 a.m., on November 17. The record contains two "Process Service Returns" from the sheriff's office of a "Copy of COMPLAINT," with the service and return charges paid by Kimberly's counsel. The documents reflect that Jayson and Erica were personally served copies of the complaint on November 17.

The hearing was held as scheduled on November 17, 2015, with Jayson in attendance. Referring to the November 17 hearing, the court's order states "[u]pon motion of [Jayson's] attorney . . . the Plaintiff's motion to dismiss is withdrawn."

The court issued a consent decree of dissolution on December 8, 2015. The decree ordered the continuation of the children's legal and physical custody with Kimberly, with set parenting time for Jayson and Erica. Jayson was ordered to pay $200 per month "toward work-related childcare expenses," in the event they were not subsidized. Erica was ordered to pay to Kimberly $100 in monthly child support.

2. Contempt

Approximately 10 months later, on October 18, 2016, the court found Jayson in contempt for failing to comply with his obligation under the decree to contribute to the children's childcare expenses.

3. Declaratory Relief, Modification, and Habeas

(a) The "Complaint"

On February 24, 2017, Jayson filed a "Complaint to Vacate or Modify, for Declaratory Judgment, and/or for Writ of Habeas Corpus." The "complaint" was filed under the same case number as the dissolution decree, and in the same court.

Jayson asserted that the dissolution decree was void by virtue of his November 16, 2015, motion to dismiss. Based on this assertion, he sought an order of the court declaring the dissolution decree and "all orders flowing therefrom" null and void.

Under the rubric of habeas corpus relief, Jayson alleged that the award of temporary custody of the children with Kimberly was unlawful, because it violated the parental preference principle. He asked for a writ of habeas corpus placing the custody of the children with him.

Alternatively to an order declaring the dissolution void, Jayson sought an order modifying the decree so as to place the children in his custody. Jayson alleged a change in circumstances. In particular, he alleged that Kimberly was neglecting the children and that Erica was in jail awaiting criminal charges.

Kimberly filed an answer generally denying the allegations and asking that the matter be dismissed. No ruling on the motion to dismiss is found in the record.

(b) Motion for Declaratory Relief and Temporary Orders

On March 10, 2017, Jayson filed a "Motion for Declaratory Relief or Temporary Suspension of Implementation and Enforcement of Decree, Temporary Custody, Temporary Child Support, Temporary Restraining Orders." The district court referred to this motion as "Filing 14."

Specifically, Jayson moved for a declaration that the decree of dissolution and all orders flowing therefrom are void and of no effect. In support of this relief, Jayson repeated his

assertion that his motion to dismiss the complaint for dissolution was self-executing and therefore deprived the court of jurisdiction to issue the dissolution decree.

"[I]n lieu" of such declaratory relief, Jayson moved for orders (1) temporarily suspending enforcement of the decree as it relates to the care, custody, control, and support of the minor children; (2) temporarily awarding Jayson exclusive custody of the children; (3) temporarily prohibiting Erica from having parenting time; (4) temporarily prohibiting Erica from having access to medical and education records; (5) temporarily prohibiting Kimberly from having visitation with the children; (6) temporarily prohibiting Kimberly from having access to the children's medical or education records; and (7) temporarily requiring Erica to pay Jayson child support and share in medical and childcare expenses.

In support of this "temporary" relief, Jayson alleged that the parental preference principle prohibited the award of custody of the children to Kimberly when he had not been found to be unfit. He further alleged that Erica was unfit to have custody and that it was contrary to the children's best interests for Kimberly to have visitation.

(c) March 31, 2017, Order

On March 31, 2017, the court overruled that part of Jayson's "Filing 14" requesting that the court declare the dissolution decree void. The court's order, signed and file stamped on March 31, incorporates its docket entry, stating that "[t]he part of the motion requesting declaratory relief (vacating the Decree of Dec[.] 8, 2015) is overruled." Also on March 31, the court denied Jayson's requests for full temporary custody and suspension of child support while the case was pending.

The "custody case" was set for a trial to be held on August 21, 2017.

(d) April 4, 2017, Order

On April 4, 2017, the court issued another order. The April 4 order states that "[t]his proceeding came before the

court for consideration of *pending* matters." (Emphasis supplied.) And "[u]pon consideration of the issue(s) presented, the court made the docket entry . . ." as follows: "At Filing 14 is [Jayson's] Motion for Declaratory Relief Or Temporary Suspension Of Implementation And Enforcement Of Decree, Temporary Custody, Temporary Child Support, Temporary Restraining Orders. The motion was argued and submitted on 3/31/17. The Motion is overruled. See Order re Docket Entry in file."

(e) Notice of Appeal

On May 3, 2017, Jayson filed a notice of appeal, stating that he was appealing the April 4 order. That is the appeal currently before us.

4. Orders Subsequent to Notice of Appeal

The proceedings continued after the May 3, 2017, notice of appeal was filed. Kimberly filed an amended answer to Jayson's "complaint," setting forth a cross-complaint for a reduction in Jayson's parenting time, for his visitation to be supervised, and for an award of child support. On May 30, the court issued an order denying a motion by Jayson to continue trial and to prohibit Kimberly from serving subpoenas upon the Nebraska Department of Health and Human Services and "Educare of Lincoln." The court also granted Kimberly's request for a protective order.

After a hearing, on June 20, 2017, the court sustained Kimberly's motion to modify parenting time to a "5/2 schedule" "for this temporary order." But the court explained that to "encourage civil collaboration," Kimberly's attorney was to confer with Jayson's attorney and the guardian ad litem. "After doing so, [Kimberly's attorney] shall submit a proposed order as to temporary custody." The court overruled motions by Jayson for sanctions and attorney fees and to reconsider the court's appointment of the guardian ad litem.

On June 28, 2017, the court issued an order sustaining Kimberly's motion for modification of parenting time. That is the last order in the record.

III. ASSIGNMENT OF ERROR

Jayson claims that the district court erred when it denied his "February 24, 2017, motion" to declare the dissolution decree void.

IV. STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decision made by the lower court.[1]

V. ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is our duty to determine whether we have jurisdiction over this appeal.[2] In this case, it is necessary for us to determine whether the April 4, 2017, order, from which Jayson appeals, is final.[3] To vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order.[4] In contrast, if an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court.[5]

[4] The three types of final orders which may be reviewed on appeal are (1) an order affecting a substantial right in an action, when such order in effect determines the action and

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[1] *Anderson v. Finkle*, 296 Neb. 797, 896 N.W.2d 606 (2017).

[2] See, e.g., *Rafert v. Meyer*, 298 Neb. 461, 905 N.W.2d 30 (2017).

[3] See Neb. Rev. Stat. §§ 25-1911 and 25-1912 (Reissue 2016).

[4] *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997). See, also, Neb. Rev. Stat. § 25-1931 (Reissue 2016).

[5] *State v. Jacques, supra* note 4.

prevents a judgment; (2) an order affecting a substantial right made in a special proceeding; and (3) an order made upon a summary application in an action after judgment.[6]

[5,6] Proceedings regarding modification of a marital dissolution are special proceedings.[7] Jayson's filings with the same district court that issued the dissolution decree, under the same case number, must be construed as motions asking the court for relief pursuant to its continuing jurisdiction over the decree, as set forth by the modification statutes.[8] An application to modify the terms of a divorce decree is not the commencement of an action.[9] It constitutes a continuation of the suit for dissolution of marriage.[10]

The jurisdictional question presented is whether the April 4, 2017, order from which this appeal is taken affected a substantial right. A substantial right is an essential legal right, not a mere technical right.[11] It is a right of substance.[12] It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[13] The duration of the order is therefore relevant to whether it affects a substantial right.[14]

[7,8] Most fundamentally, an order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.[15] Generally,

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[6] See Neb. Rev. Stat. § 25-1902 (Reissue 2016).

[7] See *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

[8] See Neb. Rev. Stat. §§ 42-364(6) and 42-365 (Reissue 2016).

[9] *Ruehle v. Ruehle*, 161 Neb. 691, 74 N.W.2d 689 (1956).

[10] See, *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997); *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979).

[11] *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

[12] *Id.*

[13] *Id.*

[14] See *id.*

[15] See *id.*

when multiple issues are presented to the district court for simultaneous disposition in the same "separate yet connected proceeding[]"[16] within the court's continuing jurisdiction over a dissolution decree, the court's determination of fewer than all the issues presented is not a final order for the purpose of an appeal.[17] This is because, absent unusual circumstances, postponing appellate review until all the issues presented under the application to modify have been decided will not significantly undermine the rights affected by the order.

Huffman v. Huffman[18] illustrates the foregoing principles. In *Huffman*, we concluded that an order denying the father's request for a change of custody was not final when the court had not yet decided the father's alternative request to modify the visitation provisions of the decree. We said that when the modification application pertains to more than one issue involving children affected by the dissolution decree, a court's resolution of one issue raised by the application, but retention or reservation of jurisdiction for disposition of another issue or issues raised by the application does not constitute a final judgment, order, or decree for the purpose of an appeal.[19]

In *Schepers v. Schepers*,[20] we likewise held that an order determining the merits of an application to modify custody was not final when the issue of child support was still pending.

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[16] John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239, 289 n.227 (2001).

[17] See, *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008); *Schepers v. Schepers*, 236 Neb. 406, 461 N.W.2d 413 (1990); *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990); *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984); *Goldenstein v. Goldenstein*, 110 Neb. 788, 195 N.W. 110 (1923); *McCaul v. McCaul*, 17 Neb. App. 801, 771 N.W.2d 222 (2009); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

[18] *Huffman v. Huffman, supra* note 17.

[19] See *id.*

[20] *Schepers v. Schepers, supra* note 17.

The Nebraska Court of Appeals, in *Paulsen v. Paulsen*,[21] found that a similar order was not final, explaining:

> There are practical reasons why an order in a special proceeding which determines less than all of the issues submitted to the court is not final. The primary reason of course is to prevent piecemeal appeals. There can be no doubt that custody and the amount of support for the children of a family are closely related issues. . . . There is no reason why both issues cannot be decided at the same time in an action where both are put [at] issue. . . . In short, there is no reason not to require a resolution of both custody and support to make the order final.

In *Johnson v. Johnson*,[22] the Court of Appeals clarified that it does not matter if the issue or issues yet undecided were explicitly requested in the application to modify the decree, when the issue or issues were "an inherent part of a custody modification action."

Without commenting on the extent to which Jayson's requests properly fell under the district court's continuing jurisdiction, in his February 24, 2017, "Complaint to Vacate or Modify, for Declaratory Judgment, and/or for Writ of Habeas Corpus," Jayson presented several issues in the proceedings. He asked the court to declare the dissolution decree void and to vacate it. He asked the court to issue a writ of habeas corpus placing the children in his custody. Alternatively to vacating the decree or issuing a writ of habeas corpus, Jayson asked the court to modify the dissolution decree to place the children in his custody, due to an alleged change in circumstances. Finally, Jayson moved for several temporary orders, apparently pending the court's determination of his underlying requests for relief.

In its order on April 4, 2017, from which this appeal is taken, the court stated that it was overruling "pending matters"

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[21] *Paulsen v. Paulsen, supra* note 17, 10 Neb. App. at 275, 634 N.W.2d at 17.

[22] *Johnson v. Johnson*, 15 Neb. App. 292, 296, 726 N.W.2d 194, 197 (2006).

under "Filing 14." As noted above, "Filing 14" asked for a declaration that the dissolution decree was void and, in the alternative, for several temporary orders. "Filing 14" did not ask for a writ of habeas corpus or for modification of the decree due to a change of circumstances.

Because in the court's order issued on March 31, 2017, it had overruled Jayson's request to declare the dissolution decree void, the April 4 order's overruling of the pending matters in "Filing 14" necessarily refers to Jayson's requests for temporary relief. Specifically, the April 4 order denied Jayson's requests for (1) temporary suspension of the decree as it relates to the care, custody, control, and support of the minor children; (2) a temporary award to Jayson of exclusive custody of the children; (3) a temporary denial of any parenting time for Erica and prohibiting Erica from having access to medical and education records; (4) a temporary cessation of grandparent visitation; and (5) a temporary award of child support.

At the time of the April 4, 2017, order, the court had not yet addressed Jayson's request for a writ of habeas. Likewise, the court had not considered the merits of Jayson's alternative request for modification of the decree to place the children permanently in his custody. On the contrary, it is clear that at the time of the April 4 order, the court had retained the "custody case" for trial. Thus, the court's April 4 order determined fewer than all the issues submitted and it retained jurisdiction for disposition of another issue raised by the application.

[9] Furthermore, the April 4, 2017, order pertained only to requests for temporary relief. In several cases, we have held that under the facts presented, orders temporarily affecting a parent's custodial, visitation, or educational rights are not final.[23] Despite the importance of the rights affected, such orders of limited duration failed to have a substantial effect

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[23] See, *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013); *Gerber v. Gerber, supra* note 17; *In re Interest of Angeleah M. & Ava M.*, 23 Neb. App. 324, 871 N.W.2d 49 (2015); *In re Interest of Nathaniel P.*, 22 Neb. App. 46, 846 N.W.2d 681 (2014).

on those rights. And here, by denying Jayson's motion for temporary relief, the April 4 order essentially left unchanged the status quo of the dissolution decree. We have said in other contexts that an order merely preserving the status quo pending a further order is not final.[24]

In his discussion of our jurisdiction in this case, Jayson relies on case law wherein we have held that an order denying a motion to vacate is a final order.[25] We find Jayson's reliance on this proposition unavailing, because the order before us is not the March 31, 2017, order denying that "part of the motion requesting declaratory relief (vacating the Decree of Dec[.] 8, 2015)," but, rather, the April 4 order. Furthermore, if the March 31 order is a final order, then Jayson failed to perfect an appeal from that order within 30 days as required by § 25-1931. If the March 31 order is not a final order, then it is appealable once the court has determined all the issues pending under these current modification proceedings. Either way, the finality of the March 31 order does not control the jurisdictional question in this appeal; that is, whether the April 4 order is final.

We conclude that the April 4, 2017, ruling was not a final order, because it did nothing more than deny requests for temporary relief, preserving the status quo pending the court's determination of the other issues raised in the proceedings. Accordingly, we have no jurisdiction over this appeal.

VI. CONCLUSION

For the foregoing reasons, we dismiss the appeal.

Appeal dismissed.

Wright, J., not participating.

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

[25] See, *Capitol Construction v. Skinner*, 279 Neb. 419, 778 N.W.2d 721 (2010); *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

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

Jessica Renee Fetherkile, appellee, v. Brandon Lee Fetherkile, appellant.

907 N.W.2d 275

Filed February 23, 2018. No. S-16-1159.

1. **Statutes.** Statutory interpretation presents 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. **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 or a modification of an existing order of 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.
4. **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.
5. **Evidence: Appeal and Error.** In a review de novo on the record, the 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.
6. **Paternity: Statutes.** Paternity proceedings are purely statutory, and such statutes must be strictly construed because they modify the common law.
7. **Judgments: Jurisdiction: Claim Preclusion.** Claim preclusion 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.

8. **Claim Preclusion.** The doctrine of claim preclusion bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.
9. ____. The doctrine of claim preclusion rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.
10. **Claim Preclusion: Issue Preclusion.** Whether the doctrine of either claim preclusion or issue preclusion applies in any given case is necessarily fact dependent.
11. **Child Support: Parent and Child: Statutes.** Nebraska's statutes do not impose a child support obligation upon any parties except the legally determined parents of a child.
12. **Child Support: Paternity.** Any order imposing an obligation of child support is necessarily a legal determination of paternity.
13. **Child Support: Paternity: Final Orders.** A paternity determination in a support order, under Neb. Rev. Stat. §§ 43-1411 or 43-512.04 (Reissue 2016), is a final judgment on the issue of paternity.
14. **Claim Preclusion: Judgments.** For purposes of claim preclusion, a judgment on the merits is one which is based on legal rights, as distinguished from mere matters of practice, procedure, jurisdiction, or form.
15. **Judgments: Stipulations: Final Orders.** A stipulated judgment operates on the merits and is as final and binding upon the parties as a decree rendered after a hearing on the merits.
16. **Divorce: Courts: Taxation.** A state court having jurisdiction in a dissolution action has the power to allocate tax dependency exemptions as part of the dissolution decree.
17. **Divorce: Taxation.** A tax dependency exemption is nearly identical in nature to an award of child support or alimony.
18. **Child Support: Judgments.** Childcare costs may be awarded as an incident to child support.
19. **Statutes: Legislature: Presumptions: Judicial Construction.** In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation.
20. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to

interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

21. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
22. **Modification of Decree: Child Support.** Under Neb. Rev. Stat. § 42-364 (Reissue 2016), a court may allow an existing support order to remain in effect without modification after considering whether a modification of the existing order is warranted, rather than making an independent calculation of child support.
23. **Due Process.** Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.
24. **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.
25. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
26. **Child Support.** Child support orders are always subject to review and modification.
27. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
28. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
29. ____: ____. The paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.
30. **Modification of Decree: Child Support: Proof.** The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification and that the best interests of the child are served thereby.

31. **Divorce: 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 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.
32. **Property Division.** Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties.
33. **Property Division: Proof.** The burden to show that a debt is nonmarital is on the party making that assertion.
34. **Divorce: Attorney Fees.** In awarding attorney fees in a dissolution action, a court should consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.
35. **Courts: Attorney Fees.** Courts have the inherent power to award attorney fees in certain unusual circumstances amounting to conduct during the course of litigation which is vexatious, unfounded, and dilatory, such that it amounts to bad faith.
36. **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 Pawnee County: Daniel E. Bryan, Jr., Judge. Affirmed.

Angelo M. Ligouri, of Ligouri Law Office, for appellant.

No appearance for appellee.

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

Funke, J.

Brandon Lee Fetherkile appeals from a dissolution decree entered by the Pawnee County District Court, which dissolved his marriage to Jessica Renee Fetherkile. The court ruled that Brandon was the legal father of Ariana D. and ordered him to

pay child support for Ariana and two other children, pursuant to an order for support in a separate case.

Primarily, Brandon argues that the evidence showed that he was not the biological or legal father of Ariana; so, the court erred in finding that he was Ariana's father and making any order regarding her. Further, he asserts that the court erred in not making an independent determination regarding child support and attaching a child support calculation worksheet to the decree.

We reject Brandon's arguments because the existing order of support was res judicata on the issue of Brandon's paternity and Brandon failed to elicit sufficient evidence to warrant a modification of the existing order of support. Further, because the court did not modify the existing order of support, it was not required to attach a worksheet to its decree. We also find Brandon's remaining assignments of error to be without merit. Therefore, we affirm.

I. BACKGROUND

Brandon and Jessica were married in June 2010 and separated in March 2013. Jessica filed a complaint for dissolution in December 2014, and Brandon filed a counterclaim, which he labeled a cross-complaint, for dissolution in June 2015. Trial was held in November 2016.

Jessica has three children: a daughter, born in 2013; another daughter, born in 2008; and Ariana, born in 2006. In her complaint and during her direct testimony, Jessica alleged that Brandon was the legal father of all three children. In his counterclaim, Brandon disputed paternity over Ariana and requested genetic testing to determine whether he was the biological father.

In November 2014, in case No. CI 14-12, a separate proceeding in the Pawnee County District Court, the court entered an order for support, based upon a stipulation of the parties. It found that Brandon had acknowledged paternity of all three children, ruled that he was their father, and ordered Brandon to pay Jessica child support.

At the dissolution trial, Jessica requested the court to continue the order of child support from case No. CI 14-12. Nonetheless, upon cross-examination, Jessica testified that Brandon was not Ariana's biological father. Jessica also stated that despite the fact she had put Brandon's name on Ariana's birth certificate, he never signed it, and that Brandon had been pursuing legal adoption of Ariana before the separation. She also acknowledged that Brandon has two other children not born of the marriage, including one which was born around August 2016. Further, the record does not reflect whether the biological testing that Brandon requested was ever performed.

The parties did not contest the division of assets. Jessica requested that the parties equally split all debts incurred before the separation and only debts related to their children after the separation. She testified and entered evidence concerning several debts related to medical expenses for the children. One exhibit, however, was a collection notice for a debt from Jessica's bank account that Jessica testified was incurred before the separation.

Jessica also requested at least $3,000 from Brandon for attorney fees. She stated that she incurred extra expenses in the proceedings because of his delays, failures to appear, last minute continuances, and failure to timely respond to discovery requests, even after her having a motion to compel granted. She presented evidence that she incurred $7,420 of attorney fees for the proceedings.

After the close of the evidence, the court ruled from the bench. In doing so, it stated that it was "not going to change the child support in this case," because Brandon had failed to produce sufficient evidence of his change in income to justify a modification. Further, it explained that Brandon still had the opportunity to seek a modification of the support order by filing for a modification in the prior case. Additionally, the court divided all of the debts submitted into evidence equally, ordered Brandon to pay $3,000 of Jessica's

attorney fees, and ordered that neither party was required to provide insurance for the children.

At a later date, the court signed a decree of dissolution which ordered Brandon to provide child support pursuant to the order of support in effect from case No. CI 14-12. Brandon filed a timely appeal. We removed the case to our docket on our own motion pursuant to our authority to regulate the caseloads of the Nebraska Court of Appeals and this court.[1]

II. ASSIGNMENTS OF ERROR

Brandon assigns, reordered and restated, that the court erred in (1) not attaching a Nebraska child support worksheet to the decree; (2) ordering child support pursuant to a prior order in separate proceedings; (3) not allowing Brandon to present evidence on his cross-claim or respond to Jessica's presentation of evidence; (4) finding that Ariana was a child of the parties; (5) determining custody, parenting time, child support, and expenses of Ariana, because she is not Brandon's child; (6) ordering child support and income tax dependencies based on three children; (7) equally splitting all of the parties' outstanding bank debts; and (8) awarding Jessica attorney fees. He also asserts, restated, that the court's ruling was erroneous because (9) it was unjust, inequitable, and could not be reached as a matter of law and (10) it was contrary to the evidence and the law and constituted an abuse of discretion.

III. STANDARD OF REVIEW

[1,2] Statutory interpretation presents 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] 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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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[2] *White v. White*, 296 Neb. 772, 896 N.W.2d 600 (2017).

[3] *Id.*

determinations of custody, child support or a modification of an existing order of 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.[4]

[4] 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.[5]

[5] In a review de novo on the record, the 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.[6]

IV. ANALYSIS

1. Brandon's Assignments of Error Regarding Paternity and Child Support Are Without Merit

Brandon's first six assignments of error concern the issues of paternity, child support, and other determinations regarding Ariana. Brandon contends the court erred in finding Ariana to be his child and making various determinations regarding Ariana as a child of the parties. He also contends that the court violated his due process rights by adopting the order of support in case No. CI 14-12, rather than making its own independent conclusions, and preventing him from presenting evidence to challenge Jessica's case or present his own case. Finally, Brandon contends that the court violated Neb. Ct. R.

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[4] See, *Marshall v. Marshall*, 298 Neb. 1, 902 N.W.2d 223 (2017); *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

[5] *Id.*

[6] *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

§ 4-203 (rev. 2011) by failing to attach a Nebraska child support calculation worksheet to the decree.

(a) Court Did Not Abuse Its Discretion in Finding Ariana to Be Child of Marriage or Violate Brandon's Due Process Rights

Brandon asserts that the evidence shows that he is not Ariana's father and that nothing in the record supports a finding that he was a legal parent of her, despite Jessica's false accusation in her complaint.

[6] At common law, the father of a child born out of wedlock had no legal obligation to support the child; that common-law rule was changed by legislative action.[7] Actions to determine paternity are governed by Neb. Rev. Stat. §§ 43-1401 through 43-1418 (Reissue 2016). Paternity proceedings are purely statutory, and such statutes must be strictly construed because they modify the common law.[8]

Despite Brandon's assertion, however, the order of support in case No. CI 14-12 was entered into evidence and contained a determination of paternity that, if res judicata on the issue, would have precluded the trial court in this case from making an independent determination on the issue of paternity.

We have not previously considered whether an order of support under Neb. Rev. Stat. § 43-512.04 (Reissue 2008) is res judicata on the issue of paternity. However, we have repeatedly held that any dissolution decree that orders child support is res judicata on the issue of paternity.[9]

[7-10] Claim preclusion 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

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[7] *State on behalf of B.M. v. Brian F.*, 288 Neb. 106, 846 N.W.2d 257 (2014), citing *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999).

[8] *Id.*

[9] *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

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.[10] The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.[11] The doctrine rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.[12] Whether either preclusion doctrine applies in any given case is necessarily fact dependent.[13]

As a threshold matter, we must consider whether Ariana's paternity was directly addressed or necessarily included in the order of support in case No. CI 14-12.

[11,12] The issue of paternity was directly addressed in case No. CI 14-12 because the court's order found that Brandon acknowledged paternity and ruled that he was the legal father of Ariana. Further, Nebraska's statutes do not impose a child support obligation upon any parties except the legally determined parents of a child.[14] "'A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support.'"[15] Thus, any order imposing an obligation of child support is necessarily a legal determination of paternity.[16]

Next, we must apply the four-factor test to determine if the order of support was res judicata. First, we consider whether the judgment in case No. CI 14-12 was rendered by a court of competent jurisdiction.

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[10] See *In re Interest of Noah B.*, 295 Neb. 764, 891 N.W.2d 109 (2017). See, also, *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994).

[11] *In re Interest of Noah B., supra* note 10.

[12] *Id.*

[13] *Id.*

[14] See *Stacy M. v. Jason M.*, 290 Neb. 141, 858 N.W.2d 852 (2015).

[15] *Cross, supra* note 7, 257 Neb. at 781, 600 N.W.2d at 784, quoting *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985).

[16] See *Stacy M., supra* note 14.

The order of support does not make clear whether the State of Nebraska initially filed the action as a paternity suit, under § 43-1411, or if it petitioned for child support directly, under § 43-512.04.

Under § 43-1411, a paternity action "may be instituted, in the court of the district where the child is domiciled or found . . . by . . . the state, either during pregnancy or within eighteen years after the child's birth." Further, § 43-1412 provides:

> (1) . . . .
>
> If it is determined in this proceeding that the alleged father is actually the father of the child, a judgment shall be entered declaring the alleged father to be the father of the child.
>
> . . . .
>
> (3) If a judgment is entered under this section declaring the alleged father to be the father of the child, the court shall retain jurisdiction of the cause and enter such order of support . . . which the court in its discretion deems appropriate to be paid by the father, as may be proper under the procedure and in the manner specified in section 43-512.04.

Section 43-512.04(1) provides that "[a]n action for child support or medical support may be brought separate and apart from any action for dissolution of marriage. The complaint initiating the action shall be filed with the clerk of the district court and may be heard by the county court or the district court . . . ."

As set out in § 43-1412(1), "[t]he alleged father and the mother shall be competent to testify." But the testimony of the party that initiated the proceedings "shall not alone be sufficient to support a verdict or finding that the alleged father is actually the father."[17]

The order in case No. CI 14-12 states that the matter was submitted upon the oral stipulation of the parties. Further,

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[17] § 43-1412(1).

nothing in the record suggests that either party contested the court's subject matter jurisdiction over the issue of paternity or the court's personal jurisdiction over the parties. As a result, under either statute, the Pawnee County District Court was a court of competent jurisdiction to determine the issue of paternity.

[13] Second, we consider whether the paternity determination in case No. CI 14-12 was a final judgment. In *DeVaux v. DeVaux*,[18] we held that a paternity determination contained in a dissolution decree was a final judgment. We reasoned, in part, that parties have a full and fair opportunity to litigate the issue of paternity in such proceedings and that "unlike alimony, child support, custody, or ground for divorce, paternity is not subject to change."[19] We find both of these reasonings to apply to paternity determinations under §§ 43-1411 and 43-512.04 with equal force. Thus, the paternity determination in case No. CI 14-12 was a final judgment.

[14,15] Third, we must determine whether the paternity judgment decree was a judgment on the merits. For purposes of claim preclusion, a judgment on the merits is one which is based on legal rights, as distinguished from mere matters of practice, procedure, jurisdiction, or form.[20] A consent decree or consent judgment operates on the merits and is as final and binding upon the parties as a decree rendered after a hearing on the merits.[21] We see no reason why this principle would not extend to stipulated judgments on the merits. Accordingly, while case No. CI 14-12 was submitted to the court by stipulation, it was a determination on the merits of the case, rather than a judgment on mere technical grounds.

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[18] *DeVaux, supra* note 10.

[19] *Id.* at 618, 514 N.W.2d at 645-46, citing *Dept. of Human Services v. Lowatchie*, 569 A.2d 197 (Me. 1990).

[20] See *DeVaux, supra* note 10.

[21] *Blazek v. City of Omaha*, 232 Neb. 562, 441 N.W.2d 205 (1989). See, also, *DeVaux, supra* note 10.

Fourth, there is no dispute that both Brandon and Jessica were involved in case No. CI 14-12. While the action was initiated by the State and Jessica was a third-party defendant, the order of support states that both Brandon and Jessica were represented by counsel who appeared before the court.

Accordingly, we find that the determination of paternity over Ariana in the order of support in case No. CI 14-12 was res judicata on Brandon's paternity and that therefore, the parties were precluded from relitigating the issue here.

Further, neither party appealed the final judgment in case No. CI 14-12 or claims that the judgment was void for want of jurisdiction; so, the judgment is not subject to collateral attack by relitigation in this case, absent compliance with § 43-1412.01 or a motion to vacate or modify the decree in light of fraud, mistake, or as set forth in Neb. Rev. Stat. § 25-2001 (Reissue 2016).[22] When a judgment is attacked in a way other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.[23] Even if erroneous, a judgment is not subject to collateral attack unless it is void, such as would be the case where a judgment is entered without jurisdiction over the person or subject matter.[24] Therefore, the court did not abuse its discretion in finding that Brandon was Ariana's legal father.

In addition, there is no concern regarding Brandon's due process on the issues because the court was not able to relitigate the paternity determination, absent Brandon's motioning the court to do so on specific bases not present in the record.

Even with the prior determination that Brandon was Ariana's father, we note that in 2008, "the Legislature enacted § 43-1412.01, which overrides res judicata principles and

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[22] See *Alisha C., supra* note 9.

[23] *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000).

[24] *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995).

allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father."[25] We have held that § 43-1412.01 "gives the court discretion to determine whether disestablishment of paternity is appropriate in light of both the adjudicated father's interests and the best interests of the child."[26]

Section 43-1412.01 provides, in relevant part, the following:

> An individual may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test . . . establishes the exclusion of the individual named as a father in the legal determination. The court shall appoint a guardian ad litem to represent the interest of the child.

While Brandon requested genetic testing of Ariana in his counterclaim, he did not request the court to disestablish the final determination of paternity in case No. CI 14-12. Additionally, while he cites to Jessica's testimony that he is not Ariana's biological father, he failed to enter into evidence the results of any genetic testing that may have been performed in this case. Further, the record does not reflect that a guardian ad litem was appointed to represent Ariana or that the court made a determination regarding whether a disestablishment of paternity was appropriate. Therefore, assuming without deciding that the disestablishment of paternity could have been litigated in this matter, as opposed to in case No. CI 14-12, the court did not abuse its discretion in not ruling on whether the disestablishment of paternity was appropriate under § 43-1412.01. As a result, there is no merit

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[25] *Stacy M., supra* note 14, 290 Neb. at 146, 858 N.W.2d at 857.

[26] *Id.* at 146-47, 858 N.W.2d at 857.

to Brandon's assignments of error regarding finding Ariana to be a child of the parties.

(b) Court Properly Considered Support, Custody, Parenting Time, Expenses, and Income Tax Deductions for Ariana

Brandon asserts that ordering him to provide support for Ariana and determining custody, parenting time, expenses, and income tax deductions regarding her were erroneous because he has no rights or duties regarding her.

Because Brandon's argument that the court erred in determining that he was Ariana's legal father was without merit, the assignment of error regarding child custody, parenting time, child support, income tax deductions, and other expenses is without merit. Neb. Rev. Stat. § 42-364 (Reissue 2016) grants the court the authority to determine child custody, parenting time, and child support. Additionally, § 43-1402 states that "[t]he father of a child whose paternity is established . . . shall be liable for its support to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support."

[16-18] Further, under Nebraska law, a state court having jurisdiction in a dissolution action has the power to allocate tax dependency exemptions as part of the dissolution decree.[27] A tax dependency exemption is nearly identical in nature to an award of child support or alimony.[28] It has also been held that childcare costs may be awarded as an incident to child support.[29] Therefore, these assignments of error are without merit.

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[27] *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). See, also, *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005).

[28] *Emery, supra* note 27.

[29] *Cross, supra* note 7.

(c) Court Did Not Abuse Its Discretion by Declining to Modify Existing Support Order

In *Robbins v. Robbins*,[30] we held that in a dissolution action brought under the provisions of Neb. Rev. Stat. §§ 42-347 to 42-379 (Reissue 1984), a court had jurisdiction to make an independent evaluation as to child support under § 42-351, but that the court must take into account and give effect to an earlier child support order entered under § 43-512.04 (Reissue 1984). An action for child support, separate from a dissolution action, is governed by § 43-512.04 (Reissue 2008).[31]

At the time we decided *Robbins*, § 42-364 (Reissue 1984), which governed dissolution proceedings, did not require a court to determine child support in any circumstances. Since *Robbins*, the Nebraska Legislature has amended § 42-364(1)(b) (Reissue 2016) to provide, in relevant part, that "[t]he decree in an action involving the custody of a minor child shall include the determination of . . . child support."[32]

[19-21] In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation.[33] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[34] In reading a statute, a court must determine and give effect to the

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[30] *Robbins v. Robbins*, 219 Neb. 151, 361 N.W.2d 519 (1985).

[31] See § 43-512.04(1). See, also, § 43-1412(3).

[32] See 2007 Neb. Laws, L.B. 554, § 32.

[33] *Pittman v. Western Engineering Co.*, 283 Neb. 913, 813 N.W.2d 487 (2012).

[34] *State v. Beitel*, 296 Neb. 781, 895 N.W.2d 710 (2017).

purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[35]

[22] While the plain language of § 42-364 now requires a court to include a determination of child support in its dissolution decree when the action involves custody of a minor child, it does not require the court to make an independent calculation of child support. Because the Legislature was presumed to have had full knowledge of Neb. Rev. Stat. § 43-512.05 (Reissue 2016) and our decision in *Robbins* when it amended § 42-364, we must interpret § 42-364 in light of our holding in *Robbins*.[36] Therefore, we interpret § 42-364 to authorize a court to determine that an existing support order may remain in effect after the court has considered the current earning capacity of each parent and the child support guidelines provided by the Supreme Court.

Here, the order of support in case No. CI 14-12 was already in effect when the court ruled on the parties' dissolution. While the court had jurisdiction to modify the order in its decree, under § 42-364, the court determined that a modification of the existing support order was not appropriate in this case, as discussed more fully in the next section. Therefore, Brandon's argument that the court cannot rely on a previous order of support is without merit.

(d) Brandon's Due Process Rights Were Not Violated by Court's Determination That Modification of Existing Order of Support Was Not Warranted

Brandon contends that the court denied him due process by preventing him from presenting evidence regarding child support and his paternity of Ariana. He asserts that the court's adoption of the support order in case No. CI 14-12, at

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[35] *Id.*

[36] See *Robbins, supra* note 30.

Jessica's request, precluded the court from even considering the matters.

[23-25] Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.[37] 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.[38] The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[39]

Brandon argues that the evidence of both his change in income and his subsequently born child shows that the court abused its discretion in not modifying the order.

[26,27] Child support orders are always subject to review and modification.[40] A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.[41]

[28,29] Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.[42] Further, the Nebraska Child Support Guidelines state that "[i]f applicable, earning capacity may

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[37] *Bryan M. v. Anne B.*, 292 Neb. 725, 874 N.W.2d 824 (2016).

[38] *Id.*

[39] *Id.*

[40] *Incontro, supra* note 4.

[41] *State on behalf of B.M., supra* note 7.

[42] *Id.*

be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities."[43] But, the paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.[44]

[30] Accordingly, it is invariably concluded that a reduction in child support is not warranted when an obligor parent's financial position diminishes due to his or her own voluntary wastage or dissipation of his or her talents and assets and a reduction in child support would seriously impair the needs of the children.[45] The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification and that the best interests of the child are served thereby.[46]

We note that no party sought a modification of the support order in case No. CI 14-12. As Brandon argues, Jessica asked the court to continue the support ordered in the preceding case. While Brandon filed a counterclaim, he did not request a reduction of the prior support order. However, because Brandon presented evidence seeking a reduction and the court did consider whether to modify the support order, we will review its decision.

First, we consider Brandon's argument that he was entitled to a reduction in his support obligation based on a child that was born to him during the proceedings of the dissolution action. Neb. Ct. R. § 4-205(E) (rev. 2016) provides that "[s]ubject to [Neb. Ct. R.] § 4-220, credit may be given for biological or adopted children for whom the obligor provides regular support." Neb. Ct. R. § 4-220, however, limits the discretion to provide the credit, as follows:

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[43] Neb. Ct. R. § 4-204 (rev. 2016).

[44] *State on behalf of B.M., supra* note 7.

[45] *Incontro, supra* note 4.

[46] See *State on behalf of B.M., supra* note 7.

> An obligor shall not be allowed a reduction in an existing support order solely because of the birth, adoption, or acknowledgment of subsequent children of the obligor; however, a duty to provide regular support for subsequent children may be raised as a defense to an action for an upward modification of such existing support order.

Accordingly, the child support guidelines allow the obligor of an existing support award a deduction for an obligation to support a subsequent child only when the obligee seeks an upward modification of support.[47] Therefore, because Jessica did not seek an upward modification of support, Brandon was not entitled to a reduction of his support obligation.

Second, we address whether the court erred in failing to find that Brandon proved that there was a material change of circumstances warranting a modification of the support order.

The court heard testimony from both parties on their financial circumstances before making its ruling not to modify the support order. Jessica testified that her income had increased by approximately $50 a month, to $1,304 a month, from the existing order to the time of trial. Brandon testified that his monthly income was about $2,600 a month until he was fired for missing work due to medical issues, his monthly income at the time of trial was about $2,000 a month from working a seasonal carpentry job and as a server, and he is actively seeking employment for at least $2,600 a month and has turned down job offers for $13 an hour, or about $2,180 a month.

However, Brandon did not supplement his discovery or submit evidence supporting his reason for the termination of employment or verifying his current income. The child support calculation worksheet itself states that the court will "require copies of [the] last 2 years' tax returns to verify 'total income'

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[47] *Schwarz v. Schwarz*, 289 Neb. 960, 857 N.W.2d 802 (2015).

figures and copies of present wage stubs to verify the pattern of present wage earnings."[48]

While Brandon testified that his financial position had changed and that it was not the result of bad faith, he did not present any supporting evidence. Further, there was no evidence that the needs of the children had changed, that Brandon's change in income was permanent, or that he suffered any decrease in earning capacity, and the evidence showed that Jessica's financial position had changed only negligibly. Accordingly, we cannot say that the court abused its discretion in finding that Brandon was not entitled to a modification of the existing support order.

Third, because the court provided Brandon the opportunity to present evidence relevant to whether a material change in circumstances had occurred, we find his argument that he was denied due process on the issue to be without merit.

(e) Summary Remand of Appeal Is Not Required

Brandon contends that by failing to attach a Nebraska child support calculation worksheet to the decree, the court violated § 4-203 of the child support guidelines. Section 4-203 provides that "[a]ll orders for child support, including modifications, must include a basic income and support calculation worksheet 1, and if used, worksheet 2 or 3."

In *Rutherford v. Rutherford*,[49] we considered an appeal from an order modifying the father's child support obligation. In that case, there was no child support worksheet prepared by the trial court in the record and the court's order merely included a calculation of the parties' monthly net income and stated that it extrapolated the income figures and used the child support guidelines to determine the support obligations.

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[48] Neb. Ct. R. ch. 4, art. 2, worksheet 1, n.1 (rev. 2016). See, also, *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002).

[49] *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009).

We held that the court's failure to complete a worksheet as to the method it used to determine the modification of child support was an abuse of discretion and remanded the cause for the court to complete the applicable worksheet. We reasoned, in part, that "because there is no worksheet in the record, we do not know why the court awarded the amount of support it did, except that the court extrapolated the amount set forth in the guidelines."[50]

Further, we held:

> Henceforth, if a trial court fails to prepare the applicable worksheets, the parties are required to request that such worksheet be included in the trial court's order. *Orders for child support or modification* which do not contain such worksheets will on appeal be summarily remanded to the trial court so that it can prepare the worksheets as required by the guidelines.[51]

In this matter, however, the decree ordered Brandon to provide child support for the minor children "pursuant to the current Order of the District Court of Pawnee County in [case No. CI 14-12]." In doing so, the court did not adopt a new child support worksheet or calculations and merely determined that the existing child support order from the paternity action should remain the operative support obligation.

Further, the determination in the dissolution decree—that Brandon shall provide support pursuant to the order in case No. CI 14-12—was not itself an order of support or modification requiring the completion of a worksheet. As stated above, in *Rutherford*, we reasoned that an order imposing or modifying child support shall include any applicable worksheets with the trial court's order so that on appeal we know why the court awarded the amount of support it did. As the Nebraska Court of Appeals has explained, "[p]erhaps the most obvious purpose of this requirement is to ensure that the appellate

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[50] *Id.* at 305, 761 N.W.2d at 925-26.

[51] *Id.* at 308, 761 N.W.2d at 927 (emphasis supplied).

courts are not left to speculate about the trial court's conclusions. . . . These worksheets show the parties and the appellate courts that the trial court has '"done the math."'"[52]

Here, the record indicates that the prior support order and its accompanying child support worksheet were received into evidence as an exhibit. That exhibit showed the calculations used in case No. CI 14-12 to determine Brandon's child support obligation. The existence in our record of the prior calculation, coupled with the fact that the court did not impose a new child support obligation or modify the previous child support obligation, renders our holding in *Rutherford* inapplicable here. Therefore, this assignment of error is without merit.

We note that while *Rutherford* is not applicable here, there may be circumstances where a child support worksheet is required to show the court's findings that a new support order should not be imposed or a previous support order should not be modified. In addition, it is important that the trial court make clear, as it did here, that no additional child support order is being implemented and that the previous order remains the operative support obligation, so as to simplify the child support collection process.

2. Bank Debt Was Marital Debt

Brandon contends that it was inequitable to order him to pay one-half of the bank debt, or $411.97. He argues that the collection notice, dated September 18, 2014, and Jessica's testimony that it was marital were insufficient because there was no evidence showing what the debt was for or when it was incurred.

Under Nebraska's divorce statutes, "[t]he purpose of a property division is to distribute the marital assets equitably between the parties."[53] The ultimate test in determining the

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[52] *Molina v. Salgado-Bustamante*, 21 Neb. App. 75, 82-83, 837 N.W.2d 553, 559 (2013).

[53] Neb. Rev. Stat. § 42-365 (Reissue 2016).

appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.[54]

[31] 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. 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.[55]

[32,33] Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties.[56] The burden to show that a debt is nonmarital is on the party making that assertion.[57]

At the hearing, Brandon's attorney questioned Jessica about the debt. Shortly after Brandon's attorney began the questioning, however, Jessica's attorney objected to a question and, without ruling, the court directed Brandon's attorney to "move on." Brandon's attorney neither objected to the court's direction nor made an argument as to why he needed to elicit additional evidence on the subject.

Brandon generally assigned error to the court's not permitting him to respond to Jessica's presentation of evidence. However, an issue not presented to or decided by the trial court is not appropriate for consideration on appeal.[58] Accordingly, we will not consider whether the court erred in preventing Brandon from eliciting further evidence on this issue, because Brandon's attorney did not adequately present the issue to the trial court. Instead, we will consider only the record before us.

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

[55] See *Osantowski, supra* note 6.

[56] *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

[57] *Id.*

[58] *Wayne L. Ryan Revocable Trust v. Ryan*, 297 Neb. 761, 901 N.W.2d 671 (2017).

Jessica testified that the bank debt was incurred while the parties were living together. Brandon presented no evidence that the debt was not incurred before the parties separated or that it was not for the parties' joint benefit. Accordingly, Brandon failed to satisfy his burden to show that this debt was nonmarital. Therefore, this assignment of error is without merit.

3. District Court Did Not Abuse Its Discretion in Awarding Jessica Attorney Fees

Brandon contends that the court's award of $3,000 for attorney fees to Jessica was an abuse of discretion. He argues that under the relevant considerations for granting attorney fees, the circumstances of this case did not warrant making an award—in light of the short duration of the parties' marriage, the simplicity of issues in the dissolution, and both parties' lack of financial resources.

[34,35] In awarding attorney fees in a dissolution action, a court should consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.[59] Additionally, courts have the inherent power to award attorney fees in certain unusual circumstances amounting to conduct during the course of litigation which is vexatious, unfounded, and dilatory, such that it amounts to bad faith.[60]

While we agree that the issues involved in the dissolution were not overly complex and the marital estate was minuscule, the proceedings lasted nearly 2 years and the attorney fees Jessica incurred were consistent with the proceedings.

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[59] *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015).

[60] See *White, supra* note 2.

Further, the court's partial granting of attorney fees was rationally related to the additional expenses incurred regarding the motion to compel and motion for sanctions filed against Brandon for failing to respond to Jessica's discovery and the motion to withdrawal of Brandon's attorney shortly before the scheduled final hearing. Therefore, we conclude that the court did not abuse its discretion by ordering Brandon to pay $3,000 of attorney fees.

4. Remaining Assignments of Error

[36] Brandon also generally assigns error to the court's decision as an abuse of discretion and incorrect as a matter of law. Concerning Brandon's specific assignments of error, these assignments are without merit. In regard to any other rulings included in the court's order, we do not consider assignments of error that are not both specifically assigned and argued. 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.[61]

V. CONCLUSION

In the order of support entered by the Pawnee County District Court, in case No. CI 14-12, Brandon was ruled to be the legal father of Ariana and ordered to support her. The determination of paternity in case No. CI 14-12 was res judicata on the issue of paternity and could not be challenged in this case, absent Brandon's pleading or motion for specific relief. Accordingly, the court's rulings regarding Ariana were all within its authority in entering the dissolution decree.

Further, while Brandon presented evidence that he was entitled to a modification of the order of support, the court did not abuse its discretion in considering the support order in case No. CI 14-12 and determining that Brandon had not

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[61] *Waldron v. Roark*, 298 Neb. 26, 902 N.W.2d 204 (2017).

proved that a material change in circumstances had occurred. Because the court did not modify the existing order of support, it was not required to attach a child support calculation worksheet to the decree.

We also conclude that the court did not abuse its discretion in distributing the marital debts or awarding Jessica attorney fees. Finally, the record does not show that Brandon's due process rights were violated regarding any of the issues on appeal. Therefore, 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

Valerie K. Connolly, appellant, v. Monte D. Connolly, appellee.

907 N.W.2d 693

Filed February 23, 2018. No. S-16-1174.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law that an appellate court resolves independently of the trial court.
2. **Divorce: Appeal and Error.** In actions for dissolution of marriage, 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.
3. **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 with respect to the matters at issue.
4. **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.
5. **Appeal and Error.** Error without prejudice is not a ground for reversal.
6. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
7. **Divorce: Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Scotts Bluff County: Leo Dobrovolny, Judge. Affirmed.

Paul W. Snyder, of Smith, Snyder, Petitt & Hofmeister, G.P., for appellant.

William E. Madelung, of Madelung Law Office, for appellee.

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

Heavican, C.J.

I. INTRODUCTION

In this dissolution action, Valerie K. Connolly filed a petition for legal separation. Valerie and her husband, Monte D. Connolly, then filed a stipulation and agreement, which was approved by the district court in its decree of legal separation. Monte subsequently filed a motion to amend the complaint from legal separation to dissolution of marriage. Following a hearing, the district court issued a divorce decree, which differed from the decree of legal separation and included both an award of alimony and an award of half of the attorney fees to Valerie. Valerie appeals. We affirm.

II. FACTUAL BACKGROUND

Monte and Valerie were married on April 15, 1974. At the time of trial, Monte was 64 years old and Valerie was 61 years old. Valerie worked from approximately 1976 until 2008, when, as a result of two automobile accidents, she became medically disabled and required continuing medical treatment. Valerie collects, as her sole source of income, approximately $1,500 per month in long-term disability payments. Prior to the divorce decree, Valerie received medical insurance coverage through Social Security, Monte's health insurance policy, and a supplemental policy paid for by Monte.

Monte also suffers from medical issues that prevent him from working. Monte collects long-term disability payments totaling approximately $3,600 per month. Monte placed $78,062.74 from a lump-sum payment of his retirement program in an

annuity with an insurance company. Together, these form his sole sources of income.

During their marriage, the couple purchased a home as joint tenants. Monte placed a value of $250,000 on the marital home, while Valerie valued the home at $299,950. As of July 2016, the home had a mortgage of $182,598. According to their 2015 joint income tax return, the couple's adjusted gross income was $20,018.

On August 15, 2012, Valerie filed the petition for legal separation against Monte. On December 12, Monte and Valerie filed a stipulation and agreement, agreeing that in the event the parties' marriage dissolved, their jointly owned real estate property would be sold and the proceeds would be divided equally between the parties. The parties agreed that Monte would continue to carry Valerie on his health insurance policy and be responsible for the premiums on that policy through December 31, 2012. Monte further agreed that commencing January 1, 2013, he would pay the premiums on Valerie's Medicare supplemental policy. The parties also agreed that neither party shall pay or receive alimony. Furthermore, each party agreed to be responsible for one-half of the attorney fees incurred in the processing of this action for a legal separation. Both parties were using the same attorney at the time.

The parties waived a hearing on the entry of a final decree of legal separation. On December 12, 2012, the district court issued a decree of legal separation, approving the parties' stipulations and granting the parties a decree of legal separation.

On September 9, 2015, Monte filed a motion to amend the complaint from legal separation to dissolution of marriage. Valerie filed an answer requesting that the real estate owned by the parties be sold; that Monte provide health insurance for Valerie until Valerie reached the age of 65 or, in the alternative, that Monte pay spousal support; and that Monte pay Valerie's attorney fees. Valerie subsequently filed a separate application for attorney fees.

On November 15, 2016, following a hearing, the district court filed a decree of dissolution. The decree divided the marital estate as follows:

> 2. . . . [E]ach party shall pay his or her own debts to include his or her own medical bills and credit card debts, and hold the other party harmless with respect to such debts.
>
> 3. . . . [E]ach party shall receive as his or her separate property his or her own clothing and personal effects, and all personal property presently in his or her own possession.
>
> 4. . . . [E]ach party shall receive as his or her separate property all bank accounts, retirement accounts, investments, and insurance policies currently held in his or her name respectively, and any other property currently in the party's possession.
>
> 5. The parties shall list the marital home for sale within thirty days. It shall be . . . initially listed for $300,000.00. In the event a closing on the property has not occurred within 180 days from the listing date, it shall be sold at public auction, and the proceeds divided consistent with the parties' legal separation agreement.
>
> 6. Monte shall pay alimony to Valerie in the amount of $363.00 per month beginning December 1, 2016, and continuing monthly thereafter until the death of either party or until Valerie remarries. This amount is the estimated Medicare supplement premium ($218.00) and the prescription supplement premium ($145.00) from exhibit 2. . . .
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> . . . .
>
> 8. Monte shall pay one-half of the attorney's fees of Valerie, in the amount of $1,347.57 within sixty days.

In support of its modification of the legal separation decree, specifically as related to alimony, the court found that it was not barred from considering an award of alimony, but that because it was a modification, it would be necessary for

Valerie to show a change in circumstances, which the court found she had not done. Despite this, the district court awarded Valerie alimony in an amount that equaled the health insurance costs which Monte had been paying under the decree of legal separation. Valerie appealed.

III. ASSIGNMENTS OF ERROR

Valerie assigns, restated and consolidated, that the district court erred in (1) determining that Valerie needed to show a change of circumstances in order to be entitled to an award of alimony in the divorce decree and (2) awarding an insufficient amount of attorney fees based on the totality of the circumstances.

Monte asserts several assignments of error in his appellee's brief, but did not comply with this court's rules regarding the filing of a cross-appeal. As such, we do not consider any of Monte's assignments of error.[1]

IV. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law that an appellate court resolves independently of the trial court.[2]

[2,3] In actions for dissolution of marriage, 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.[3] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.[4]

[4] A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving

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[1] Neb. Ct. R. App. P. § 2-109 (rev. 2014).

[2] *State v. Thompson*, 294 Neb. 197, 881 N.W.2d 609 (2016).

[3] *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017).

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

a litigant of a substantial right and denying just results in matters submitted for disposition.[5]

V. ANALYSIS

1. Award of Alimony

(a) Whether Parties Need to Show Change in Circumstances

Valerie assigns that the district court erred in requiring that she show a change of circumstances in the time between the decree of legal separation and the divorce decree in order to receive an award of alimony. In the alternative, Valerie argues that she has shown a change in circumstances, because her costs have increased due to the divorce decree, while Monte's income has increased.

We begin our analysis with the underlying statutes. The availability of an award of alimony is addressed in Neb. Rev. Stat. § 42-365 (Reissue 2016), which states in pertinent part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . . A proceeding to modify or revoke an order for alimony for good cause shall be commenced by filing a complaint to modify. . . . Amounts accrued prior to the date of filing of the complaint to modify may not be modified or revoked. A decree may not be modified to award alimony

[5] *Stephens v. Stephens, supra* note 3.

if alimony was not allowed in the original decree dissolving a marriage.

Actions involving legal separation are considered separately. Neb. Rev. Stat. § 42-347(7) (Reissue 2016) provides that "[l]egal separation means a decree of a court of competent jurisdiction providing that two persons who have been legally married shall thereafter live separate and apart and providing for any necessary adjustment of property, support, and custody rights between the parties but not dissolving the marriage."

Finally, Neb. Rev. Stat. § 42-368 (Reissue 2016) states in pertinent part:

> When a legal separation is decreed, the court may order payment of such support by one party to the other as may be reasonable, having regard for the circumstances of the parties and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Orders for support may be modified or revoked for good cause shown upon notice and hearing . . . .

This court held in *Pendleton v. Pendleton*[6] that the prohibition against modifying a decree of dissolution to provide alimony when none was awarded in the original decree was applicable only in cases involving dissolution, and inapplicable in the case of legal separation. We explained that the definition of legal separation set forth in § 42-347(7) contained no provisions similar to the language set forth in § 42-365 dealing with alimony in a dissolution action. We further explained that the language in Neb. Rev. Stat. § 42-366(6) (Reissue 2016) and § 42-368 specifically stated that the prohibition against modifying a decree did not apply to a decree of legal separation. Finally, we noted that res judicata did not preclude the district court from awarding alimony in the dissolution decree.

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[6] *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993).

As in *Pendleton*, we find that because § 42-347(7) contains no provisions similar to the language set forth in § 42-365, we must construe these statutes separately. And because we construe the decree of legal separation and the decree of dissolution separately, we find that an award of alimony in a decree of dissolution is not equivalent to a modification of an award of alimony in a decree of legal separation such that it is modifiable only upon a finding of good cause under § 42-365. Furthermore, we note that by its terms, § 42-365 is applicable only to an alimony award in a decree of dissolution and makes no mention of a decree of legal separation.

We hold that Valerie was not required to show a change of circumstances for purposes of good cause to modify the award of alimony awarded in the decree of legal separation. Instead, the district court should have determined a reasonable award of alimony based on the criteria set forth in § 42-365.

Valerie's first assignment of error has merit.

(b) Whether Alimony Award Was Reversible Error

[5] Next, we turn to whether the district court error was prejudicial. Error without prejudice is not a ground for reversal.[7] Both in dividing property and in 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 without interfering with the interests of any minor children in the custody of such party, the polestar being fairness and reasonableness as determined by the facts of each case.[8]

Monte has a monthly income of approximately $3,600, and his monthly living expenses total $2,551. Valerie's monthly

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[7] *Emery v. Mangiameli*, 218 Neb. 740, 359 N.W.2d 83 (1984).

[8] See, § 42-365; *Meints v. Meints, supra* note 4.

income is approximately $1,500, and her monthly budget totals $2,341. In the separation order, the judge approved the parties' agreement that Monte would continue to carry Valerie on his health insurance policy and be responsible for the premiums on that policy through December 31, 2012. Monte agreed that thereafter, commencing January 1, 2013, he would be responsible for the premiums on Valerie's Medicare supplemental policy. According to Valerie's monthly budget, these costs totaled $363. This calculation formed the basis of the judge's determination in the divorce decree of $363 as the amount of alimony.

Valerie contends that the award of alimony is insufficient, because she is now responsible for half of the monthly house payments, she pays rent, and she must pay the medical insurance that was previously provided by Monte. Valerie further argues that Monte's finances have improved due to the lump-sum payment of his retirement plan.

The parties agreed in the stipulation that the retirement accounts would remain separate, nonmarital property. Therefore, we do not find that the district court abused its discretion in failing to take the lump sum from Monte's retirement plan into consideration for purposes of alimony. Nor do we find merit in Valerie's contention that because she is now responsible for payment of her supplemental medical policy, half the payments on the house, and payment of rent where she lives, the amount of alimony was an abuse of discretion.

Contrary to Valerie's contention otherwise, the district court explicitly took into account Valerie's payment of her supplemental medical policy in the calculation of the amount of alimony in the decree. And Valerie did not include monthly house payments in her proposed monthly budget that she submitted to the court. It was Valerie's responsibility to furnish this information in the record, and she did not do so.[9] In addition, as noted above, the decree ordered the parties to sell the

[9] See *Pendleton v. Pendleton, supra* note 6.

house within 6 months and split the proceeds equally; thus, this monthly cost for house payments was of short duration. Furthermore, as the district court noted, Monte testified that he refinanced the real estate mortgage to lower the house payment after the separation and has paid approximately $75,000 toward the value of the real estate. Accordingly, the net value was to be divided equally between the parties. It was not an abuse of discretion for the court to omit this cost in its calculation of the amount of alimony.

We further find that the amount of alimony, when considered alongside Valerie's monthly income and the proceeds from the sale of the couple's home, was not an abuse of discretion. We note that the district court correctly took into account the income and earning capacity of each party and any disparity in the incomes between the parties. While Monte has a higher monthly income, his income is also based solely on disability payments. The disparity between the parties' income is not of such a degree that the amount of alimony was unfair.

After consideration of all other facts and circumstances of the case, we hold that the district court did not abuse its discretion in awarding Valerie $363 per month in alimony for her lifetime or until she remarries. We therefore hold that any error by the court in its analysis was not prejudicial to Valerie.

2. Attorney Fees

[6,7] Finally, Valerie assigns that the district court abused its discretion in ordering Monte to pay one-half of Valerie's attorney fees. In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.[10] The award of attorney fees depends on multiple factors that include the nature of the case, the services

[10] *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004).

performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.[11]

Based on our de novo review of the record and the general equities of the case, we find nothing to indicate an abuse of discretion on the part of the district court in its decision to award Valerie one-half of her attorney fees. Therefore, the district court did not err in awarding Valerie one-half of her attorney fees. Valerie's second assignment of error is without merit.

VI. CONCLUSION

We affirm the order of the district court.

Affirmed.

Wright, J., not participating.

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[11] *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002).

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

Aksamit Resource Management LLC et al., appellants, v. Nebraska Public Power District, appellee.

907 N.W.2d 301

Filed February 23, 2018. No. S-17-333.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Mandamus: Words and Phrases.** Mandamus is a law action, and it is an extraordinary remedy, not a writ of right.
3. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, and an appellate court will not disturb those findings unless they are clearly erroneous.
4. **Mandamus.** Whether to grant a writ of mandamus is within the trial court's discretion.
5. **Legislature: Statutes: Intent: Records.** In enacting the public records statutes, the Legislature has determined that the welfare of the people is best served through liberal public disclosure of the records of the three branches of government.
6. **Legislature: Statutes: Intent: Records: Public Policy.** Because the Legislature has expressed a strong public policy for disclosure, an appellate court must narrowly construe statutory exemptions shielding public records from disclosure.
7. **Mandamus: Proof.** A party seeking a writ of mandamus under Neb. Rev. Stat. § 84-712.03 (Reissue 2014) has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records, (2) the document sought is a public record as defined by Neb. Rev. Stat. § 84-712.01 (Reissue 2014), and (3) the requesting party has been denied access to the public record as guaranteed by Neb. Rev. Stat. § 84-712 (Reissue 2014).
8. ____: ____. If the public body holding the record wishes to oppose the issuance of a writ of mandamus under Neb. Rev. Stat. § 84-712.03 (Reissue 2014), the public body must show, by clear and conclusive evidence, that the public record at issue is exempt from the

disclosure requirement under one of the exceptions provided by Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2016) or Neb. Rev. Stat. § 84-712.08 (Reissue 2014).

9. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
10. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
11. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
12. **Statutes: Words and Phrases.** Generally, if an exception is expressed in the conjunctive, both requirements must be met for the exception to become operative.
13. **Public Purpose: Intent.** A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants.

Appeal from the District Court for Platte County: Robert R. Steinke, Judge. Reversed and remanded with direction.

Roger P. Cox, P.C., L.L.O., and Peter S. Ratner, of Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., for appellants.

Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and John C. McClure, of Nebraska Public Power District, for appellee.

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

Cassel, J.

INTRODUCTION

Nebraska Public Power District (NPPD) refused a public records request[1] from potential competitors for documents

[1] See Neb. Rev. Stat. §§ 84-712, 84-712.01, and 84-712.03 to 84-712.09 (Reissue 2014 & Cum. Supp. 2016).

showing cost and revenue information for each of its generation units, and the district court declined to issue a writ of mandamus to compel disclosure. The competitors' appeal turns on the statutory exception for "proprietary or commercial information which if released would give advantage to business competitors *and serve no public purpose*."[2]

Does the statute require public records useful to an energy policy debate to be released despite an advantage flowing to a competitor? The words chosen by the Legislature dictate that the answer must be "yes." We cannot say the result is absurd. Accordingly, we reverse the district court's order and direct issuance of an appropriate writ.

BACKGROUND

Parties

Aksamit Resource Management LLC and First Security Power, LLC, are limited liability companies that were formed under the laws of Nebraska and have headquarters in Nebraska. Gary Aksamit is the chief executive officer of both companies (collectively Aksamit). Aksamit intends to produce and sell electricity in Nebraska in the near future.

NPPD is a public corporation and a political subdivision of Nebraska. It has facilities for generation, transmission, and distribution of electric power and energy for sale at retail and wholesale. NPPD has several different types of generation sources: conventional steam electric generation, which generates heat from fossil fuel; steam nuclear generation, which generates heat from nuclear fission; combined cycle and combustion turbine generation, which generates heat from the combustion of natural gas; hydro facilities, which generate power from water; diesel facilities, which use diesel engines to produce electricity; and wind facilities, where the mode of force for the generator is wind.

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[2] § 84-712.05(3) (emphasis supplied).

Requests for Public Records and Response

In March 2016, Aksamit sent to NPPD 22 requests for public records. NPPD provided documents to satisfy the vast majority of the requests. This appeal concerns only three requests:

- "documents sufficient to show actual expenditures and revenues by cost and profit centers for each year from 2008 through 2015";
- "each and any document dated January 1, 2013[,] or later that contains, reflects, or constitutes a six-year rate outlook by cost and profit centers"; and
- "documents sufficient to show the annual generation output and revenue for each [NPPD] generation resource, owned or cont[r]acted from 2008 through 2015."

NPPD refused to provide records responsive to those requests and asserted that the requested information was exempt from public disclosure under § 84-712.05(3).

Petition for Writ of Mandamus

Aksamit filed a petition for writ of mandamus. It alleged that disclosure of the requested information would serve a public purpose, because the citizens of Nebraska "have an indisputable interest in knowing the operational and financial details associated with state-owned electrical utilities so that they may evaluate, among other things, the continued viability of public power in Nebraska."

The district court ordered NPPD to either promptly provide access to the records or, alternatively, to file an answer showing cause why it declined to provide access to the records. In an answer, NPPD maintained that the requested documents fell within the exemption in § 84-712.05(3).

Trial

At trial, Aksamit focused on public purposes that would be served by disclosure of the requested information. Aksamit's

vice president of marketing testified that Aksamit had an interest in examining the documents as part of its marketing program to educate Nebraska's ratepayers and elected rate officials.

Dr. Ernest Goss testified about his research on public power in Nebraska. The research involved "[e]xamining the competitiveness of public power in Nebraska and how it stacks up against its counterparts in the contiguous states such as MidAmerican Energy in Iowa and . . . examining potential problems for the taxpayer, the ratepayer in the years ahead." Based on his research, Goss concluded that "there were clear and present dangers" for Nebraska's taxpayers and electricity ratepayers. Goss explained that the trajectory of electricity prices was larger than the national average and that the trajectory of rate changes "was and is unsustainable."

A difficulty that Goss encountered while conducting research was a lack of access to information about the costs and revenues for NPPD's individual generation units. Goss preferred to have data relating to individual generation units so that he could "more properly find out what's the cause and is it something that's going to be of fundamental issue for the businesses, the citizens, the taxpayers of the State of Nebraska in future years." According to Goss, such data would have been "very instrumental in coming to conclusions about the economic viability of public power in Nebraska."

Goss, as an economist and Nebraska taxpayer, expressed an interest in knowing NPPD's costs and revenue for individual generating units. He explained that NPPD does not pay property or income taxes and that the payments it makes in lieu of such taxes are much lower than the property tax rate, which meant that "those are taxes that are hoisted off on the Nebraska taxpayer." As an economist, Goss testified that it was very difficult to judge whether NPPD was being run efficiently without looking at the cost and revenue information broken down by generation units.

A former NPPD employee testified that he observed business inefficiencies that increased NPPD's costs and negatively affected ratepayers. As a board member or a ratepayer, he would want access to NPPD's cost information by generation unit, because it would allow a better understanding of such costs in order to challenge board members on "why there's a continuation of a high cost generating unit and what could be done to lower those costs." He did not believe that NPPD's total cost information was adequate to make assessments as to cost by generating unit, because "[y]ou're lumping several contributors to a total cost which prevents you from making sound decisions on the individual contributors to that total." Based on NPPD's total cost information, an individual would be unable to identify "particular high cost plans."

NPPD focused on the confidentiality of the information in the industry and the competitive harm that it may suffer if it had to disclose records responsive to Aksamit's requests. There is no real dispute that Aksamit seeks to compete with NPPD.

NPPD also competes with participants in the Southwest Power Pool. The power pool is a regional integrated market for the buying and selling of electricity. NPPD both buys and sells electricity in that market. Thomas James Kent, the vice president and chief operating officer of NPPD, testified that the power pool makes bidding offers public 90 days after the operating day, but that it masks the source of the bid and the offer information in order to protect the confidentiality of the specific units. Kent testified that if a participant in the power pool had access to NPPD's generation unit-specific cost and revenue information, that information could be used to "create bid and offer strategies that would put NPPD at a disadvantage and an unequal playing field in terms of being able to compete equally in the commodity market." He explained that "if someone knew the specific cost information of a given unit, they may use that information to set a bid in pricing

strategy that would make their units more competitive." And if the power pool market is not recovering all of NPPD's costs of production, NPPD's only other source to make up that loss is with the rates charged to ratepayers.

Kent testified that power purchase agreements are typically not considered public documents, because the pricing information for the cost of the power is generally considered proprietary and confidential by the developer. For example, NPPD currently had a power purchase agreement with a wind facility in Nebraska which contained a confidentiality clause to protect pricing information and other terms. Other of NPPD's contracts similarly contained confidentiality provisions. Kent explained that "confidentiality is provided to ensure that the pricing arrangements, commercial arrangements, et cetera, are specific to that arrangement and can't be used competitively with other entities." NPPD considered the cost and revenue information on a generation unit-specific basis to be proprietary and confidential.

District Court's Decision

The district court dismissed the petition for writ of mandamus. It stated that the evidence showed the generation unit-specific cost and revenue information was proprietary or commercial to NPPD and that if it were released publicly, it would give advantage to NPPD's competitors. The court reasoned:

> It would be highly unlikely that in enacting §84-712.05(3), the Legislature intended to allow record custodians to withhold proprietary or commercial information that would give advantage to business competitors, only to render the exemption meaningless by also requiring anything that could conceivably be labeled a "public purpose" for release to nullify the exemption. Here, release of NPPD's proprietary generation unit-specific cost and revenue information would give advantage to its competitors, including the relators. There is

> merit to NPPD's argument that creating an unlevel field for competition is not a public purpose.

The district court concluded that NPPD established the exemption under § 84-712.05(3) by clear and convincing evidence. It stated:

> To require disclosure of NPPD's generation unit-specific cost and revenue information would give advantage to its business competitors, and result in disadvantage to its ratepayers by denying them "the benefits of a successful and profitable operation and conduct of the business of the district." [Neb. Rev. Stat.] §70-655(1) [(Cum. Supp. 2016)]. Such a result would serve no public purpose.

Aksamit filed a timely appeal, and we granted its petition to bypass review by the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Aksamit assigns nine errors concerning the dismissal of its petition for a writ of mandamus. Consolidated and restated, the errors present one issue: Whether the district court erred in applying the exemption set forth in § 84-712.05(3).

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[3]

[2-4] Mandamus is a law action, and it is an extraordinary remedy, not a writ of right.[4] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, and we will not disturb those findings unless they are clearly erroneous.[5] Whether to grant a writ of mandamus is within the trial court's discretion.[6]

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[3] *McCoy v. Albin*, 298 Neb. 297, 903 N.W.2d 902 (2017).

[4] *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 894 N.W.2d 788 (2017).

[5] *Id.*

[6] *Id.*

ANALYSIS

Public Policy

[5,6] In enacting the public records statutes, the Legislature has determined that the welfare of the people is best served through liberal public disclosure of the records of the three branches of government.[7] The Legislature intended that courts liberally construe §§ 84-712 to 84-712.03 for disclosure "whenever any . . . political subdivision . . . record of receipt . . . or expenditure involving public funds is involved."[8] And it does so "in order that the citizens of this state shall have the full right to know of and have full access to information on the public finances of . . . the public bodies and entities created to serve them."[9] Because the Legislature has expressed a strong public policy for disclosure, an appellate court must narrowly construe statutory exemptions shielding public records from disclosure.[10]

Burdens of Proof for Writ of Mandamus

[7] A person denied access to a public record may file for speedy relief by a writ of mandamus under § 84-712.03.[11] A party seeking a writ of mandamus under § 84-712.03 has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records, (2) the document sought is a public record as defined by § 84-712.01, and (3) the requesting party has been denied access to the public record as guaranteed by § 84-712.[12] It is uncontested that Aksamit satisfied its prima facie claim for release of public records.

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[7] *Id.*

[8] § 84-712.01(3).

[9] *Id.*

[10] *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

[11] *State ex rel. Veskrna v. Steel, supra* note 4.

[12] *Id.*

[8] Where a suit is filed under § 84-712.03, the Legislature has imposed upon the public body the burden to "sustain its action."[13] If the public body holding the record wishes to oppose the issuance of a writ of mandamus, the public body must show, by clear and conclusive evidence, that the public record at issue is exempt from the disclosure requirement under one of the exceptions provided by § 84-712.05 or § 84-712.08.[14]

Statutory Interpretation of § 84-712.05(3)

[9-11] Principles regarding statutory interpretation are well known. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[15] In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[16] It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.[17]

In withholding the requested information, NPPD relies upon § 84-712.05(3). That statute sets forth an exemption for "[t]rade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give

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[13] See § 84-712.03(2).

[14] *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998). Cf. *Evertson v. City of Kimball, supra* note 10 (using clear and convincing burden of proof).

[15] *Farmers Co-op v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017).

[16] *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

[17] *In re Guardianship of Kaiser*, 295 Neb. 532, 891 N.W.2d 84 (2017).

advantage to business competitors and serve no public purpose."[18] The meaning of the latter part of the exemption is the crux of this appeal.

[12] We must give effect to the statutory language. Grammatically, the key phrase contains two parts, following initial words common to both. The common words are "proprietary or commercial information which if released would."[19] The two parts are "give advantage to business competitors" and "serve no public purpose."[20] Thus, the correct grammatical reading of the second part is "proprietary or commercial information which if released would . . . serve no public purpose." The two parts are joined by "and." The word "and" is "[a] conjunction connecting words or phrases expressing the idea that the latter is to be added or taken along with the first."[21] Generally, if an exception is expressed in the conjunctive, both requirements must be met for the exception to become operative.[22] Thus, NPPD had the burden to show both that the information would give advantage to competitors and that the information would serve no public purpose.

[13] "A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants."[23] When we consider the meaning of the words "public purpose" in § 84-712.05(3), liberal public disclosure of the records of public entities is an important factor. The testimonies of Goss and the former NPPD employee articulated public

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[18] § 84-712.05(3).

[19] *Id.*

[20] *Id.*

[21] Black's Law Dictionary 86 (6th ed. 1990). See, also, *State v. Melcher*, 240 Neb. 592, 483 N.W.2d 540 (1992).

[22] See *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006).

[23] *Platte Valley Public Power & Irrigation District v. County of Lincoln*, 144 Neb. 584, 589, 14 N.W.2d 202, 205 (1944).

purposes of the information well within political and economic realms; indeed, one can scarcely escape the intense public debate regarding the merits of fossil fuels versus renewable fuels.

The Iowa Supreme Court's interpretation and application of a similar statute illustrates its narrow reach. The Iowa statute provides that "[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose" shall be kept confidential.[24] In construing that statute, the Iowa Supreme Court has stated that the public body must prove both that the documents "would give advantage to . . . competitors *and* [that] their release would serve *no* public purpose."[25] The court recognized the competing policy interests—"the public's right to know versus protecting an entity against a competitor."[26] But the court stated: "[I]t is not our responsibility to balance competing policy interests. This balancing is a legislative function and our role is simply to determine the legislature's intent about those policy issues."[27]

Similarly, we conclude that the language of § 84-712.05(3) does not allow us to balance the competing interests. Information which would give a business competitor an advantage may be withheld only if it would "serve no public purpose." There is no requirement that the public purpose to be served outweigh the competitive harm caused.

We recognize that NPPD is not a typical governmental body. A public corporation organized for the purpose of generating, transmitting, and distributing electrical energy operates in a proprietary as distinguished from a governmental

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[24] Iowa Code Ann. § 22.7(6) (West Cum. Supp. 2017).

[25] *Northeast Council v. Dept. of Public Health*, 513 N.W.2d 757, 760 (Iowa 1994) (emphasis in original).

[26] *Id.* at 761.

[27] *Id.*

capacity.[28] The Legislature gave to public power districts the usual powers of corporation organized for public purposes, and statutes located in chapter 70, article 6, of the Nebraska Revised Statutes (concerning public power districts) are intended to permit the business of the district to be operated in a successful and profitable manner.[29] From this general premise, the district court inferred legislative intent regarding a public power district's records. But its inference finds no direct statutory support.

The Legislature has not included in the lengthy statutes governing public power districts any provision purporting to deny the public access to its books and records. Indeed, the statutes say otherwise. The board of directors of a public power district "shall cause to be kept accurate minutes of their meetings and accurate records and books of account," which books and records shall be open to public inspection.[30] Further, if a district wishes to acquire an existing system for electric light and power, hydrogen, or ethanol, a copy of the proposed contract must be open to public inspection for a period of time before being executed.[31]

Two other public power district statutes bear upon the issue only tangentially. One requires an annual audit by a certified public accountant of "the books, records, and financial affairs of the district."[32] The other mandates that the accountant have "access to all books, records, vouchers, papers, contracts, or other data."[33] Neither statute limits public access to these

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[28] *Wittler v. Baumgartner*, 180 Neb. 446, 144 N.W.2d 62 (1966), *overruled in part on other grounds, State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979).

[29] See *York County Rural Public Power Dist. v. O'Connor*, 172 Neb. 602, 111 N.W.2d 376 (1961).

[30] Neb. Rev. Stat. § 70-622 (Reissue 2009).

[31] See Neb. Rev. Stat. § 70-626 (Reissue 2009).

[32] Neb. Rev. Stat. § 70-623 (Cum. Supp. 2016).

[33] Neb. Rev. Stat. § 70-623.02 (Reissue 2009).

materials. At most, the second statute effectively prohibits a power district from contractually limiting its accountant's access to the district's records.

If presented with the opportunity to exclude a public power district's competitive information from public scrutiny, the Legislature might well do so. But thus far it has not. If the Legislature had done so, we would not hesitate to apply the "other statute" exception[34] of the public records law and the general principle favoring a specific over a general statute.[35]

NPPD failed to show that it was entitled to withhold the requested information. Although it demonstrated that releasing the information requested would give an advantage to its competitors, it failed to establish that the information would serve no public purpose. The law as framed required it to prove both elements. It is the role of the Legislature to balance and reconcile the public purposes embodied in the public records statutes and the public power statutes.

CONCLUSION

In order for NPPD to withhold its proprietary or commercial information, it had to show that the information "if released would give advantage to business competitors and serve no public purpose."[36] Construing this exemption narrowly, we conclude that NPPD failed to demonstrate by clear and conclusive evidence that the information would serve no public purpose. We therefore reverse the district court's order and remand the cause with direction to issue an appropriate writ in conformity with this opinion.

Reversed and remanded with direction.

Wright, J., not participating.

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[34] See § 84-712.01(1).

[35] See, e.g., *State v. Thompson*, 294 Neb. 197, 881 N.W.2d 609 (2016).

[36] See § 84-712.05(3).

Nebraska Supreme Court
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Amanda E. Cookson et al., appellants, v. Bruce R. Ramge, director, Nebraska Department of Insurance, appellee.

907 N.W.2d 296

Filed February 23, 2018. No. S-17-521.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Declaratory Judgments: Statutes: Appeal and Error.** When a declaratory judgment action presents a question of law, such as statutory interpretation, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
3. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
4 ____: ____: ____. In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
5. **Insurance: Physician and Patient: Words and Phrases.** A copayment is generally understood as the amount an insured must pay in order to receive a medical service.
6. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.

7. **Statutes: Legislature: Intent.** The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Mark D. Hill, Marnie A. Jensen, and Kamron T.M. Hasan, of Husch Blackwell, L.L.P., and, on brief, L. Steven Grasz, for appellants.

Douglas J. Peterson, Attorney General, and David A. Lopez for appellee.

John C. Hewitt and Jonathan J. Papik, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for amicus curiae America's Health Insurance Plans, Inc.

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

Cassel, J.

INTRODUCTION

Health insurance policyholders brought a declaratory judgment action to determine whether a statute[1] allows insurance policies to impose higher copayments on policyholders when they obtain a covered service from a chiropractor rather than from a medical doctor. The district court concluded that it does. Because the plain language of the statute does not require insurance policies to charge identical copayments for a covered service regardless of the type of provider, we affirm.

BACKGROUND

Currently, health insurance policies in Nebraska are permitted to charge a policyholder a higher copayment if covered

[1] Neb. Rev. Stat. § 44-513 (Reissue 2010).

services are obtained from a chiropractor rather than from a medical doctor. Three Nebraska residents and a nonprofit corporation (collectively Policyholders) filed a declaratory judgment action against the director of the Nebraska Department of Insurance. Policyholders requested an order declaring that § 44-513 precludes future approval of an insurance policy in Nebraska which requires a higher payment from a policyholder if the policyholder receives care for a covered service from a chiropractor rather than from a medical doctor, where both practitioners are in-network preferred providers and both are legally authorized to perform the service. Policyholders subsequently moved for summary judgment.

The district court overruled the motion for summary judgment and dismissed Policyholders' complaint. The court reasoned that the language of § 44-513 did not require insurers to pay the same dollar amount to all providers or to set equal copayments for policyholders. The court explained that the Legislature could have imposed equal copayment requirements if it wished to do so, and the court identified other statutes where the Legislature expressly invoked "'copayments' and other cost-sharing restrictions."

Policyholders filed a timely appeal, and we granted their petition to bypass review by the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

Policyholders assign that the district court erred in holding that § 44-513 allows insurance policies to discriminate against policyholders by charging a higher copayment if a policyholder obtains a covered service from a chiropractor rather than from a medical doctor.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the

ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2]

[2] When a declaratory judgment action presents a question of law, such as statutory interpretation, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.[3]

ANALYSIS

[3,4] The dispute centers on the meaning of § 44-513. In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.[4] In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.[5]

We begin by examining the statutory language. Section 44-513 provides:

> Whenever any insurer provides by contract, policy, certificate, or any other means whatsoever for a service, or for the partial or total reimbursement, payment, or cost of a service, to or on behalf of any of its policyholders, group policyholders, subscribers, or group subscribers or any person or group of persons, which service may be

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[2] *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016).

[3] See *id.*

[4] *Id.*

[5] *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016).

> legally performed by a person licensed in this state for the practice of osteopathic medicine and surgery, chiropractic, optometry, psychology, dentistry, podiatry, or mental health practice, the person rendering such service or such policyholder, subscriber, or other person shall be entitled to such partial or total reimbursement, payment, or cost of such service, whether the service is performed by a duly licensed medical doctor or by a duly licensed osteopathic physician, chiropractor, optometrist, psychologist, dentist, podiatrist, or mental health practitioner. This section shall not limit the negotiation of preferred provider policies and contracts under sections 44-4101 to 44-4113.

To overly simplify: Whenever an insurer provides for a service, in whole or in part, the insured may obtain such service from one of the duly-licensed providers listed, so long as it is within the scope of the provider's license.

Policyholders argue that § 44-513 requires copayment parity, pointing to the statute's language stating that if a policy covers the "partial . . . cost of a service," the policyholder is "entitled to such partial . . . cost of such service."

[5,6] But the statute does not use the word "copayment"—a term often found in health insurance plans. A copayment is generally understood as the amount an insured must pay in order to receive a medical service[6]—not, as mentioned in the statute, an amount payable to or on behalf of an insured. An appellate court will not read into a statute a meaning that is not there.[7] Thus, we cannot read the statute as requiring an equal copayment.

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[6] See, Neb. Rev. Stat. § 44-3296 (Reissue 2010); "co-payment," Oxford English Dictionary Online, http://www.oed.com/view/Entry/250769 (last visited Feb. 16, 2018).

[7] See *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, 287 Neb. 653, 844 N.W.2d 276 (2014).

[7] The absence of "copayment" in § 44-513 is significant. The word "copayment" appears in 22 statutes[8] located in chapter 44 of the Nebraska Revised Statutes, governing "Insurance." Only the plural form of the word "copayment" appears in 11 additional statutes in the same chapter.[9] The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.[10] The omission of "copayment" in this insurance statute provides strong support for the position that the statute does not require equal copayments.

Other statutes demonstrate the Legislature's understanding of copayment parity. For example, one statute provides that a medical benefit contract "shall not impose upon any person who is a party to or beneficiary of the contract a fee or copayment not equally imposed upon any party or beneficiary utilizing a mail-order pharmacy."[11] Another dictates that the cost of an orally administered anticancer medication "shall not exceed the coinsurance or copayment that would be applied to any other cancer treatment involving intravenously administered or injected anticancer medications."[12] And yet another provides that coverage for an autism spectrum disorder shall not be "subject to dollar limits, deductibles, copayments, or

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[8] See Neb. Rev. Stat. §§ 44-3,159(2) (Cum. Supp. 2016); 44-513.02(2)(a), 44-784, 44-785(2), 44-790(6)(a), 44-796(1)(a), 44-798(2)(a), and 44-7,102(2) (Reissue 2010); 44-7,104(2) and (3) (Cum. Supp. 2016); 44-32,110 (Reissue 2010); 44-4220.02(2) (Cum. Supp. 2016); and 44-4709(1)(b), 44-4717(5), 44-5418(20), 44-6827(13), 44-6829(3), 44-7003(11), 44-7103(14), 44-7203(12), 44-7303(21), and 44-8311(2)(c)(i) (Reissue 2010). See, also, § 44-3296.

[9] See Neb. Rev. Stat. §§ 44-789 and 44-792(4) (Reissue 2010); 44-7,106(3) (Cum. Supp. 2016); and 44-32,105, 44-32,120(3), 44-32,129(6), 44-4705(1)(c)(i), 44-5242.03, 44-6909.01, 44-7106(2)(b) and (n), and 44-7108(2) (Reissue 2010).

[10] *Kerford Limestone Co. v. Nebraska Dept. of Rev., supra* note 7.

[11] § 44-513.02(2)(a).

[12] § 44-7,104(2).

coinsurance provisions that are less favorable to an insured than the equivalent provisions that apply to a general physical illness under the policy."[13] Had the Legislature intended in § 44-513 to require an equal copayment regardless of the type of provider, it would have used language similar to that in the above statutes to evidence such an intent.

It appears that the statute was enacted to prevent discrimination in coverage by the insurer rather than discrimination in copayments charged to an insured. Policyholders argue that an insurance policy could effectively deny coverage for a chiropractor's services by requiring a copayment equal to the cost of the service. To begin with, that is not the situation before us. While this hypothetical danger may be conceivable, it does not allow us to read a meaning into a statute that is not there. Statutory language requiring an insurer to pay for a service regardless of provider is not the same as requiring an insured to pay an identical copayment regardless of provider. If an insurer attempted to impose a copayment of the full cost of a service as a subterfuge to avoid coverage, the gravamen of a complaint under the existing statute would be denial of equal coverage rather than inequality of copayments.

Because the statute is clear, we do not rely upon legislative history. But for the sake of completeness, we note that an examination of the history does not elucidate the matter. What is clear is that if an insurer provided for a service, then the policyholder was to have the right to use the services of one of the listed providers.[14] The legislative history did not manifest an intent to mandate copayment parity. It cited "insurance equality"[15] in one instance and contained several

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[13] § 44-7,106(3).

[14] See Committee Statement, L.B. 487, Banking, Commerce and Insurance Committee, 77th Leg., 1st Sess. (Apr. 12, 1967).

[15] Introducer's Statement of Purpose, L.B. 196, Banking, Commerce and Insurance Committee, 80th Leg., 1st Sess. (Jan. 16, 1969).

references to prohibiting discrimination.[16] But throughout the entirety of the legislative history, the word "copayment," whether in singular or plural form, was not spoken. Because the statute's plain language defeats Policyholders' arguments, the issue of equality of copayments remains in the legislative arena.

CONCLUSION

The plain language of § 44-513 does not prohibit an insurer from requiring different copayments for different types of providers. We affirm the judgment of the district court.

Affirmed.

Wright, J., not participating.

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[16] Banking, Commerce and Insurance Committee Hearing, L.B. 196, 80th Leg., 1st Sess. 10 (Jan. 27, 1969); Introducer's Statement of Purpose, L.B. 190, Banking, Commerce and Insurance Committee, 84th Leg., 1st Sess. (Jan. 27, 1975); Floor Debate, L.B. 190, 84th Leg., 1st Sess. 420 (Feb. 4, 1975).

Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Christopher Bell, as Special Administrator for the Estate of Cash Bell, et al., appellants and cross-appellees, v. Grow With Me Childcare & Preschool LLC, a domestic limited liability company organized under the laws of the State of Nebraska, et al., appellees and cross-appellants.

907 N.W.2d 705

Filed March 2, 2018. No. S-16-678.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
2. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
5. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.
6. **Negligence: Liability.** Under the duty framework of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010), the ordinary duty of reasonable care is expressly conditioned on the actor's having engaged in conduct that creates a risk of physical harm to another. In the absence of such conduct, an actor ordinarily has no duty of care to another.
7. ____: ____. The Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010) states the general principle that an actor

has a duty of reasonable care when the actor's conduct creates a risk of physical harm to others. The Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 37 (2012) states a complementary principle: There is no duty of care when another is at risk for reasons other than the conduct of the actor, even though the actor may be in a position to help.

8. **Torts: Negligence.** The common law of torts has long recognized a fundamental distinction between affirmatively creating a risk of harm and merely failing to prevent it.
9. **Negligence.** There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and nonfeasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.
10. ____. One way to determine whether an actor's conduct created a risk of harm is to explore, hypothetically, whether the same risk of harm would have existed even if the actor had not engaged in the conduct.
11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
12. **Negligence.** The Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010) does not recognize a universal duty to exercise reasonable care to all others in all circumstances. Rather, it imposes a general duty of reasonable care only on an actor whose conduct has created a risk of physical harm to another, and it recognizes that absent such conduct, an actor ordinarily has no duty of care to another.
13. ____. Under the risk architecture of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010), the first step is to determine whether the actor's affirmative conduct created a risk of physical harm such that the general duty to exercise reasonable care under § 7 is applicable. If no such affirmative conduct exists, then the next step is to determine whether any special relationship exists that would impose a recognized affirmative duty on the actor with regard to the risks arising within the scope of that relationship.
14. ____. The failure to rescue or protect another from harm is not conduct creating a risk of harm under the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010), and does not give rise to a duty of care under that section.
15. ____. Under the duty analysis of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010), the conduct creating the risk must be some affirmative act, even though the claimed breach

can be a failure to act. When the only role of the actor is failing to intervene to protect others from risks created by third persons, the actor's nonfeasance cannot be said to have created the risk.

16. ____. Generally speaking, the law does not recognize a duty of care when others are at risk of physical harm for reasons other than the conduct of the actor, even if the actor may be in a position to help.
17. ____. Ordinarily, the failure to act will not be the sort of affirmative conduct that gives rise to a duty under the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010).
18. ____. Even when an actor's conduct does not create a risk of physical harm, the actor may still owe an affirmative duty of care based on a special relationship.
19. ____. Under the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 41 (2012), an actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

Mark C. Laughlin, David C. Mullin, and Jacqueline M. DeLuca, of Fraser Stryker, P.C., L.L.O., for appellants.

Mark J. Daly, Andrew T. Schlosser, and MaryBeth Frankman, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellees La Petite Academy, Inc., and Lisa Hampson.

Richard J. Gilloon, Bonnie M. Boryca, and MaKenna J. Stoakes, of Erickson & Sederstrom, P.C., for appellees Grow With Me Childcare & Preschool LLC and Jennifer Schmaderer.

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

Stacy, J.

This is a tort action brought to recover damages resulting from the tragic death of an infant who was abused by his nanny. The parents and special administrator for the infant's estate sued the nanny for battery, and also sued two childcare centers where the nanny had worked previously, alleging the

childcare centers were negligent because they knew or should have known the nanny had been abusive to other children while in their employ but failed to report it to authorities. At the close of the evidence, the district court directed a verdict in favor of the childcare centers and dismissed them from the case. The claim against the nanny was submitted to the jury, which returned a verdict in excess of $5 million. The parents and special administrator appeal the dismissal of the childcare centers, and the childcare centers cross-appeal.

This case requires us to determine, as a threshold matter, whether the childcare centers owed a legal duty to protect the infant from the criminal acts of a former employee. Because we find no such duty on the facts of this case, we affirm the district court's dismissal of the claims against the childcare centers.

I. FACTS

Christopher Bell and Ashley Bell are the parents of Cash Bell, born in October 2012. Christopher and Ashley used Care.com, an online marketplace for finding caregivers, to hire a nanny to provide in-home care for Cash. They ultimately hired Sarah Cullen. They selected Cullen over approximately 30 other matches proposed by Care.com, in part because Cullen had more experience working in childcare centers. Before selecting Cullen, Christopher and Ashley conducted a standard background check using Care.com. The background check revealed no concerns.

Cullen began working for Christopher and Ashley in January 2013. On February 28, Cullen inflicted fatal injuries on Cash, and he died from his injuries several days later. Cullen subsequently was convicted of intentional child abuse resulting in death and was sentenced to imprisonment for a term of 70 years to life.[1] This court affirmed her conviction and sentence on direct appeal.[2]

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[1] *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

[2] *Id*.

1. Bells Sue for Wrongful Death

In May 2014, Christopher, acting as the special administrator for the estate of Cash, filed this wrongful death action in the Douglas County District Court on behalf of the next of kin. Joined with the wrongful death action was a survival action seeking to recover Cash's damages, as well as Christopher and Ashley's claim for predeath medical expenses. We refer collectively to these parties as "the Bells."

(a) Claims Against Cullen

The Bells sued Cullen, alleging a claim of battery resulting in death. Cullen was served but did not answer, and the district court entered default judgment against Cullen on the issue of liability for Cash's death. The question of damages was tried to the jury, which returned a verdict against Cullen totaling $5,125,000. The Bells do not assign error to this verdict, and Cullen is not participating in this appeal.

Cullen testified at trial by deposition. She denied abusing any children while working for the childcare centers, but declined to answer any questions about Cash. Cullen testified, over the childcare centers' objection, that if she had been accused of, investigated for, or charged with child abuse, she would have stopped working as a childcare provider before being hired by Christopher and Ashley. Cullen also testified, over objection, that if she had been listed on the child abuse central registry,[3] she would not have placed her profile on Care.com.

(b) Claim Against Care.com

The Bells sued Care.com for negligent misrepresentations regarding Cullen's background. Prior to trial, Care.com was dismissed on summary judgment. No party has assigned error to that ruling, and Care.com is not participating in this appeal.

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[3] See Neb. Rev. Stat. §§ 28-718 and 28-720 (Cum. Supp. 2012).

(c) Claims Against Childcare Centers

The Bells alleged negligence claims against La Petite Academy, Inc., and its director, Lisa Hampson (collectively La Petite), and Grow With Me Childcare & Preschool LLC and its director, Jennifer Schmaderer (collectively Grow With Me). The evidence offered at trial against La Petite and Grow With Me is summarized below.

The Bells alleged the childcare centers were negligent because they knew or should have known that Cullen was abusing children while in their employ and failed to report that abuse to authorities. The Bells' general theory of liability was that the childcare centers had a common-law duty of reasonable care and breached that duty by failing to report Cullen's abusive behavior. The alleged breach was premised in part on Neb. Rev. Stat. § 28-711(1) (Reissue 2016), which provides:

> When any physician, any medical institution, any nurse, any school employee, any social worker, . . . or any other person has reasonable cause to believe that a child has been subjected to child abuse or neglect or observes such child being subjected to conditions or circumstances which reasonably would result in child abuse or neglect, he or she shall report such incident or cause a report of child abuse or neglect to be made to the proper law enforcement agency or to the [Department of Health and Human Services] on the toll-free number established by subsection (2) of this section.

In Nebraska, the willful failure to report child abuse or neglect is a Class III misdemeanor.[4]

Nebraska maintains a central registry of child protection cases.[5] This registry contains "records of all reports of child abuse or neglect opened for investigation" that are

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[4] See Neb. Rev. Stat. § 28-717 (Reissue 2016).

[5] See §§ 28-718 and 28-720.

ultimately classified as either "court substantiated or agency substantiated."[6] "Court substantiated" means a court of competent jurisdiction has entered a judgment of guilty against the subject of the report or there has been an adjudication of abuse or neglect in juvenile court.[7] "Agency substantiated" means the Department of Health and Human Services investigated and determined the report "was supported by a preponderance of the evidence."[8] Nebraska administrative regulations provide that an individual listed as a perpetrator on the registry may not be on the premises of a childcare center during the hours of operation.[9] Administrative regulations also permanently bar an individual from working in a childcare center if he or she has been convicted of an unlawful act that endangers the health or safety of another individual, including child abuse, child neglect, and assault.[10]

(i) Evidence Against La Petite

La Petite is a national company that operates a childcare center in Omaha, Nebraska. The Bells had no relationship with La Petite, but Cullen was employed at La Petite from December 2006 to December 2007.

At trial, the Bells presented evidence that while Cullen was employed by La Petite, a coworker saw Cullen yell at, shove, and drop toddlers in her care. Cullen was also seen forcefully pulling a child down a playground slide, causing the child's head to hit the ground. A coworker reported these events to La Petite's director, who investigated and concluded they did not amount to reportable child abuse.[11] Neither the director, the coworker, nor anyone else at La Petite reported Cullen's

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[6] § 28-718.

[7] § 28-720(1).

[8] § 28-720(3).

[9] 391 Neb. Admin. Code, ch. 3, § 006.03B (operative May 20, 2013).

[10] *Id.*, § 006.03A1.

[11] See § 28-711.

behavior to the authorities. Cullen was fired from La Petite in December 2007.

(ii) Evidence Against Grow With Me

Grow With Me is also an Omaha childcare center. The Bells had no relationship with Grow With Me, but Cullen was employed there from March to September 2012.

At trial, the Bells presented evidence that while Cullen was employed by Grow With Me, a coworker saw her verbally and physically abuse children. Cullen was seen dragging children, yelling at children, and dropping children. On one occasion, a coworker saw Cullen "shove" shoes and pants into a child's mouth during a diaper change. On another occasion, a coworker saw Cullen "fling" a child across the room, causing the child to hit her head on a table. These events were reported to the Grow With Me director, who investigated and concluded they did not amount to reportable child abuse.[12] Neither the director, Cullen's coworkers, nor anyone else at Grow With Me reported Cullen's behavior to the authorities. Cullen was fired from Grow With Me in September 2012.

2. Cullen Is Placed on Central Registry

At trial, the Bells presented evidence that after Cash's death, Cullen was investigated by the Department of Health and Human Services and the Omaha Police Department. As part of that investigation, Cullen's former coworkers at Grow With Me were interviewed. Based on the former coworkers' reports of Cullen's actions while employed at Grow with Me, the Department of Health and Human Services concluded the allegations of abuse were "[a]gency substantiated" and placed Cullen on the central child abuse registry.[13] An Omaha police officer testified at trial, over the childcare centers' objection,

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[12] See *id.*

[13] See § 28-720(3).

that she would have arrested Cullen for child abuse based on the reports of what had occurred at Grow With Me.

The Bells claim that if Cullen's abusive behavior had been timely reported by the childcare centers, then authorities would have investigated the reports sooner, and either (1) the investigation would have prompted Cullen to voluntarily stop working in the childcare field before she applied for the position with Christopher and Ashley or (2) the investigation would have resulted in Cullen's name being placed on the central registry sooner, because the abuse would have been agency substantiated or, alternatively, because Cullen would have been charged and convicted of child abuse. The Bells contend that under any of these causal chains, but for the childcare center's negligence, Christopher and Ashley would not have hired Cullen and she would not have been in a position to inflict fatal injuries on Cash.

3. Childcare Centers Seek Dismissal/Directed Verdict

Before trial, the childcare centers filed motions to dismiss claiming they had no legal duty to protect Cash from the criminal acts of Cullen. The trial court denied these motions, reasoning the childcare centers owed a duty to Cash because their "alleged conduct of not reporting suspected child abuse created a risk of physical harm" to Cash. In making this legal determination, the trial court appears to have relied on *A.W. v. Lancaster Cty. Sch. Dist. 0001*[14] and § 7 of the Restatement (Third) of Torts,[15] both of which we discuss below.

At the close of the Bells' case in chief, the childcare centers moved for a directed verdict on several grounds. First, the childcare centers argued they owed no legal duty to protect Cash from Cullen's criminal acts. Next, the childcare centers

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

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

argued that if they owed a duty, it was not breached, because Cullen's actions were not reasonably foreseeable. And finally, the childcare centers argued that even assuming they were negligent in not reporting Cullen's behavior while in their employ, no reasonable fact finder could conclude that the fatal injuries inflicted on Cash were proximately caused by the childcare centers' negligence.

The district court sustained the motion for directed verdict and dismissed the Bells' amended complaint against the childcare centers. In explaining its reasoning, the district court commented that if the childcare centers had a duty it was "slim" but the court's primary reason for directing a verdict was proximate cause. The court reasoned that all of the Bells' causal chains relied on facts that were too tenuous and speculative to be accepted by any reasonable jury, and the court found no reasonable jury could conclude the childcare centers' conduct was a proximate cause of Cash's death.

After the jury returned its verdict against Cullen, the Bells filed this timely appeal, and the childcare centers cross-appealed. We granted the parties' joint motion to bypass, and moved this appeal to our docket.

II. ASSIGNMENTS OF ERROR

The Bells assign, restated and consolidated, that the district court erred in (1) granting the childcare centers' motions for directed verdict and (2) excluding certain evidence at trial.

On cross-appeal, Grow With Me assigns, restated and consolidated, that the district court erred in (1) finding Grow with Me owed a legal duty to either Cash or the Bells and (2) finding it breached any duty. La Petite assigns, restated and consolidated, that the district court erred in (1) finding La Petite owed a legal duty to either Cash or the Bells and (2) admitting certain evidence.

III. STANDARD OF REVIEW

[1] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw

but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.[16]

[2,3] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[17] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[18]

IV. ANALYSIS

When confronted with an unimaginable loss like the one experienced by the Bells, it is natural to ask, What more could have been done? But tort law requires that a different question be answered first, Was there a legal duty to do something more?

[4,5] In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.[19] The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.[20]

Throughout the pendency of this case, the childcare centers have argued they cannot be liable in tort for Cash's death, because they had no legal duty to protect him from Cullen. The childcare centers unsuccessfully sought a no-duty determination before trial and again during trial. On cross-appeal, the childcare centers argue it was error for the trial court to find they owed a duty on the facts of this case.

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[16] *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015).

[17] *McReynolds v. RIU Resorts & Hotels*, 293 Neb. 345, 880 N.W.2d 43 (2016). See, also, *Durre v. Wilkinson Development*, 285 Neb. 880, 830 N.W.2d 72 (2013); *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013).

[18] *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017); *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 903 N.W.2d 432 (2017).

[19] *McReynolds v. RIU Resorts & Hotels, supra* note 17.

[20] *Id.*; *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010).

Before directly addressing the parties' arguments on the threshold question of duty, we review the general duty framework set out in § 7 of the Restatement (Third) of Torts, which this court adopted in *A.W. v. Lancaster Cty. Sch. Dist. 0001*.[21]

1. Duty Analysis Under Restatement (Third) of Torts

(a) § 7: Duty of Reasonable Care When Actor's Conduct Creates Risk of Physical Harm

The cornerstone of the duty analysis under the Restatement (Third) is set out in § 7(a): "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Section 7(b) recognizes that even when an actor's conduct creates a risk of harm, there can be "exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases [and] a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification."

Since adopting the duty analysis of § 7 in 2010,[22] this court has applied both the general duty rule articulated in § 7(a)[23] and the policy-based exception to that rule articulated in § 7(b).[24] But the instant case presents a question we have not fully explored under the risk architecture of the Restatement (Third): When does an actor's conduct create a risk of physical harm sufficient to trigger the ordinary duty of reasonable care under § 7?

[6] This question is central to the duty framework of the Restatement (Third), because the ordinary duty of reasonable

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[21] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 14.

[22] See *id*.

[23] See, e.g., *Olson v. Wrenshall*, 284 Neb. 445, 822 N.W.2d 336 (2012); *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011).

[24] See, e.g., *McReynolds v. RIU Resorts & Hotels, supra* note 17; *Kimminau v. City of Hastings*, 291 Neb. 133, 864 N.W.2d 399 (2015).

care under § 7 is expressly conditioned on the actor's having engaged in conduct that creates a risk of physical harm to another.[25] And, as the comments to § 7 recognize, "[i]n the absence of conduct creating a risk of harm to others, an actor ordinarily has no duty of care to another."[26]

Although "conduct creating a risk of harm" is the touchstone of duty under § 7, that section does relatively little to develop the concept. Comments to § 7 explain that "[a]n actor's conduct creates a risk when the actor's conduct or course of conduct results in greater risk to another than the other would have faced absent the conduct."[27] Additional guidance is found in the comments to the Restatement (Third) of Torts, § 6, which explain:

> The conduct that creates the risk must be some affirmative act, even though the negligence might be characterized as a failure to act. For example, an automobile driver creates risks to others merely by driving, although the negligence may be failing to employ the brakes at an appropriate time or failing to keep a proper lookout. By contrast, when the only role of an actor is failing to rescue or otherwise intervene to protect another from risks created by third persons or other events, courts need to give explicit consideration to the question of duty.[28]

Section 37 of the Restatement (Third) of Torts,[29] discussed below, also addresses the foundational concept that the duty of reasonable care is limited to risks created by the actor's affirmative conduct.

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[25] Restatement (Third) of Torts, *supra* note 15, § 7, comment *l*.

[26] *Id*. at 83.

[27] *Id*., comment *o*. at 84.

[28] *Id*., § 6, comment *f*. at 69.

[29] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 37 (2012).

(b) § 37: No Duty of Care Regarding Risks Not Created by Actor's Conduct

[7] Section 37 of the Restatement (Third) provides: "An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38-44 is applicable."[30] The Restatement (Third) explains the relationship between §§ 7 and 37 as follows:

> Section 7 of this Restatement states the general principle that an actor has a duty of reasonable care when the actor's conduct creates a risk of physical harm to others. [Section 37] states a complementary principle: there is no duty of care when another is at risk for reasons other than the conduct of the actor, even though the actor may be in a position to help. As with any no-duty rule, this one pretermits consideration of an actor's negligence. In the absence of a duty, the actor cannot be held liable.[31]

[8-10] The rationale for the no-duty rule under § 37 is premised, in part, on a distinction long recognized in the common law of torts between affirmatively creating a risk of harm and merely failing to prevent it.[32] As the Reporter for the first Restatement of Torts explained:

> "There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant . . . ."[33]

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[30] *Id*. at 2.

[31] *Id*., comment *b.* at 3.

[32] *Id*., Reporters' Note, comment *a.*

[33] *Id*. at 8, quoting Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. Pa. L. Rev. 217 (1908).

In theory, the difference between actively creating risk and failing to prevent it is fairly clear,[34] but in practice, it can be difficult to discern.[35] Comments to § 37 suggest that one way to determine whether an actor's conduct created a risk of harm is to "explore, hypothetically, whether the same risk of harm would have existed even if the actor had not engaged in the conduct."[36] Similarly, comments in § 7 suggest that to determine whether an actor's conduct has created the risk, it is useful to "consider whether, if the actor had never existed, the harm would not have occurred."[37]

But under § 37, even a determination that a defendant's conduct did not create a risk of physical harm to the plaintiff does not necessarily end the duty inquiry. This is because § 37 recognizes an exception to the no-duty rule when a court has determined that another recognized affirmative duty is applicable.[38] Generally speaking, these affirmative duties arise from special relationships that courts have determined justify the imposition of an affirmative duty to act.[39]

The Restatement (Third) identifies several such special relationships[40] and cautions the list is not exclusive; courts may decide to recognize other areas for affirmative duties under § 37, just as they may decide—for reasons of policy or principle—to recognize additional no-duty rules under § 7.[41] Among others, the Restatement (Third) recognizes an affirmative duty when the actor has a special relationship with the

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[34] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56 (5th ed. 1984).

[35] See Restatement (Third) of Torts, *supra* note 29, § 37, comment *c.*

[36] *Id.* at 4.

[37] Restatement (Third) of Torts, *supra* note 15, § 7, Reporters' Note, comment *l.* at 103.

[38] See Restatement (Third) of Torts, *supra* note 29.

[39] See, e.g., Keeton et al., *supra* note 34.

[40] Restatement (Third) of Torts, *supra* note 29, §§ 40 to 42.

[41] *Id.*, § 37, comment *b.*

plaintiff[42] or when the actor has a special relationship with a person who poses a risk to the plaintiff.[43] The term "'special relationship' has no independent significance," but "merely signifies that courts recognize an affirmative duty arising out of the relationship where otherwise no duty would exist pursuant to § 37."[44]

Since 2010, this court has cited approvingly to § 37 in several cases.[45] Likewise, we have relied on the framework of that section in recognizing the principle that even when an actor's conduct does not create a risk of physical harm, the actor may still owe an affirmative duty of care based on a special relationship.[46] For instance, we have recognized and adopted several of the special relationship provisions found in the Restatement (Third), including the special relationship between a school and its students,[47] the special relationship between an employer and its employees,[48] the special relationship between a landlord and its tenants,[49] and the special relationship between a custodian and those in its custody.[50] All of these special relationships have in common the characteristic that the actor is in a position to exercise some degree of control over the other person.[51]

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[42] *Id*., § 40.

[43] *Id*., § 41.

[44] *Id*., § 40, comment *h.* at 42.

[45] See, *Rodriguez v. Catholic Health Initiatives*, 297 Neb. 1, 899 N.W.2d 227 (2017); *Olson v. Wrenshall*, 284 Neb. 445, 822 N.W.2d 336 (2012); *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012).

[46] See *Rodriguez v. Catholic Health Initiatives, supra* note 45.

[47] See, *Thomas v. Board of Trustees*, 296 Neb. 726, 895 N.W.2d 692 (2017); *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 14.

[48] *Martensen v. Rejda Bros*., 283 Neb. 279, 808 N.W.2d 855 (2012).

[49] *Peterson v. Kings Gate Partners*, 290 Neb. 658, 861 N.W.2d 444 (2015).

[50] *Rodriguez v. Catholic Health Initiatives, supra* note 45; *Ginapp v. City of Bellevue, supra* note 45.

[51] See Restatement (Third) of Torts, *supra* note 29, § 41, comment *c.*

For the sake of completeness, we observe that before adopting the duty analysis under the Restatement (Third),[52] we generally relied on § 315 of the Restatement (Second) of Torts[53] to analyze whether a defendant had an affirmative duty to control the conduct of a third person to prevent them from causing physical harm to others.[54] Section 315 also focused the duty inquiry on whether a special relationship existed, providing:

> There is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.[55]

The Restatement (Third) instructs that § 37 is intended to replace Restatement (Second) § 315.[56] To the extent § 37 provides the framework for those special relationship rules this court has previously recognized in §§ 40 and 41 of the Restatement (Third), we find § 37 is consistent with Nebraska's jurisprudence and, to that extent only, adopt its rationale.

Mindful of the duty framework of the Restatement (Third) §§ 7 and 37, we now consider the threshold legal question presented here: Did the childcare centers owe a legal duty to protect Cash from the risk of physical harm by Cullen?

2. Duty Analysis Under Restatement (Third)

The district court found the childcare centers owed a duty of reasonable care to Cash under the general duty rule of the

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[52] See *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 14.

[53] Restatement (Second) of Torts § 315(a) (1965).

[54] See *Ginapp v. City of Bellevue, supra* note 45.

[55] Restatement (Second) of Torts, *supra* note 53, § 315 at 122.

[56] See Restatement (Third) of Torts, *supra* note 29, comment *a.*

Restatement (Third) § 7, reasoning that their failure to report Cullen's suspected child abuse created a risk of physical harm to Cash. In the childcare centers' cross-appeal, they assign this as error.

The childcare centers argue, summarized, that (1) they did not owe a legal duty to Cash under § 7 of the Restatement (Third) and (2) they had no special relationship with either Cash or Cullen that would support recognition of an affirmative duty under any other section of the Restatement (Third). The childcare centers also argue that Nebraska's reporting statutes[57] do not create a private right of action or establish a duty in tort.

[11] In responding to the cross-appeal, the Bells expressly reject any suggestion that they are claiming Nebraska's reporting statutes create a tort duty or give rise to a private right of action, and they do not claim the failure to report suspected abuse amounts to negligence per se. Instead, the Bells argue—as they have throughout the pendency of this case—that the childcare centers owe everyone, including Cash, a general duty of reasonable care under § 7 of the Restatement (Third). In other words, the Bells do not characterize the childcare centers' failure to report Cullen's abuse as the source of any legal duty, but instead suggest it is evidence the childcare centers breached their general duty of reasonable care. Given the Bells' position, it is not necessary, in this case, to consider whether Nebraska's reporting statutes create a private right of action or an affirmative duty in tort to act in protection of another, because that question is not presented. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[58]

It is necessary, however, to address the Bells' suggestion that § 7 of the Restatement (Third), and our adoption of that

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[57] §§ 28-718 and 28-720.

[58] *State v. Jedlicka,* 297 Neb. 276, 900 N.W.2d 454 (2017); *State v. Botts*, 25 Neb. App. 372, 905 N.W.2d 704 (2017).

section in *A.W. v. Lancaster Cty. Sch. Dist. 0001*,[59] effectively recognized a general duty of reasonable care to all others at all times. This interpretation of § 7 was advanced at oral argument before this court, and it is incorrect.

[12] As explained earlier, § 7 of the Restatement (Third) does not recognize a universal duty to exercise reasonable care to all others in all circumstances. Rather, it imposes a general duty of reasonable care only on an actor whose conduct has created a risk of physical harm to another, and it recognizes that absent such conduct, an actor ordinarily has no duty of care to another.[60] The expansion of § 7 urged by the Bells is not supported by the Restatement (Third) and is inconsistent with our prior decisions applying that section.

[13] Instead, we apply the framework of the Restatement (Third) to determine whether the childcare centers owed a legal duty to Cash or the Bells. Under that framework, the first step is to determine whether the actor's affirmative conduct created a risk of physical harm such that the general duty to exercise reasonable care under § 7 is applicable. If no such affirmative conduct exists, then the next step is to determine whether any special relationship exists that would impose a recognized affirmative duty on the actor with regard to the risks arising within the scope of that relationship.

(a) Conduct of Childcare Centers Did Not Create Risk of Harm

In addressing the threshold question of legal duty, the trial court found the childcare centers' "conduct of not reporting suspected child abuse created a risk of physical harm to Cash." This finding was erroneous for several reasons.

First, by finding the failure to report suspected abuse gave rise to a legal duty of reasonable care, the trial court conflated the separate concepts of legal duty and breach of that duty. The failure to report suspected abuse might present a question of

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[59] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 14.

[60] See Restatement (Third) of Torts, *supra* note 15, § 7, comment *l*.

breach, but it does not speak to the existence of a legal duty. Here, the trial court effectively found that the same failure to act both created the legal duty and breached it.

[14-17] The failure to rescue or protect another from harm is not conduct creating a risk of harm under § 7 and does not give rise to a duty of care under that section. Under the duty analysis of the Restatement (Third), the conduct creating the risk must be some affirmative act, even though the claimed breach can be a failure to act.[61] When the only role of the actor is failing to intervene to protect others from risks created by third persons, the actor's nonfeasance cannot be said to have created the risk.[62] Generally speaking, the law does not recognize a duty of care when others are at risk of physical harm for reasons other than the conduct of the actor, even if the actor may be in a position to help.[63] Ordinarily, the failure to act will not be the sort of affirmative conduct that gives rise to a duty under § 7.

However, at oral argument before this court, the Bells characterized the childcare centers' actions not as the failure to report, but, rather, as the affirmative conduct of hiding Cullen's abuse from authorities. This argument illustrates the sometimes fragile distinction between nonfeasance and misfeasance in tort jurisprudence. But even if the childcare centers' conduct can be characterized as affirmative, it is insufficient to create a legal duty under § 7 of the Restatement (Third), because the conduct did not create a risk of physical harm.

There is little doubt that Cullen herself posed a risk of harm to children in her care. And while the childcare centers presented evidence that they investigated Cullen's behavior and concluded it did not amount to reportable child abuse, it is frankly appalling to think that a childcare center would conceal any mistreatment of children in its care. But even if Cullen's

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[61] *Id.*, § 6, comment *f*.

[62] See *id*.

[63] Restatement (Third) of Torts, *supra* note 29, comment *b*.

behavior had been reported and an investigation ultimately confirmed abuse, the risk of harm posed by Cullen would remain the same. Under § 7, "[a]n actor's conduct creates a risk when the actor's conduct or course of conduct results in greater risk to another than the other would have faced absent the conduct."[64] And whatever the childcare centers' reasons may have been for not reporting Cullen's behavior, their failure to do so did not create or increase the risk Cullen posed, rather it allowed the risk to continue unabated.

As such, whether framed as the failure to report suspected abuse or as the affirmative act of concealing suspected abuse, the childcare centers' conduct did not create or increase the risk of physical harm to Cash or the Bells and was insufficient to create a duty under § 7. The trial court erred in finding otherwise.

(b) No Special Relationship or Other Affirmative Duty

[18] Even when an actor's conduct does not create a risk of physical harm, the actor may still owe an affirmative duty of care based on a special relationship.[65] The Bells argue that a special relationship between the childcare centers and Cullen created a duty to protect third parties such as Cash and the Bells from the risk of harm posed by Cullen. Specifically, the Bells contend the special relationship of employer and employee created a legal duty under § 41(b)(3) of the Restatement (Third).

[19] Section 41 of the Restatement (Third) provides that "[a]n actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship."[66] Among the relationships identified in § 41 is that of "an employer with employees when the employment facilitates

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[64] Restatement (Third) of Torts, *supra* note 15, § 7, comment *o*. at 84.

[65] See *Rodriguez v. Catholic Health Initiatives, supra* note 45.

[66] Restatement (Third) of Torts, *supra* note 29, § 41(a) at 64-65.

the employee's causing harm to third parties."[67] We have not expressly adopted the special relationship set out in § 41(b)(3), and do not do so here, because the present facts do not support the existence of a special relationship under that section.

Comments explaining the duty of reasonable care under § 41 of the Restatement (Third) observe that all of the special relationships identified in that section are ones in which the actor has some degree of control over the other person.[68] The Bells acknowledge that the employer/employee relationship between Cullen and the childcare centers terminated before Cash was born, and they do not suggest the childcare centers had any control over Cullen after she left their employ. But the Bells argue that § 41 still gives rise to a duty in this case, because "Cullen's employment with [the childcare centers] facilitated her ability to cause harm to third parties."[69] Specifically, the Bells argue that "[a]bsent Cullen's untarnished records at the [childcare centers], Cullen would not have become [Cash's] nanny and, further, would not have abused and, ultimately, killed Cash . . . ."[70]

This argument misconstrues the provisions of § 41. As the comments to that section make clear, an employer facilitates the employee causing harm to third-parties only when the employment "provides the employee access to physical locations, such as the place of employment, or to instrumentalities, such as a concealed weapon that a police officer is required to carry while off duty, or other means by which to cause harm that would otherwise not be available to the employee."[71]

If Cullen had been employed by the childcare centers when she fatally injured Cash, our analysis under § 41 would be

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[67] *Id.*, § 41(b)(3) at 65.

[68] See *id.*, comment *c.*

[69] Reply brief on cross-appeal for appellants at 16.

[70] *Id.*

[71] Restatement (Third) of Torts, *supra* note 29, § 41, comment *e.* at 67.

very different. But the risk that Cullen posed to Cash and the Bells did not arise within the scope of her prior employment with either of the childcare centers, and nothing about Cullen's prior employment provided Cullen with the means, location, or instruments used to inflict harm on Cash. The fact that Cullen highlighted her prior employment when seeking the nanny position with Christopher and Ashley cannot fairly be characterized as the childcare centers' facilitating Cullen's criminal acts.

We find, as a matter of law, that there was no special relationship under § 41(b)(3) between the childcare centers and Cullen that could give rise to an affirmative duty to prevent Cullen from causing physical harm to Cash after she left their employ.

We emphasize the narrow nature of our holding in this case. This opinion does not disturb the jury's verdict against Cullen finding her liable in tort for Cash's death and awarding damages to the estate and the Bells. Nor does this opinion impact the duty of a childcare provider to protect children in its care from the risk of physical or emotional abuse, or immunize childcare providers from the criminal consequences of failing to notify authorities of child abuse or neglect under the reporting statutes.[72]

But on the facts of this case, we cannot find that either § 7 or § 41(b)(3) of the Restatement (Third) supports the existence of a legal duty owed by the childcare centers to Cash or the Bells. Indeed, if we were to recognize a legal duty to protect others from harm based exclusively on the failure to report suspected abuse, such a duty could expose every citizen in Nebraska who witnesses possible abuse or neglect and fails to report it, to potentially limitless civil tort liability for the future criminal acts of abusers over whom they have no control, and with whom they have no special relationship.

Therefore, although our reasoning differs from that articulated by the trial court, we affirm the decision to direct a

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[72] §§ 28-718 and 28-720.

verdict in favor of the childcare centers, because, as a matter of law, the childcare centers owed no legal duty to Cash or the Bells. Because we have resolved this appeal on the threshold issue of duty, it is unnecessary to address any of the remaining assignments of error.[73]

V. CONCLUSION

Given the magnitude of the loss suffered by the Bells, we realize the result of this appeal may appear harsh, but the law does not permit recovery on these facts. As a matter of law, the childcare centers cannot be liable in tort for Cash's death, because their conduct did not create a risk of physical harm to Cash and because they did not have a special relationship with either Cash, the Bells, or Cullen that would give rise to an affirmative duty to protect Cash from the risks posed by Cullen. Because there can be no liability in tort in the absence of a legal duty, we must affirm the trial court's decision to direct a verdict in favor of the childcare centers.

Affirmed.

Wright, J., not participating in the decision.

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[73] See *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007).

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

State of Nebraska, appellee, v. Fredrick A. Collins, Jr., appellant.

907 N.W.2d 721

Filed March 2, 2018. No. S-17-147.

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.** 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 the claim and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.
3. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A court may address the two prongs of this test, deficient performance and prejudice, in either order.
4. **Effectiveness of Counsel: Speedy Trial.** When a defendant alleges he or she was prejudiced by trial counsel's failure to properly assert the defendant's speedy trial rights, the court must consider the merits of the defendant's speedy trial rights under *Strickland v. Washington*, 466

U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Only if a motion would have resulted in the defendant's absolute discharge, thus barring a later trial and conviction, could the failure to move for discharge be deemed ineffective assistance.

5. **Speedy Trial.** To calculate the deadline for trial for speedy trial purposes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016).
6. **Effectiveness of Counsel.** As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument.
7. **Postconviction: Justiciable Issues: Right to Counsel: Appeal and Error.** When the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel. But, where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction petition contained no justiciable issue of fact or law, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed.

Fredrick A. Collins, Jr., pro se.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

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

Cassel, J.

I. INTRODUCTION

Fredrick A. Collins, Jr., appeals from an order denying his motion for postconviction relief. Collins failed to allege sufficient facts supporting the majority of his claims, and his remaining claims are without merit. We affirm.

II. BACKGROUND

Collins was originally charged with first degree sexual assault of a child, a Class IB felony, and third degree sexual

assault of a child, a Class IIIA felony. Pursuant to a plea agreement, Collins pled no contest to a reduced charge of first degree sexual assault, a Class II felony, and the State dismissed the third degree sexual assault of a child charge. The district court sentenced Collins to 10 to 15 years' imprisonment with credit for 396 days of time served.

On direct appeal, Collins assigned that he received an excessive sentence and that he was denied effective assistance of trial counsel. He alleged that his trial counsel was ineffective when counsel (1) failed to inform him of the potential penalty for a Class II felony, (2) failed to attack the validity of the information for lack of jurisdiction, (3) failed to file a motion for DNA testing or investigate why a sexual assault evidence collection kit was not completed, (4) failed to file a motion to discharge or dismiss, (5) failed to move to sever the offenses, (6) failed to file a motion seeking to exclude testimony from the victim and two witnesses, (7) failed to conduct depositions of a police detective and a child advocacy center employee, (8) failed to show him transcripts of any depositions, (9) failed to object to or correct the factual basis provided at the plea hearing, (10) coerced his acceptance of a plea deal, and (11) failed to attend a presentence investigation interview with him or review presentence investigation errors with him.

We affirmed Collins' sentence and determined that he was not prejudiced by any failure of trial counsel to inform him of the potential penalty for a Class II felony.[1] We did not reach the remaining claims of ineffective assistance of counsel after determining that the record was not sufficient for review of those claims.

Collins has now filed a motion for postconviction relief reasserting his 2d through 8th and 10th claims of ineffective assistance of counsel which were not reviewed on direct appeal. He additionally filed a motion to appoint postconviction counsel.

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[1] *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016).

The district court denied postconviction relief without an evidentiary hearing after finding Collins' claims were either insufficiently pled or without merit. The court also denied Collins' request for appointment of postconviction counsel.

Collins appealed, and we moved the case to our docket.[2]

III. ASSIGNMENTS OF ERROR

Collins assigns, restated, that the district court erred in failing to (1) conduct an evidentiary hearing on his claims of ineffective assistance of counsel and (2) assign counsel for the postconviction proceeding.

IV. 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]

V. ANALYSIS

1. Motion for Postconviction Relief

[2] 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 the claim and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.[4] If none of Collins' allegations were sufficiently alleged, no evidentiary hearing was required. Likewise, no evidentiary hearing would be necessary even if some claims were sufficiently alleged, so long as the files and records affirmatively showed that he was entitled to no relief.

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[2] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

[3] *State v. Johnson*, 298 Neb. 491, 904 N.W.2d 714 (2017).

[4] See *id.*

All of Collins' allegations are grounded in claims of ineffective assistance of counsel. The standard governing such claims is well settled.

[3] To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, in accordance with *Strickland v. Washington*,[5] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[6] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[7] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[8] A court may address the two prongs of this test, deficient performance and prejudice, in either order.[9]

With these standards in mind, we turn to Collins' specific claims. As explained below, none required an evidentiary hearing.

(a) Failure to Attack Validity of Information

Collins alleged that he received ineffective assistance of counsel when trial counsel failed to attack the validity of the original information filed, because "the dates alleged concerning the offenses clearly posed a jurisdictional issue." However, he did not specify how the dates constituted a jurisdictional issue or how he was prejudiced when the dates were modified in the amended information.

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

[6] *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017).

[7] *Id.*

[8] *Id.*

[9] *Id.*

Collins argues in his brief on appeal that the court lacked jurisdiction, because some of the alleged actions took place in a different county and the victim lived in a different county from January 1, 2009, to June 30, 2010. But, the amended information alleged that Collins committed first degree sexual assault between June 25, 2011, and June 12, 2012, in Douglas County, Nebraska. Therefore, his allegations and conclusions concerning the time between January 1, 2009, and June 30, 2010, are irrelevant. Collins failed to identify any jurisdictional issue with the operative information and thus cannot show either deficient performance or prejudice.

(b) Failure to Move for DNA Testing and Investigate Lack of Sexual Assault Evidence Collection Kit

Collins alleged that trial counsel was ineffective in failing to move for DNA testing and in failing to investigate why a sexual assault evidence collection kit was not completed. He argues that if such actions had been taken, evidence against him would have been suppressed or evidence exonerating him would have been admitted.

However, Collins did not allege what evidence a DNA test or collection kit would have discovered. Because this case involved various incidents of sexual abuse which recurred over a long period of time and included digital—but not penile—penetration,[10] his failure may well have resulted from an absence of evidence to test or collect. Accordingly, counsel could not be ineffective for failing to request such testing or investigate the lack of an evidence collection kit.

(c) Failure to Move to Discharge on Speedy Trial Grounds

Collins alleged that trial counsel failed to move to discharge the information on speedy trial grounds. He maintains that the speedy trial clock had expired before entry of his plea.

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[10] See *State v. Collins, supra* note 1.

[4] When a defendant alleges he or she was prejudiced by trial counsel's failure to properly assert the defendant's speedy trial rights, the court must consider the merits of the defendant's speedy trial rights under *Strickland*.[11] Only if a motion would have resulted in the defendant's absolute discharge, thus barring a later trial and conviction, could the failure to move for discharge be deemed ineffective assistance.[12]

[5] To calculate the deadline for trial for speedy trial purposes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016).[13] The original information was filed July 30, 2012. Therefore, the speedy trial deadline before adding any excluded time was January 30, 2013.

The State argues that there were two periods of excludable time pursuant to § 29-1207(4). First, it argues that the time between Collins' pretrial motion to produce certain evidence, filed November 1, 2012, and the district court's order sustaining the motion on November 28, 2012 (27 days), was excludable. Second, it suggests that Collins' motion to continue the scheduled trial, filed January 16, 2013, was one of indefinite duration. Therefore, it argues that the time between the filing of the motion and the trial rescheduled for March 18, 2013 (61 days), was excludable. We agree on both counts.

[6] After adding the excluded time, the deadline for trial was April 28, 2013. Collins entered his plea of no contest on March 20. Because the deadline for speedy trial purposes had not run, defense counsel could not have been ineffective for failing to file a motion to discharge on speedy trial grounds.

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[11] *Strickland v. Washington, supra* note 5; *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016).

[12] See *State v. Betancourt-Garcia, supra* note 11.

[13] See *id.*

As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument.[14]

(d) Failure to Move for Severance

Collins alleged that trial counsel was ineffective for failing to sever the charges against him. He argued that "[h]ad [he] had separate trials, he would not have agreed to the plea agreement reached in this case."[15] However, Collins did not allege how he was prejudiced given that the third degree sexual assault of a child charge was dismissed pursuant to the plea agreement. In fact, it is impossible to see how two trials would have benefited Collins more than the plea agreement when he had previously admitted his wrongdoing to two witnesses for the State. Consequently, Collins has failed to allege prejudice on this claim.

(e) Failure to Move to Exclude Testimony

Collins alleged that counsel was ineffective for failing to move to exclude testimony of the victim and two adult witnesses. He claimed, "Trial Counsel was aware or should have been aware that portions of the alleged victim's statements were perjurious when she lied and fabricated in her deposition . . . ."[16] However, Collins did not specify which statements were fabricated or provide any detail of the deposition. He also failed to identify the legal basis on which trial counsel could have excluded any of the testimony. Without more specificity, Collins failed to adequately allege this claim. Thus, the district court was correct in denying it without an evidentiary hearing.

(f) Allegations Concerning Discovery

Collins alleged that trial counsel failed to conduct depositions of two State witnesses and review other deposition

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[14] *State v. Schwaderer, supra* note 6.

[15] Brief for appellant at 14.

[16] *Id.*

transcripts with him. He generally claimed that, had counsel deposed the witnesses and shared all deposition transcripts with him, he "would not have agreed to the plea agreement in this matter."[17] But, without more, these are merely conclusory statements. Collins has not alleged any facts that the depositions may have revealed that would have prevented his acceptance of the plea deal. Because these claims were insufficiently pled, the district court was correct in denying the claims without an evidentiary hearing.

(g) Coerced Acceptance of Plea Agreement

Collins alleged that trial counsel coerced his acceptance of the plea agreement by withholding discovery; admitting that counsel had never tried a case like his; failing to inform him of the rights he would waive by pleading guilty and how the proceedings would go; prompting him to answer the court's questions at the plea hearing; and suggesting that he would be imprisoned for at least 35 years if he did not plead guilty, but would likely get probation or a light sentence if he accepted the plea deal. However, these allegations are directly refuted by the record.

The district court informed Collins of the rights he would retain and the rights he would waive by entering his plea, which Collins stated he understood. The court also explained the range of penalties which Collins would be subject to as a result of his plea, which Collins again stated he understood. Collins asserted that "[t]here's been no promises" on whether he would receive a particular sentence or be placed on probation and affirmed that he had enough time to talk to his attorney before the hearing. This record affirmatively shows that Collins is entitled to no relief on this claim, because he freely, knowingly, intelligently, and voluntarily entered his plea pursuant to the plea agreement.

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[17] *Id.*

2. Motion to Appoint Counsel

[7] Collins assigns and argues that the district court erred when it denied his motion for appointment of postconviction counsel. When the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel.[18] But, where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction petition contained no justiciable issue of fact or law, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.[19]

As we have noted, Collins has not alleged facts sufficient to entitle him to an evidentiary hearing on his postconviction claim, and thus has raised no justiciable issue of fact or law. Therefore, the district court did not abuse its discretion in declining to appoint counsel.

VI. CONCLUSION

For the reasons set forth above, we affirm the final order of the district court.

Affirmed.

Kelch, J., participating on briefs.
Wright, J., not participating.

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[18] *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

[19] See, *State v. Rice*, 295 Neb. 241, 888 N.W.2d 159 (2016); *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska, appellee, v. Michael E. Lane, appellant.

907 N.W.2d 737

Filed March 2, 2018. No. S-17-150.

1. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty plea, and an appellate court will overturn that decision only where there is an abuse of discretion.
2. **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.
3. **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.
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. **Pleas.** To support a finding that a defendant has entered a guilty plea freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.
6. **Convicted Sex Offender: Sentences.** A defendant's duties to register as a sex offender are a collateral consequence to a defendant's sentence. Because registration duties under the Sex Offender Registration

Act are not punitive, a trial court may inform a defendant of the duties imposed under the act before accepting pleas of guilty or no contest, but is not required to do so, and a plea is not rendered involuntary or unintelligent because a defendant was not aware of his or her registration duties.

7. **Convicted Sex Offender.** The notification requirements of Neb. Rev. Stat. § 29-4007 (Reissue 2016) are mandatory.
8. **Sentences: Appeal and Error.** An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.
9. **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.
10. **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.
11. ____: ____: ____. 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.
12. **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.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

Nathan S. Lab, 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.

I. NATURE OF CASE

Michael E. Lane accepted a plea agreement and entered a no contest plea to incest, a Class III felony, on October 31, 2016. At the sentencing hearing, the district court for Douglas County pronounced that Lane was sentenced to 4 to 4 years' imprisonment, with credit for 11 days served, and a term of 2 years' postrelease supervision. Lane appeals. Lane claims that he should be able to withdraw his plea, because at the plea hearing, the State and the district court misinformed him that he would not need to register as a sex offender. As explained below, we reject this assignment of error. Lane challenges his sentence in certain respects. However, because, as we explain below, we are vacating his sentence due to plain error, we do not reach these assignments of error. Finally, Lane alleges ineffectiveness of trial counsel. We do not reach the merits of Lane's ineffectiveness of counsel claims. We affirm Lane's conviction, but because we find error in the sentencing, we vacate Lane's sentence and remand the cause for resentencing.

II. STATEMENT OF FACTS

Following the denial of Lane's motion to suppress, pursuant to a plea agreement in which Lane agreed to enter a no contest plea, the State filed an amended information charging Lane with incest, a Class III felony, under Neb. Rev. Stat. § 28-703 (Reissue 2016).

At the plea hearing, the State provided a factual basis for the charge. In sum, the victim, who is Lane's niece, reported an incident which occurred on or about November 7, 2015. Lane had been living with the victim's family for about a month when the events giving rise to the conviction occurred. The crime occurred in Douglas County, Nebraska.

At the plea hearing, the district court informed Lane of his constitutional rights and that by pleading, Lane would be giving up all of those rights but for the right to appeal and the right to counsel, and Lane stated that he understood and still wished to plead. While informing Lane of the penalties associated with the crime charged, the court asked the State whether the offense required registration under the Sex Offender Registration Act (SORA), Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2016). The State responded that the offense did not require registration under SORA. The parties agree that this advisement by the State and by the district court was incorrect and that an incest conviction requires registration under SORA. See § 29-4003(1)(b)(i)(A)(XIV). Lane's counsel did not object or make a statement regarding this erroneous statement at the plea hearing.

Lane pled no contest. The district court found that the plea was made freely, knowingly, and voluntarily and accepted the plea. The district court found Lane guilty of the charge and sentenced him to 4 to 4 years' imprisonment, with credit for 11 days served, and a term of 2 years' postrelease supervision.

This appeal followed. On appeal, Lane seeks to withdraw his plea, challenges his sentence, and alleges ineffectiveness of trial counsel.

III. ASSIGNMENTS OF ERROR

Lane claims that (1) because the district court and the State misinformed him that he would not be subject to sex offender registration, he should be permitted to withdraw his plea, and (2) the district erred in the sentence it imposed. Lane further claims that (3) he was prejudiced by ineffectiveness of trial counsel.

IV. STANDARDS OF REVIEW

[1] A trial court is given discretion as to whether to accept a guilty plea, and an appellate court will overturn that

decision only where there is an abuse of discretion. *State v. Russell*, 291 Neb. 33, 863 N.W.2d 813 (2015).

[2] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

[3,4] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017). 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. *Id*.

V. ANALYSIS

As we explain below, we affirm Lane's conviction. However, we find plain error in connection with sentencing, because on the record before us, the district court failed to complete SORA notification obligations. See § 29-4007. Accordingly, we affirm Lane's conviction but vacate his sentence and remand the cause for resentencing. Further, we are unable to reach the merits of Lane's claims of ineffectiveness of trial counsel.

1. Withdrawal of Plea

On appeal, Lane contends that he should be allowed by this court to withdraw his plea on the basis that his plea was the product of being wrongly advised by the district court and the State that he was not subject to SORA and its registration duties. We reject this assignment of error. For completeness, we note that our rejection of Lane's claim regarding the propriety of his plea considers only this basis asserted by Lane.

[5] To support a finding that a defendant has entered a guilty plea freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. *State v. Bol*, 294 Neb. 248, 882 N.W.2d 674 (2016). The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged. *Id*.

[6] In *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002), we held that a defendant's duties to register as a sex offender are a collateral consequence to a defendant's sentence. Because the SORA registration duties at issue are not punitive, a trial court may inform a defendant of the duties imposed under SORA before accepting pleas of guilty or no contest, but is not required to do so, and a plea is not rendered involuntary or unintelligent because a defendant was not aware of his or her registration duties. See *id*. See, also, *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009). Compare *Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010) (noting difference between civil duties and punitive consequences). Thus, under *Schneider*, the district court's incorrect advisement regarding the collateral SORA consequence of Lane's plea does not invalidate his plea or warrant the relief of withdrawal.

2. Sentencing Errors

We have reviewed the record, and on the record before us, we determine that the district court failed to complete the SORA notification requirements of § 29-4007, which the court is mandated to do in a conviction for an offense triggering SORA duties. As a result, we find plain error in sentencing and we vacate the sentence and remand for resentencing.

Lane was convicted of incest pursuant to § 28-703, which is a registrable offense under § 29-4003(1)(b)(i)(A)(XIV). The

State suggests that we vacate the sentence and remand this cause for additional sentencing proceedings, because the record does not show that the district court complied with its duty to inform Lane, in writing, about his duty to register under SORA. See § 29-4007. We agree with the State.

Section 29-4007 provides, in relevant part:

> (1) When sentencing a person convicted of a registrable offense under section 29-4003, the court shall:
>
> . . . .
>
> (b) Require the defendant to read and sign a form stating that the duty of the defendant to register under [SORA] has been explained;
>
> (c) Retain a copy of the written notification signed by the defendant; and
>
> (d) Provide a copy of the signed, written notification, the judgment and sentence, the information or amended information, and the journal entry of the court to the county attorney, the defendant, the sex offender registration and community notification division of the Nebraska State Patrol, and the county sheriff of the county in which the defendant resides, has a temporary domicile, or has a habitual living location.
>
> . . . .
>
> (3)(a) The Department of Correctional Services or a city or county correctional or jail facility shall provide written notification of the duty to register pursuant to [SORA] to any person committed to its custody for a registrable offense under section 29-4003 prior to the person's release from incarceration.

[7] We have stated that the notification requirements of § 29-4007 are mandatory. *State v. Pathod*, 269 Neb. 155, 690 N.W.2d 784 (2005). In *Pathod*, we noted that the plain language of § 29-4007 states that when sentencing a person, the court "shall" provide written notification and copies of the notification and corresponding journal entry to various parties.

In *Pathod*, the sentencing court failed to enter a journal entry or notify the defendant at sentencing, but the notice signed by the defendant was filed the day after sentencing and was included in the record. Given all the facts in *Pathod*, we concluded that the court's error in SORA compliance did not invalidate the sentence.

Although the facts we have before us differ, we apply an analysis similar to *Pathod* in the instant case. Here, the State notes that on this record, the court failed to provide written notification to Lane at sentencing or provide copies of the notification and journal entry to the various parties, as required by § 29-4007. Unlike *Pathod*, the record in the instant case does not show whether Lane ultimately received proper advisements regarding his SORA duties, and we do not assume that he did. We agree with the State that the district court plainly erred by failing to comply with SORA notification requirements.

[8] An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced. *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014); *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006). Accordingly, we vacate Lane's sentence and remand the cause for resentencing compliant with § 29-4007.

3. Ineffective Assistance of Counsel

We have reviewed Lane's allegations concerning claims of ineffective assistance of trial counsel, and we determine that the record on direct appeal is not sufficient to address them.

[9,10] Lane is represented on direct appeal by counsel different from the counsel who represented him at trial. 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. *State v.*

Mora, 298 Neb. 185, 903 N.W.2d 244 (2017). Otherwise, the issue will be procedurally barred. *Id*. The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id*. The determining factor is whether the record is sufficient to adequately review the question. *Id*.

[11,12] 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. *Id*. 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. *Id*.

(a) Failing to Notify Lane of SORA Duties

Lane has brought to our attention alleged deficiencies regarding his trial counsel's advice regarding his SORA duties. Lane contends the alleged deficiencies justify withdrawal of his plea. Although the record shows Lane's trial counsel did not comment on the question of SORA's applicability at his sentencing hearing, the record is silent regarding whether Lane otherwise received advisements from his trial counsel, including compliance features of § 29-4007, at any other time. In this direct appeal, the record is incomplete on the matter, and we are unable to determine whether Lane's trial counsel performed deficiently regarding advice pertaining to Lane's SORA duties in connection with counsel's advice to enter the plea.

(b) Waiver of Right to Appeal Because of Plea

As noted above, Lane asserts that his plea of no contest was the result of ineffective assistance of trial counsel. As

an additional reason, Lane contends that he was not correctly advised that by entering a plea of no contest, he would give up his right to appeal the denial of his motion to suppress. See, e.g., *State v. Payne*, 298 Neb. 373, 904 N.W.2d 275 (2017). Lane argues this is prejudicial because he is now unable to challenge the denial of his motion to suppress his confession to incest, in which motion he claims that he relied on statements by a law enforcement officer implying that to acknowledge the facts of the incident was not to confess to a crime.

Upon our review, we determine that the record is insufficient to review Lane's allegation regarding counsel's advice relative to the plea. The nature of Lane's claim that it was deficient performance for trial counsel to advise him to waive his right to appeal is entwined with his acceptance of a plea deal, and on this record, we cannot review the conduct of Lane's trial counsel.

VI. CONCLUSION

We affirm Lane's conviction for incest. However, because the district court failed to comply with its obligation to notify Lane of his SORA registration duties, we vacate the sentence and remand the cause for resentencing. Finally, in this direct appeal, the record is insufficient to resolve Lane's claims of ineffectiveness of trial counsel.

Affirmed in part, and in part vacated and remanded for resentencing.

Wright, J., not participating.

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

Zweiback Family Limited Partnership et al., appellees, v. Lincoln Benefit Life Company and Brian Schuster, appellees, and Dennis Tubbergen, appellant.

907 N.W.2d 700

Filed March 2, 2018. No. S-17-324.

1. **Arbitration and Award: Judgments: Appeal and Error.** Arbitrability presents a question of law. On a question of law, an appellate court reaches a conclusion independent of the court below.
2. **Arbitration and Award.** A party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so.
3. **Contracts: Arbitration and Award.** Arbitration is purely a matter of contract.

Appeal from the District Court for Douglas County: Horacio J. Wheelock, Judge. Affirmed.

Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellant.

Edward D. Hotz, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellees.

Heavican, C.J., Cassel, Stacy, and Kelch, JJ., and Bishop, Judge.

Stacy, J.

The district court denied a motion to compel arbitration, reasoning the agreement to arbitrate "concern[ed] or relat[ed] to an insurance policy" and thus was unenforceable

under Nebraska law.[1] We affirm, although for different reasons.

FACTS

Eugene M. Zweiback is the named insured under two variable life insurance policies issued by Lincoln Benefit Life Company (LBL). Zweiback is also the general partner of two partnerships named as plaintiffs in this lawsuit. Zweiback alleges that in 2004, he consulted two authorized agents or brokers of LBL, Dennis Tubbergen and Brian Schuster, and told them he wanted to purchase a life insurance policy. Zweiback wanted a policy with a one-time premium of approximately $1 million that would continue to finance the ongoing cost of insurance during his lifetime and then pay a large benefit upon his death, regardless of his age.

In 2005, Zweiback applied for and was issued two LBL life insurance policies; the death benefit of each was $10 million. Zweiback alleges both Tubbergen and Schuster advised him on multiple occasions that the LBL policies satisfied Zweiback's conditions. Zweiback paid premiums of approximately $1 million for the policies, and he alleges Tubbergen and Schuster received substantial commissions on the sale of the policies. He also alleges he did not know the policies were variable life insurance policies or that the ability of the policies to pay future insurance costs without additional premiums depended on the performance of underlying investments.

Approximately 1 year later, in October 2006, the face values of both LBL policies were lowered from $10 million to $3.5 million. Zweiback alleges this was done after the date upon which Tubbergen and Schuster would have to return earned commissions. In June 2012, Zweiback was informed by LBL that additional premiums were due to keep the policies in force. Instead of paying additional premiums, Zweiback chose to reduce the face value of both policies to $2 million.

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[1] Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2016).

In August 2014, Zweiback and the partnerships (collectively Zweiback) filed an action against LBL, Tubbergen, and Schuster in the Douglas County District Court. Zweiback alleges Tubbergen and Schuster fraudulently induced him into purchasing the LBL life insurance policies by misrepresenting the nature and terms thereof. The operative amended complaint alleges claims of fraudulent misrepresentation and fraudulent concealment against Tubbergen and Schuster and seeks to have LBL reform or replace the existing policies with ones more suitable to Zweiback.

In December 2014, all defendants answered, generally denying the allegations of fraud and misrepresentation and raising a variety of affirmative defenses. Tubbergen alone raised the affirmative defense that the action against him was subject to binding arbitration.

More than 1½ years after filing his answer, Tubbergen filed a motion to compel arbitration. A hearing on the motion was held in February 2017. The only evidence offered and received at the hearing was an affidavit authored by Tubbergen. Attached to the affidavit were two "Investor Profile" agreements executed by Zweiback, both of which contained arbitration provisions. The terms of the arbitration agreements will be set out in our analysis.

The investor profiles were apparently part of Tubbergen's association with USA Financial Securities and USA Advanced Planners, both of which appear to be firms registered with the Securities and Exchange Commission, but neither of which are parties to this action. The investor profile agreements were signed by Zweiback in February 2005 and February 2007.

Tubbergen's affidavit avers that the LBL policies issued in 2005 were variable life insurance policies required to be registered by the Securities and Exchange Commission as securities. His affidavit does not indicate the investor profiles were a necessary part of either applying for or registering the LBL policies, but does aver that Tubbergen "submitted [the

investor profiles] with the applications for the variable insurance products that are the basis for this action."

On February 22, 2017, the district court entered an order denying Tubbergen's motion to compel arbitration. The court relied on § 25-2602.01(f)(4), which provides, in relevant part, that an arbitration agreement "concerning or relating to an insurance policy" is not valid and enforceable. The court rejected Tubbergen's argument that the variable life insurance policies at issue were actually securities and not "insurance polic[ies]" within the meaning of § 25-2602.01(f)(4).

Tubbergen timely appealed, and we moved the case to our docket on our own motion.[2]

ASSIGNMENTS OF ERROR

Tubbergen assigns that the district court erred in (1) denying his motion to compel arbitration and (2) determining the investor profiles concerned or related to an insurance policy within the meaning of § 25-2602.01(f)(4).

STANDARD OF REVIEW

[1] Arbitrability presents a question of law.[3] On a question of law, we reach a conclusion independent of the court below.[4]

ANALYSIS

Tubbergen filed his motion to compel arbitration pursuant to both Nebraska's Uniform Arbitration Act[5] and the Federal Arbitration Act.[6] When a contract containing an arbitration clause involves interstate commerce, issues of federal

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[2] Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

[3] *Speece v. Allied Professionals Ins. Co.*, 289 Neb. 75, 853 N.W.2d 169 (2014).

[4] *Id.*

[5] Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2016).

[6] 9 U.S.C. §§ 1 to 16 (2012).

preemption arise and must be analyzed when ruling on a motion to compel arbitration in order to determine which act governs the agreement.[7] And when issues of insurance and arbitration are presented, the applicability and scope of the McCarran-Ferguson Act[8] should also be considered.[9] The trial court's order did not include any such analysis. However, to resolve this appeal, it is not necessary to engage in a preemption analysis, because we find there was a failure of proof regarding the arbitration agreement itself.

[2,3] A party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so.[10] Arbitration is purely a matter of contract,[11] and thus, our threshold inquiry here is whether the record shows that Zweiback agreed to submit future disputes with Tubbergen to binding arbitration.

Before addressing the merits of this inquiry, we note Tubbergen has both alleged the existence of and offered evidence of an arbitration agreement signed by Zweiback. This case is thus factually distinguishable from *Pearce v. Mutual of Omaha Ins. Co.*,[12] where we lacked jurisdiction over an appeal from a denial of a motion to compel arbitration. In *Pearce*, we held that where no agreement to arbitrate had been alleged or offered, an order refusing to compel arbitration was not an appealable order under the Uniform Arbitration Act[13]

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[7] See, e.g., *Speece, supra* note 3; *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

[8] 15 U.S.C. §§ 1011 to 1015 (2012).

[9] See, e.g., *Speece, supra* note 3; *Kremer, supra* note 7.

[10] See, *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[11] *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002).

[12] *Pearce v. Mutual of Omaha Ins. Co.*, 293 Neb. 277, 876 N.W.2d 899 (2016).

[13] See § 25-2620(a)(1).

and was not a final, appealable order under Neb. Rev. Stat. § 25-1902 (Reissue 2016). Here, Tubbergen has both alleged an agreement to arbitrate and offered evidence of the same, so the concerns present in *Pearce* are not present here. We conclude we have jurisdiction over this appeal,[14] and we turn our attention to whether the arbitration agreements in the record support Tubbergen's claim that Zweiback agreed to submit this dispute to arbitration.

The 2005 arbitration agreement provides:

> I and USA Financial agree that the following PRE-DISPUTE AGREEMENT TO BINDING ARBITRATION APPLIES TO ANY AND ALL CONTROVERSIES arising among USA Financial, USA Financial's Related Persons, My Investment Custodian, and Me or My related interests. All claims or controversies, and any related issues concerning any transaction or order; or the construction, performance, or breach of this or any other Agreement with Me whether entered into prior to, on, or subsequent to the date of this Agreement . . . SHALL BE FINALLY AND CONCLUSIVELY DETERMINED BY BINDING ARBITRATION . . . .

The 2007 arbitration agreement contained the same language, but referred to "USA Advanced Planners" instead of "USA Financial."

It is undisputed that Zweiback signed both the 2005 and the 2007 arbitration agreements, but whether Tubbergen is a signatory to, or otherwise is subject to, the arbitration agreements is not evident from either the face of the agreement or the record. Because arbitration is purely a matter of contract, we review the arbitration agreements here using basic contract principles.[15] For efficiency, we discuss the terms of the 2005 arbitration agreement, but our analysis applies equally to the 2007 agreement.

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[14] See, *Speece, supra* note 3; *Webb, supra* note 10.

[15] *Koricic v. Beverly Enters. - Neb.*, 278 Neb. 713, 773 N.W.2d 145 (2009).

The 2005 arbitration agreement pertains to disputes between Zweiback and "USA Financial," "USA Financial's Related Persons," or Zweiback's "Investment Custodian." Tubbergen's affidavit does not use or reference the agreement's vernacular, and instead avers he was "an officer, member and registered representative" of USA Financial Securities. There is nothing in his affidavit, or elsewhere in the record, demonstrating that Tubbergen was Zweiback's "Investment Custodian" or one of "USA Financial's Related Persons," as those terms are used in the arbitration agreement. To the extent "Related Persons," and "Investment Custodian" appear to be defined terms, neither the affidavit nor the attachments provide the definition.

The record is insufficient to demonstrate that the arbitration agreement between Zweiback and USA Financial Securities includes disputes between Zweiback and Tubbergen. Without evidence that Tubbergen is Zweiback's "Investment Custodian" or is one of "USA Financial's Related Persons," Tubbergen has not met his burden of proving he is subject to the arbitration agreement he seeks to enforce.[16] The trial court was correct to deny Tubbergen's motion to compel arbitration.

CONCLUSION

On the record before us, there is no evidence that the arbitration agreements between Zweiback and USA Financial Securities or USA Financial Planners apply to disputes between Zweiback and Tubbergen. We thus affirm the district court's order denying Tubbergen's motion to compel arbitration.

Affirmed.

Wright, Miller-Lerman, and Funke, JJ., not participating.

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[16] See *RFD-TV v. WildOpenWest Finance*, 288 Neb. 318, 849 N.W.2d 107 (2014) (where appellees were not signatories to agreement, appellant failed to make prima facie showing appellees were subject to arbitration clause).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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In re Interest of Zachary B., a child under 18 years of age. State of Nebraska, appellee, v. Zachary B., appellant.

907 N.W.2d 311

Filed March 2, 2018. No. S-17-466.

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. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
4. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
5. **Constitutional Law: Minors.** Nebraska law as reflected in Neb. Rev. Stat. § 43-251.01(7) (Reissue 2016) recognizes that a juvenile has an essential legal right, and therefore a substantial right, to remain in his or her home.
6. **Final Orders: Appeal and Error.** In analyzing whether a substantial right was affected by a court order, it is not enough that the right itself be substantial, the effect of the order on that right must also be substantial.

7. **Final Orders.** Whether the effect of an order is substantial depends on whether it affects with finality the rights of the parties in the subject matter.
8. **Final Orders: Minors: Appeal and Error.** Orders which temporarily suspend a juvenile's right to stay in the home for a brief period of time and do not purport to determine the juvenile's placement with finality do not affect a substantial right and are therefore not appealable.

Appeal from the Separate Juvenile Court of Lancaster County: Reggie L. Ryder, Judge. Appeal dismissed.

Joe Nigro, Lancaster County Public Defender, and Sarah Safarik for appellant.

Joe Kelly, Lancaster County Attorney, and Margeaux K. Fox for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Zachary B., a juvenile, appeals the order of the separate juvenile court of Lancaster County which ordered that he be removed from his family home and placed in Boys Town. Because the juvenile court's order was not a final order, we dismiss this appeal for lack of jurisdiction.

STATEMENT OF FACTS

In March 2016, the juvenile court adjudicated Zachary, who was born in April 2000, to be a juvenile as defined by Neb. Rev. Stat. § 43-247(3)(b) (Supp. 2015). Zachary admitted to the State's charge that he had been truant from school between the dates of August 12 and December 15, 2015. In June 2016, Zachary was placed on probation for a period of 15 months, with placement in the family home. The court ordered that Zachary's probation was subject to certain terms and conditions, including, inter alia, that he "[a]ttend school regularly . . . without truancy or suspension . . . ."

In January 2017, the State moved to revoke Zachary's probation. The State alleged that he had violated conditions of his probation by failing to attend school regularly and by failing to cooperate with services arranged by his probation officer. Zachary admitted to the violations at a hearing held February 24. In an order entered after the hearing, the juvenile court found Zachary's admission to be freely, voluntarily, and knowingly made and it found that a factual basis existed for his admission; however, the juvenile court deferred "ruling on whether or not to revoke [Zachary's] probation pending the completion of an updated predisposition report." The court continued the case to April 12.

After the hearing on April 12, 2017, the juvenile court entered an order which stated that "[d]isposition was continued for good cause." The court found that since the time Zachary was placed on probation in June 2016, "numerous services have been provided to the family, including in-home counseling and tracker services," but that "[d]espite those efforts, [Zachary] has not been attending school, despite his family's belief that he has." The court found that Zachary had missed at least 131 of the 152 scheduled days of the current school year and that when he did not go to school, he stayed home. The court also found that the services that had been provided had been "unsuccessful due to lack of cooperation by [Zachary] and/or his family" and that no services had been identified that would "change the dynamics within the home."

The court then found that "[a]ll relevant community-based services have been utilized and exhausted to assist [Zachary] and his family." The court further found that "[m]aintaining [Zachary] in the home is not only contrary to his health, safety, and welfare, but it presents a significant risk of harm . . . with regards to his education and his future" and that if Zachary remained in the home, "he will not attend school and he will never graduate high school." Although the court did not cite the statute, it appears that these findings were prompted by

Neb. Rev. Stat. § 43-251.01 (Reissue 2016), which provides in relevant part:

> All placements and commitments of juveniles for evaluations or as temporary or final dispositions are subject to the following:
>
> . . . .
>
> (7) A juvenile alleged to be a juvenile as described in subdivision (1), (2), (3)(b), or (4) of section 43-247 shall not be placed out of his or her home as a dispositional order of the court unless:
>
> (a) All available community-based resources have been exhausted to assist the juvenile and his or her family; and
>
> (b) Maintaining the juvenile in the home presents a significant risk of harm to the juvenile or community.

In the April 12, 2017, order, in addition to reflecting § 43-251.01(7), the court cited Neb. Rev. Stat. § 43-286 (Reissue 2016) as authorizing the court to "continue the disposition portion of the hearing, from time to time upon such terms and conditions as the court may prescribe, and place the juvenile in a suitable family home or institution." The court determined that Boys Town was a suitable placement for Zachary and that such placement was in his best interests. The court stated that under the authority of § 43-286, it was "ordering that disposition be continued and that Zachary . . . be placed at Boys Town as soon as possible" and that he "follow the rules of Boys Town once placement takes place." The court ordered that the hearing on the motion to revoke probation was continued to June 22.

At the April 12, 2017, hearing, the court orally made the following comments regarding the effect of the order it was entering:

> I'm not entering final disposition today so this is not going to be a dispositional Order in that sense. The law does allow the Court under 43-286 to continue disposition from time to time under whatever terms and

> conditions the Court deems to be appropriate based on the evidence, and as part of that, allow the Court to place youth outside of the home. . . . I'm continuing the matter, ordering him to be placed at Boys Town as soon as possible, continuing disposition for 60 days. The family's still going to be involved in his life. The family needs to be part of his life and the goal is for him then to return home. . . . So I'm continuing the matter, ordering Boys Town, ordering Zach to follow the rules at Boys Town and we'll continue the matter for maybe 60 to 90 days and we'll address further disposition at the next hearing.

Zachary appeals the April 12, 2017, order.

ASSIGNMENTS OF ERROR

Zachary generally claims that the juvenile court erred when it ordered him to be removed from his home, and he specifically claims that there was insufficient evidence for the juvenile court to find under § 43-251.01(7) that all community-based resources had been exhausted and that maintaining him in his home presented a significant risk of harm to him or the community.

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

ANALYSIS

[2] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Id.* The State argues that the order removing Zachary from his home is not a final, appealable order, because it was not a final disposition and instead it was a temporary placement and did not affect a substantial right. In

contrast, Zachary argues that the order is appealable because it affected a substantial right and that if he is not allowed to appeal the order, he will be denied his right to a meaningful review of the order placing him outside his home if such placement is merely continued in a future disposition. We agree with the State.

[3] Neb. Rev. Stat. § 43-2,106.01(1) (Reissue 2016) gives appellate courts jurisdiction to review "[a]ny final order or judgment entered by a juvenile court . . . ." Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *In re Interest of Becka P. et al., supra*. Because neither the first type nor the third type of final orders is applicable in this case, we examine appealability under the second type. A proceeding before a juvenile court is a "special proceeding" for appellate purposes, see *id*., and therefore, in order to determine whether the April 12, 2017, order is a final order, we must determine whether the order affected a substantial right. The determination of appealability in this case, as in other juvenile cases, is a fact-intensive inquiry.

[4] A substantial right is an essential legal right, not a mere technical right. *Id*. We have recognized that the substantial right of a parent in juvenile proceedings is a parent's fundamental, constitutional right to raise his or her child. *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 861 N.W.2d 398 (2015). In this case, however, it is the juvenile himself and not a parent who is appealing the placement order.

We have recognized that as a corollary to a "parent's right to the companionship, care, custody, and management of his or her child," a child has a "reciprocal right to be raised and nurtured by a biological or adoptive parent," and we have

stated that "establishment and continuance of the parent-child relationship is the most fundamental right a child possesses." *In re Guardianship of Benjamin E.*, 289 Neb. 693, 707, 856 N.W.2d 447, 457 (2014) (Stephan, J., concurring) (citing *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004)). However, the record in this case indicates that Zachary was not being raised and nurtured by a biological or adoptive parent. Instead, Zachary was living with his aunt, and for purposes of our review, we determine that this was his "home" under § 43-251.01(7). For completeness, we note that his legal guardian was his grandmother, with whom he was not residing.

[5] With the legal principles recited above in mind, we must consider whether Zachary has an essential legal right to stay in his home, which right is independent of his right to establishment and continuance of the parent-child relationship. The issue to which Zachary assigns error in this case is the juvenile court's determination under § 43-251.01(7) that all community-based resources had been exhausted and that maintaining him in his home presented a significant risk of harm to him or the community. We note that subsection (7) was added to § 43-251.01 as part of 2015 Neb. Laws, L.B. 482, and that subsection (7) requires that a juvenile "shall not be placed out of his or her home" unless the required findings are made. The Introducer's Statement of Intent with regard to L.B. 482 indicated that the intent of the bill was "to ensure that juveniles charged with status offenses [including truancy] are not treated like criminals" and to "prevent kids charged with . . . truancy from being . . . placed in out of home care unless certain factors are present." Judiciary Committee, 104th Leg., 1st Sess. (Feb. 25, 2015). We determine that Nebraska law as reflected in § 43-251.01(7) recognizes that a juvenile has an essential legal right, and therefore a substantial right, to remain in his or her home.

[6,7] Having determined that a substantial right of Zachary's was at issue in this case, we need to determine whether the

April 12, 2017, order affected that right within the meaning of § 25-1902(2). In analyzing whether a substantial right was affected by a juvenile court order, we have stated that it is not enough that the right itself be substantial, the effect of the order on that right must also be substantial. See *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017). We further stated that whether the effect of an order is substantial depends on whether it affects with finality the rights of the parties in the subject matter. *Id*.

In juvenile court cases, we have observed that whether an order affects a substantial right of a parent is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed. See *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017). We stated in such cases that orders which temporarily suspend a parent's custody, visitation, or education rights for a brief period of time do not affect a substantial right and are therefore not appealable. We believe that it is prudent to apply a similar analysis here where the focus is on the juvenile's right to remain in his or her home.

[8] As is evident from the foregoing, the substance of an order placing a juvenile outside his home affects the juvenile's right to stay in the home; however, in determining whether a substantial right has been affected for final order purposes, we must also consider the length of time the juvenile may reasonably be expected to be deprived of that right. Similar to our holding with regard to orders that suspend a parent's rights, we hold that orders which temporarily suspend a juvenile's right to stay in the home for a brief period of time and do not purport to determine the juvenile's placement with finality do not affect a substantial right and are therefore not appealable.

Zachary notes that by virtue of the introductory sentence of § 43-251.01, the requirements of § 43-251.01(7) apply to all placements of juveniles, whether temporary or final

dispositions. Zachary contends that because the requirements must be met in temporary as well as final dispositions of juveniles, even a temporary order has a substantial effect on a juvenile's rights. We do not agree.

We recognize that the requirements of § 43-251.01(7) apply to a temporary as well as a final disposition and that therefore, a juvenile court must make the required findings before it makes a temporary placement. It does not necessarily follow that the temporary order is appealable.

To determine appealability, we must determine whether the April 21, 2017, order which temporarily suspended Zachary's right to stay in his home for a brief period of time affected that right with finality and had a substantial effect on that right. We note in this regard we have recognized that as a general matter, a juvenile court has continuing authority to change the custody or care of a juvenile under its jurisdiction when doing so is in the juvenile's best interests, but that such ability to potentially change a placement at some future point "has no bearing on whether [a specific placement] order is final and appealable." *In re Interest of Karlie D.*, 283 Neb. 581, 587, 811 N.W.2d 214, 221 (2012). We cited this proposition in *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 626, 861 N.W.2d 398, 404 (2015), when we determined that an order was not temporary where the "order gave no indication that the court would revisit this issue prior to the next review hearing scheduled . . . approximately 6 months in the future."

In contrast to *In re Interest of Cassandra B. & Moira B.*, in this case, the court indicated that it intended to revisit Zachary's placement more immediately and continued the disposition for 60 days. In the April 12, 2017, order, the court stated it was continuing disposition of the matter to June 22 and that it was making the placement pursuant to § 43-286, which authorized the court to continue disposition from time to time and place the juvenile in a suitable family home or institution. The language of the order is reinforced by the

court's statements at the hearing, in which the court indicated that it had authority under § 43-286, that it was not entering final disposition, that it was placing Zachary at Boys Town and continuing disposition for 60 days, that it would address further disposition at that next hearing, and that the goal was for Zachary to return to his home.

Thus, in the order and the associated comments at the hearing, the juvenile court in the present case made clear that it intended the April 12, 2017, order to be temporary in nature and that it planned to revisit the issue of an appropriate placement for Zachary at the June 22 hearing. Cf. *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017) (concluding that order was not temporary and therefore was appealable, because neither language of order nor court's remarks on record denoted temporary interruption of parents' rights). The order did not substantially affect Zachary's right to home placement, and it was not a final order under § 25-1902(2).

CONCLUSION

Because the April 12, 2017, order is not a final order, we do not have jurisdiction of this appeal. Accordingly, we dismiss the appeal for lack of jurisdiction.

Appeal dismissed.

Wright, J., not participating.

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

In re Interest of Dana H., a child under 18 years of age. State of Nebraska, appellee, v. Dana H., appellant.

907 N.W.2d 730

Filed March 2, 2018. No. S-17-612.

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. **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.
3. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Juvenile Courts: Final Orders: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
6. **Final Orders: Words and Phrases: Appeal and Error.** A substantial right is an essential legal right, not a mere technical right. But, for purposes of appeal, it is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.
7. **Minors: Proof.** The exhaustion requirement of Neb. Rev. Stat. § 43-251.01(7)(a) (Reissue 2016) demands evidence establishing that

no other community-based resources have a reasonable possibility for success or that all options for community-based services have been thoroughly considered and none are feasible.

8. ____: ____. The requirement of Neb. Rev. Stat. § 43-251.01(7)(b) (Reissue 2016) of a significant risk of harm to a juvenile is satisfied by a showing of a reasonable likelihood that the juvenile will suffer a material or tangible detriment.

Appeal from the Separate Juvenile Court of Lancaster County: Linda S. Porter, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Mark D. Carraher for appellant.

Joe Kelly, Lancaster County Attorney, and Maureen E. Lamski for appellee.

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

Cassel, J.

I. INTRODUCTION

Dana H. timely appeals from two interim juvenile court orders, one dictating an out-of-home placement and another continuing it. The appeal presents two issues. First, was it taken from a final order? It was, because the placement order substantially affected a substantial right for an indefinite duration. Second, did the placement orders comply with the statutory requirements of (1) exhaustion of "[a]ll available community-based resources"[1] and (2) "significant risk of harm to the juvenile or community"[2] from maintaining in-home placement? After interpreting the statute, we conclude the placement complied with both requirements. Therefore, we affirm.

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[1] Neb. Rev. Stat. § 43-251.01(7)(a) (Reissue 2016).

[2] § 43-251.01(7)(b).

II. BACKGROUND

In October 2014, the State filed a supplemental petition alleging that as a juvenile, Dana unlawfully possessed a switchblade knife in violation of a city ordinance. The separate juvenile court found the allegations to be true by proof beyond a reasonable doubt and determined that Dana was a juvenile as defined by Neb. Rev. Stat. § 43-247(1) (Supp. 2015). Dana unsuccessfully appealed his adjudication, and no disposition order was entered.[3]

While the appeal was pending, the State filed a second supplemental petition alleging that Dana was habitually truant from school. Dana entered a plea of no contest, and the separate juvenile court found the allegations to be true by proof beyond a reasonable doubt. Final disposition on the second supplemental petition was consolidated with disposition of the supplemental petition. The court continued the matter and entered interim orders.

The court entered numerous successive interim orders, continuing prior orders and requiring further in-home services to Dana and his parents, with whom he resided. After the in-home services proved ineffective, the court ordered placement at Omaha Home for Boys as soon as placement was available. It specifically found that reasonable efforts were made and all available community resources expended to maintain Dana in his home and that it would be contrary to Dana's welfare to remain in the home due to his refusal to attend school or cooperate with the offered in-home services. The juvenile court continued this interim order and continued the dispositional hearing.

Dana appealed, and we moved the case to our docket.[4]

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[3] See *In re Interest of Dana H.*, No. A-15-246, 2015 WL 7733998 (Neb. App. Dec. 1, 2015) (selected for posting to court website).

[4] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

III. ASSIGNMENTS OF ERROR

Dana assigns, restated, that the juvenile court erred when it ordered him to be removed from his family home when there was insufficient evidence that all community-based resources had been exhausted and that maintaining him in his family home presented a significant risk of harm to him or the community.

IV. 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.[5]

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[6]

V. ANALYSIS

1. Jurisdiction

[3] The State argues that the interim orders providing for placement of Dana in a group home were not final, appealable orders. In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[7]

Our opinion in *In re Interest of Zachary B.*[8] accurately sets forth the analysis for the finality of orders in juvenile court proceedings. And as discussed in that case, it is necessarily a fact intensive inquiry.

[4] Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal

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[5] *In re Interest of Lilly S. & Vincent S.*, 298 Neb. 306, 903 N.W.2d 651 (2017).

[6] *In re Interest of Zachary B., ante* p. 187, 907 N.W.2d 311 (2018).

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

[8] *In re Interest of Zachary B., supra* note 6.

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.[9] Here, only the second type could apply.

[5,6] A proceeding before a juvenile court is a "special proceeding" for appellate purposes.[10] And a substantial right is an essential legal right, not a mere technical right.[11] But, for purposes of appeal, it is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[12]

Here, our analysis differs somewhat from the situation in *In re Interest of Zachary B.* There, because the juvenile was not residing with a parent, the juvenile court's interim order affected only a purely statutory right to remain in his home. Moreover, the order's effect upon the right was not substantial.[13] Here, the same statutory right applied. But because Dana was residing with his parents, a constitutionally protected right also applied.[14] And the situation here also differed in that the effect of the order on those rights was substantial.

In this regard, we are guided in our analysis by our decision in *In re Interest of Becka P. et al.*[15] In that case, we reviewed the language of a juvenile court's orders appointing an educational surrogate and the court's remarks on the record to find an appealable order where there was no limit on the duration or scope of the educational surrogate's appointment. Here, the

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[9] *In re Interest of Becka P. et al., supra* note 7.

[10] *Id.*

[11] See *id.*

[12] See *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

[13] See, § 43-251.01(7); *In re Interest of Zachary B., supra* note 6.

[14] See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

[15] *In re Interest of Becka P. et al., supra* note 7.

juvenile court's remarks likewise indicated no limit on the duration of the out-of-home placement.

Theoretically, the juvenile court could change its mind about placement upon entering a dispositional order. But the court stated that it wanted "to make sure that [Dana is] settled into the program before we enter final disposition." This demonstrated that it intended the order to be of indefinite duration and to be continued in the final disposition. Indeed, the court's record reveals a practice of simply continuing or modifying prior interim orders, by continuing the dispositional hearing 12 times over the course of a year before it entered the orders at issue.

Evidence of the average length of placements at the Omaha Home for Boys provides little help in our analysis. The record establishes that the average length of stay was anywhere between 6 to 14 months. Six months might suggest a mere temporary effect, but an out-of-home placement of 14 months would substantially affect Dana's right to reside in his family home with his parents. We cannot say that the order contemplated only a temporary, short-term placement.

Because the effect of the juvenile court's order authorizing placement with the Omaha Home for Boys appears to be of indefinite duration and significantly affects a substantial right, it was a final, appealable order under § 25-1902. We now proceed to consider the merits of the error assigned on appeal.

2. Merits

Dana assigns that the juvenile court erred in removing him from his family home. He argues that the relevant statutory requirements were not met, because there was insufficient evidence that all community-based resources had been exhausted and that maintaining him in his family home presented a significant risk of harm to him or the community. After a review of the statute and the record, we disagree.

(a) Exhaustion of All Available Community-Based Resources

The key subsection provides:

> A juvenile alleged to be a juvenile as described in subdivision (1), (2), (3)(b), or (4) of section 43-247 shall not be placed out of his or her home . . . unless:
>
> (a) All available community-based resources have been exhausted to assist the juvenile and his or her family; and
>
> (b) Maintaining the juvenile in the home presents a significant risk of harm to the juvenile or community.[16]

The interpretation of this particular statute is an issue of first impression. But in an earlier case,[17] we considered a similar statutory requirement. There, the statute allowed for the commitment of a juvenile to a youth rehabilitation and treatment center—a more restrictive placement than the one at issue here—only after the juvenile has exhausted "all levels of probation supervision and options for community-based services."[18]

This comparable requirement "[did] not imply that a juvenile court must ensure that every conceivable probationary condition has been tried and failed."[19] Instead, the statute required a careful review of the juvenile's file and record, after which the Office of Probation Administration must report "whether any such untried conditions of probation or community-based services have a reasonable possibility for success or that all levels of probation and options for community-based services have been studied thoroughly and that none are feasible."[20]

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[16] § 43-251.01(7).

[17] *In re Interest of Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014).

[18] Neb. Rev. Stat. § 43-286(1)(b)(ii) (Supp. 2013).

[19] *In re Interest of Nedhal A., supra* note 17, 289 Neb. at 716, 856 N.W.2d at 569.

[20] *Id.*

[7] We apply the same interpretation to the statute before us. The exhaustion requirement of § 43-251.01(7)(a) demands evidence establishing that no other community-based resources have a reasonable possibility for success or that all options for community-based services have been thoroughly considered and none are feasible. The evidence in the record satisfied this requirement.

The juvenile probation officer assigned to work with Dana testified that Dana had been under probation supervision for several years without improving his school attendance. The officer testified that Dana had not cooperated with "tracker services" or evening reporting services and had minimally cooperated with the provided intensive family preservation services. He testified that there were no other appropriate or necessary services available to address Dana's school attendance issues. And although Dana argues that there were other in-home community services available, the record demonstrates that similar services had not been successful.

In the same way as in the earlier case, we decline to interpret § 43-251.01(7) to require services that have already been proven to be unsuccessful. The record establishes that other options for community-based services were thoroughly considered but deemed inappropriate or unnecessary. Accordingly, we find that the available community-based resources were "exhausted" within the meaning of the statute.

(b) Significant Risk of Harm

Regarding the second requirement, Dana argues that he did not pose a significant risk to the community or to himself and that his truancy did not amount to a significant risk of harm to himself. The State did not argue that Dana posed a significant risk of harm to the community. But we disagree with Dana's argument that his behavior posed no significant risk of harm to himself. He interprets "harm" too narrowly and disregards the juvenile court's authority and statutory duty to issue orders in the child's best interests.

[8] We understand "harm" to encompass not only physical injury and hurt, but also any "material or tangible detriment."[21] Thus, the requirement of § 43-251.01(7)(b) of a significant risk of harm to a juvenile is satisfied by a showing of a reasonable likelihood that the juvenile will suffer a material or tangible detriment. Here, the juvenile court found Dana to be at serious risk of harm and detriment due to his refusal to attend school and develop basic life skills while living in the family home. This finding is consistent with the public policy behind the compulsory education statutes[22] and the juvenile court's jurisdiction to intercede where a juvenile is habitually truant or otherwise has his or her educational needs neglected by a parent or guardian.[23]

Before ordering out-of-home placement, the juvenile court made the correct statutory findings. These findings were supported by the evidence. Upon our de novo review, we find no merit to Dana's arguments.

VI. CONCLUSION

For the reasons set forth above, the orders of the juvenile court are affirmed.

Affirmed.

Wright, J., not participating.

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[21] Black's Law Dictionary 832 (10th ed. 2014) (defining "harm").

[22] See Neb. Rev. Stat. § 79-201 et seq. (Reissue 2014).

[23] See *In re Interest of Becka P. et al., supra* note 7 (finding juvenile court had statutory authority to appoint educational surrogate to direct education of children within meaning of § 43-247(3)(a)). See, also, *In re Interest of Laticia S.*, 21 Neb. App. 921, 844 N.W.2d 841 (2014) (finding juvenile at risk for harm and within meaning of child neglect statute due to missing school).



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Sonia Becher, appellee and cross-appellant, v. Mark A. Becher, appellant and cross-appellee.

908 N.W.2d 12

Filed March 9, 2018. Nos. S-16-054, S-16-793.

1. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
2. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
3. **Appeal and Error.** Generally, a party cannot complain of error which the party has invited the court to commit.
4. **Verdicts: Evidence: Appeal and Error.** The recommended factual findings of a special master have the effect of a special verdict, and the report upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence.
5. **Trial: Judgments.** Neb. Rev. Stat. § 25-1131 (Reissue 2016) does not require a district court reviewing a referee's decision to make specific findings.
6. **Statutes.** To the extent there is a conflict between two statutes on the same subject, the specific statute controls over the general.
7. **Child Custody: Visitation: Courts.** A trial court has an independent responsibility to determine questions of custody and visitation of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties.
8. **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.

9. **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.
10. **Property Division.** With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance.
11. **Modification of Decree: Divorce: Child Custody.** If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.
12. **Waiver: Appeal and Error.** Whether a party waived his or her right to appellate review is a question of law.
13. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
14. **Estoppel.** The doctrine of equitable estoppel is applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he or she has acquiesced or of which he or she has accepted any benefit.
15. **Divorce: Judgments: Waiver: Appeal and Error.** A spouse who accepts the benefits of a divorce judgment does not waive the right to appellate review under circumstances where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse was entitled as a matter of right to the benefits accepted such that the outcome of the appeal could have no effect on the right to those benefits, or the benefits accepted are pursuant to a severable award which will not be subject to appellate review.
16. **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 is reviewed for abuse of discretion.
17. **Courts: Restitution: Contempt.** Through its inherent powers of contempt, a court may order restitution for damages incurred as a result of failure to comply with a past order.

18. **Contempt.** Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party.

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, Steven D. Burns, Judge. Judgment of Court of Appeals in No. S-16-054 affirmed in part, and in part reversed and remanded with directions.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge, and Karen Flowers, Judge, Retired. Judgment in No. S-16-793 affirmed.

David P. Kyker for appellant in Nos. S-16-054 and S-16-793.

Brad Sipp for appellant in No. S-16-054.

Sally A. Rasmussen, of Mattson Ricketts Law Firm, for appellee.

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

Cassel, J.

I. INTRODUCTION

These two appeals, which have been consolidated in this court, stem from marital dissolution proceedings. One challenged the district court's decree, and is before us on further review of a Nebraska Court of Appeals' decision.[1] Primarily, we disagree with the Court of Appeals' determination that a district court must state specific findings in order to set aside or modify a referee's report authorized by chapter 25 of the Nebraska Revised Statutes (Chapter 25)[2] as clearly against the weight of the evidence. In this appeal, we affirm in part,

[1] *Becher v. Becher*, 24 Neb. App. 726, 897 N.W.2d 866 (2017).

[2] See Neb. Rev. Stat. §§ 25-1129 to 25-1137 (Reissue 2016) (authorizing trial by referee).

and in part reverse and remand with directions. The assigned errors in the second appeal, flowing from contempt proceedings, lack merit. In that appeal, we affirm.

II. BACKGROUND

1. Appeal No. S-16-054

Mark A. Becher and Sonia Becher were married for 21 years before Sonia filed a complaint for dissolution of marriage in 2013. Because they could not agree to the valuation and division of their vast marital estate or to the award of child custody, child support, alimony, and attorney fees and costs, they agreed to have these issues tried before a court-appointed referee. The consent cited § 25-1129 et seq.

(a) District Court Proceedings

After a 14-day trial, the referee submitted a report describing its findings of fact on uncontested issues and its "analysis and recommendations" which are set forth in more detail below. Both parties initially filed exceptions to the report, but Mark later withdrew his. Therefore, only Sonia's exceptions and the voluminous record produced at trial were submitted to the district court on review of the referee's report.

The district court entered a final decree in December 2015 in which it adopted some of the referee's factual findings and recommendations and set forth its own findings and conclusions on other issues. Specific findings and conclusions are discussed in our analysis.

(b) Appeal to Court of Appeals

Mark timely appealed and challenged the district court's review and consideration of the referee's report. He assigned error to certain findings of the court regarding the classification, valuation, and division of the parties' assets and debts; custody and parenting time; child support; alimony; and attorney fees. Sonia cross-appealed and assigned error to the court's allocation of holiday parenting time and its failure to classify certain property as nonmarital.

The Court of Appeals found several of Mark's assigned errors had been waived pursuant to the acceptance of benefits doctrine and for failure to take exception to the referee's report. After concluding that the majority of the issues were preserved for appeal, it addressed the remaining assigned errors concerning the district court's revisions of the referee's report.

The Court of Appeals reviewed Nebraska precedents which generally provided that a referee's findings are treated like a special verdict and can be set aside only where it is "'clearly against the weight of the evidence.'"[3] However, the court also relied on a case from the District Court of Appeal of Florida[4] to find that a trial court must *explicitly determine* that a referee's findings are clearly against the weight of the evidence before setting aside or modifying a referee's report. With this new standard, the Court of Appeals concluded that the district court failed to apply the correct standard of review. The Court of Appeals then vacated those portions of the decree where the district court made findings and conclusions that were inconsistent with the referee's report and modified it to incorporate the findings and conclusions of the referee.[5]

We granted Mark's and Sonia's petitions for further review to address the correct standard of review owed to the findings and recommendations of court-appointed referees.

2. Appeal No. S-16-793

While the first appeal was pending before the Court of Appeals, Mark and Sonia each filed cross-motions for orders

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[3] *Brown v. O'Brien*, 4 Neb. 195, 198 (1876). See, also, *Mid America Agri Products v. Rowlands*, 286 Neb. 305, 835 N.W.2d 720 (2013) (reviewing recommended findings of special master appointed by Nebraska Supreme Court); *Larkin v. Ethicon, Inc.*, 251 Neb. 169, 556 N.W.2d 44 (1996) (reviewing recommended findings of special master appointed by Nebraska Supreme Court); *Hodges v. Graham*, 71 Neb. 125, 98 N.W. 418 (1904); *Gibson v. Gibson*, 24 Neb. 394, 39 N.W. 450 (1888).

[4] *Kalmutz v. Kalmutz*, 299 So. 2d 30 (Fla. App. 1974).

[5] *Becher v. Becher, supra* note 1.

to show cause, alleging numerous violations of the district court's decree. Because the parties contest only a few of the findings of contempt, only those allegations and findings relevant to this appeal are set forth.

Sonia alleged that Mark entered her residence uninvited, caused damage to the residence, and removed personal property that was not awarded to him under the decree. She further alleged that he repeatedly entered one of her commercial buildings without authorization, caused damage to the property, and removed property from the building that was not awarded to him under the decree.

Mark alleged that Sonia failed to deliver certain personal property awarded to him under the decree. At the hearing, Sonia admitted to having sold certain items awarded to Mark, but maintained that several of the listed items were actually awarded to her. She alleged that she did not have any of the other items of property.

The district court entered orders of contempt against both Mark and Sonia. The court did not make any findings as to whether Mark entered Sonia's home or commercial building unauthorized, caused damage to the properties, or otherwise removed property from those locations. Rather, it disposed of these allegations with a blanket denial of all other relief requested. In its order of contempt against Sonia, the court found that she willfully and contumaciously failed to comply with the decree requiring she turn over all the property listed. Instead of ordering that she turn over the property, the court entered a judgment against Sonia and required that she pay $2,500 as "compensation for the property she did not turn over."

Mark timely appealed, and Sonia cross-appealed. We moved the appeal to our docket[6] and consolidated the appeal with the appeal in case No. S-16-054 for oral argument and disposition.

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[6] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

III. ASSIGNMENTS OF ERROR

In appeal No. S-16-054, the dissolution proceeding, Mark assigns that the Court of Appeals erred in (1) finding that he waived his right to appeal the award of three commercial properties to Sonia, because he quitclaimed the deeds to Sonia in compliance with the district court's decree; (2) adopting the referee's determination of custody and parenting time instead of remanding the issues to consider new developments in the 18 months the appeal has been pending; and (3) not remanding for further hearing to conduct a complete accounting.

Sonia assigns that the Court of Appeals erred in (1) applying its standard of review and (2) concluding that the acceptance of benefits doctrine did not bar Mark's appeal as it relates to the division of property.

In appeal No. S-16-793, the civil contempt proceeding, Mark assigns that the district court (1) erred in modifying its decree of dissolution while the appeal of the decree was pending, (2) abused its discretion in ordering Sonia to pay restitution for selling or retaining personal property awarded to Mark in an amount less than the value of the property, and (3) abused its discretion and violated Mark's right to due process in refusing to permit Mark to offer evidence or otherwise rebut Sonia's evidence in support of her motion for contempt.

Sonia cross-appeals and assigns that the district court erred in failing to find Mark in contempt for (1) his unauthorized entry into Sonia's home and the damage he caused while at the home and (2) his unauthorized entry into Sonia's commercial building and the removal of property not awarded to him in the decree.

IV. ANALYSIS

1. Standard of Review of Chapter 25 Referee's Report

Sonia argues that the Court of Appeals incorrectly applied its standard of review, because it "took issue with the fact that the trial judge had not specifically stated the referee's report

(in certain, limited respects) was 'against the weight of the evidence.'"[7] We agree. In addressing this assignment of error, it is first necessary to clarify the standard of review owed to a court-appointed referee's findings. Because the referee in this case additionally made findings and recommendations as to child custody, child support, and alimony, it is also necessary to discuss the effect of the child support referee statutes[8] and the Parenting Act.[9] This requires statutory interpretation. Therefore, we begin by recalling basic guiding principles of statutory interpretation.

[1,2] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[10] It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.[11]

(a) District Court's Standard of Review

(i) Chapter 25 Referee Statutes

[3] Our civil procedure statutes have provided for trial by referee since Nebraska became a state.[12] But we have been unable to find a reported decision where this procedure has been used in a divorce case since 1888.[13] Prior to the adoption of Nebraska's no-fault divorce statute in 1972,[14] our divorce statute stated that suits for divorce "shall be conducted in the same manner as other suits in courts of equity."[15] But our

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[7] Brief for appellee in support of petition for further review at 3.

[8] Neb. Rev. Stat. §§ 43-1608 to 43-1613 (Reissue 2016 & Supp. 2017).

[9] Neb. Rev. Stat. §§ 43-2920 to 43-2943 (Reissue 2016 & Supp. 2017).

[10] *Jill B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017).

[11] *In re Guardianship of Kaiser*, 295 Neb. 532, 891 N.W.2d 84 (2017).

[12] See Rev. Stat. §§ 299 to 306 (1867).

[13] See *Gibson v. Gibson, supra* note 3.

[14] See 1972 Neb. Laws, L.B. 820.

[15] Neb. Rev. Stat. § 42-307 (Reissue 1968).

current divorce statutes contain no such language. It is an open question whether the Legislature intended the Chapter 25 referee provisions to apply to a dissolution action. But even if doing so was error, it was one invited by the parties. Generally, a party cannot complain of error which the party has invited the court to commit.[16] Thus, we assume that a Chapter 25 referee may be appointed in a dissolution action, and turn to the specific issue presented here.

Section 25-1131 provides the relevant standard of review for a general court-appointed referee's findings:

> The trial before referees is conducted in the same manner as a trial by the court. . . . They must state the facts found and the conclusions of law, separately, and their decision must be given, and may be excepted to and reviewed in like manner. . . . *When the reference is to report the facts, the report has the effect of a special verdict*.

(Emphasis supplied.) By its plain language, a Chapter 25 referee's *factual findings* are entitled to some deference. This is in line with our historical standard of review for the recommended findings of special masters appointed by this court pursuant to § 25-1129.[17] But without similar language limiting the district court's review of a referee's *conclusions or recommendations*, we decline to read such language into the statute. Therefore, we conclude that the district court owed no deference to the referee's conclusions or recommendations.

[4] Our case law establishes that the recommended factual findings of a special master have the effect of a special verdict, and the report upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence.[18] The recommended factual findings of the referee were entitled to the same treatment.

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[16] *Burcham v. Burcham*, 24 Neb. App. 323, 886 N.W.2d 536 (2016).

[17] See cases cited *supra* note 3 and accompanying text.

[18] See, e.g., *Mid America Agri Products v. Rowlands, supra* note 3.

[5] But the Court of Appeals went further. It reasoned that because the district court did not make an explicit determination on the record that the findings were against the clear weight of the evidence, it did not give deference to recommended factual findings.[19] However, § 25-1131 does not require a district court reviewing a referee's decision to make specific findings. Our divorce statutes do not require specific findings in the division of property,[20] except a finding whether a property settlement agreement is or is not unconscionable.[21] That is not to say that specific findings are not helpful. In some instances, we have stated that they would have been.[22] But even where our civil procedure code mandates specific findings, it does so only upon a party's request.[23] Our case law teaches that unless a statute requires specific findings or we mandated them as a matter of case law, explicit findings are not required.[24] Because nothing in the plain language of § 25-1131 requires such explicit findings, a district court may implicitly find that a referee's findings are against the clear weight of the evidence.

(ii) Child Support Referee Statutes

Having determined the correct standard of review for a referee's factual findings, we must now harmonize the apparently conflicting standard espoused in the child support referee statutes.

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[19] *Becher v. Becher, supra* note 1.

[20] See Neb. Rev. Stat. §§ 42-365 and 42-366 (Reissue 2016).

[21] See § 42-366(2) to (4).

[22] See, e.g., *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006).

[23] See Neb. Rev. Stat. § 25-1127 (Reissue 2016).

[24] See, e.g., *State v. Rogers*, 297 Neb. 265, 899 N.W.2d 626 (2017) (specific factual findings not required to justify sentence even where factors are enumerated by statute); *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010) (specific finding not required in creating parenting plan under Parenting Act); *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003) (encouraging but not requiring specific findings on record at each step of *Batson* challenge).

[6] The child support referee statutes allow a trial court to refer a case involving the establishment, modification, enforcement, and collection of child, spousal, or medical support and protection orders to a court-appointed child support referee.[25] Like Chapter 25 referees, child support referees must submit a written report containing findings of fact and recommendations to the trial court, which may be excepted to by the parties.[26] But, the trial court owes no deference to these findings and recommendations and "may accept or reject all or any part of the report and enter judgment *based on the court's own determination*."[27] This necessarily conflicts with the Chapter 25 referee statutes. To the extent there is a conflict between two statutes on the same subject, the specific statute controls over the general.[28] Accordingly, the standard of review for the findings and recommendations of child support referees directs the district court's review of findings and recommendations on the issues of child support, including payment of reasonable education expenses,[29] and spousal support or alimony.

(iii) Parenting Act

[7] The referee's report also included recommended findings of fact related to child custody and a proposed parenting plan. These recommended findings are subject to the standard of review in § 25-1131, but the proposed parenting plan is subject to the Parenting Act. The Parenting Act provides that a court rule may provide for the parenting plan to be developed by the parties or their counsel, a court conciliation program, an approved mediation center, or a private mediator.[30] Though

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[25] See § 43-1609(1).

[26] § 43-1612(3).

[27] § 43-1613 (emphasis supplied).

[28] *SFI Ltd. Partnership 8 v. Carroll*, 288 Neb. 698, 851 N.W.2d 82 (2014).

[29] Neb. Rev. Stat. § 42-369(3) (Reissue 2016).

[30] § 43-2929(1).

it does not specifically provide that a court-appointed referee may propose a parenting plan, no one has challenged the referee's authority to propose a parenting plan. But, regardless of the referee's authority, a trial court has an independent responsibility to determine questions of custody and visitation of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties.[31]

A court is required to review a parenting plan and determine if it meets the requirements of the Parenting Act and if is in the best interests of the minor child or children. If the parenting plan lacks any of the elements required by the act or is not in the child's best interests, the court shall modify and approve the parenting plan as modified, reject the parenting plan and order the parties to develop a new parenting plan, or reject the parenting plan and create a parenting plan that meets all the required elements and is in the best interests of the child.[32] However, if the court rejects a parenting plan, it must provide written findings as to why the parenting plan is not in the best interests of the child.[33]

This multiplicity of review standards counsels against using Chapter 25 referees routinely in dissolution actions. And it may explain why 130 years have passed since the last reported decision documenting its use.

(b) Appellate Court
Standard of Review

[8] Although the district court's review of the referee's report was necessarily complicated by the effect of these different statutes, the standard of review on appeal remains the same. In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has

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[31] See *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[32] § 43-2935(1).

[33] See § 43-2923(4).

been an abuse of discretion by the trial judge.[34] This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.[35]

[9] 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.[36] 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.[37] In this case, the appellate court would give weight to the fact that the court-appointed referee heard and observed the witnesses and accepted one version of the facts rather than another.

(c) Application of Standard of Review

Because the Court of Appeals did not correctly apply its standard of review, we must review the district court's decree for an abuse of discretion, keeping in mind the multifaceted standard of review that the district court was to apply to the referee's report.

The Court of Appeals correctly concluded that Mark waived any challenge where the district court came to the same conclusion as a referee, because he withdrew his exceptions to the referee's report. Therefore, we limit our review to those instances where the Court of Appeals modified the district court's decree to incorporate the referee's findings and recommendations. Though Mark filed a motion to strike the argument in Sonia's supplemental brief related to this assignment of error, we overrule the motion.

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[34] *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

[35] *Id.*

[36] *Id.*

[37] *Id.*

(i) Division of Marital Estate

a. Classification of Nonmarital Property

During the parties' marriage, Sonia's father gave her monetary gifts totaling over $1.7 million. Both the referee and the district court determined that the monetary gifts were not traceable to identifiable assets with two exceptions—the gift used to purchase the West O Development/Dollar General building and the gift used to pay off the mortgage on the marital home.

i. West O Development/ Dollar General Building

The West O Development/Dollar General building was purchased by Sonia and her sister using an $825,000 gift from their father. Later, Sonia purchased her sister's interest in the building with a $500,000 loan on the building and $25,000 from a savings account. Additional money was put into the property for repairs and improvements. The referee determined the $825,000 gift did not retain its status as a gift, because the equity in the building was encumbered by loans in order to pay the sister back and money generated during the marriage was invested into the building for repairs.

The district court disagreed with the referee's determination and found that "[t]here is no evidence of any marital funds being used for the purchase or continued operation of [the property]." Because the rents and gifts from Sonia's father exceeded the costs associated with the property, the court concluded that Mark had no claim to it. The court also noted an additional monetary gift from Sonia's father for repairs to the building which was not discussed by the referee. Therefore, the court implicitly determined that the referee's finding as to the gift status of the property was against the clear weight of the evidence and set aside the property to Sonia as nonmarital property.

The district court reviewed the evidence and concluded that no evidence supported a finding that the monetary gifts

represented by the West O Development/Dollar General building lost their gift status. Accordingly, it did not abuse its discretion when it substituted its own findings for that of the referee.

ii. Mortgage Payoff

Sonia's father made another gift to Sonia in the amount of $432,948. Of this amount, $220,300 was used to pay off the mortgage on the marital home. The remainder was placed in a certificate of deposit held in Mark's name only. Mark spent the entirety of the certificate of deposit during a period of separation, and Sonia has not challenged this expenditure.

The referee determined that the monetary gift was a gift to the marriage, or at least that it lost its status as a gift when it was applied to the marital debt. Nonetheless, it concluded that Sonia was entitled to some credit in equity and reduced the fair market value of the marital home awarded to Sonia by one-half of the payoff value ($110,150). The district court noted the same evidence, but determined that Sonia was entitled to a credit for the entire mortgage payoff ($220,300) in recognition of the gift.

[10] With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance.[38] And, there is no exception where an otherwise nonmarital monetary gift is spent on a family expense.[39] Therefore, the referee's finding that the portion of the gift spent on the mortgage payoff lost its gift status because it was applied to a marital expense was contrary to the law and against the weight of the evidence. The district court did not err in its determination that the mortgage payoff money retained its status as a gift. Even assuming that it did lose its status, it was within the district court's power in equity to give

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[38] *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

[39] See, e.g., *Mathew v. Palmer*, 8 Neb. App. 128, 589 N.W.2d 343 (1999).

credit to Sonia for one-half of the gift where Mark dissipated the other half.[40]

b. Valuation of Business Entities

The district court awarded two businesses to Mark at different values than those recognized by the court-appointed referee. The valuation of a business is a question of fact. As a result, the findings of the referee on the issue had the effect of a special verdict.

i. Sark Tile, Inc.

The referee awarded Sark Tile, Inc., to Mark at a value of $491,353 after altering the formula used in one of the expert valuations. The district court also awarded the business to Mark, but at a value of $570,000. It is apparent from the record that the district court reweighed the testimony and the evidence and used a different formula than that used by the referee. This was an abuse of discretion.

The district court effectively retried the issue, taking on the role of the fact finder, and did not engage in any analysis of whether the value accepted by the referee was against the clear weight of the evidence. Because we find, in our de novo review, that it was not against the clear weight of the evidence, Sark Tile should have been awarded at the value assigned by the referee.

ii. Lamp & Lighting of Lincoln, Inc.

The referee awarded Lamp & Lighting of Lincoln, Inc., to Mark at a value of $107,000 after altering the formula used in one of the expert valuations similar to that used in Sark Tile. The district court also awarded the business to Mark

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[40] See Neb. Rev. Stat. § 42-365 (Reissue 2016). See, also, *Parde v. Parde*, 258 Neb. 101, 108, 602 N.W.2d 657, 662 (1999) ("[i]n determining what assets constitute the marital estate and how the property should be divided, . . . Nebraska, by statute, is an equitable property distribution jurisdiction").

at a net value of $107,000 after applying a $150,000 debt to the business. However, the referee appears to have set the $150,000 debt over to Mark separate from the business valued at $107,000. After a careful review of the record, it is plain that this was done in error.

The expert valuation relied upon by the referee included the $150,000 debt in its calculation. Therefore, the referee gave credit to Mark for the $150,000 debt twice—once in arriving at the net value using the expert's formula and once in setting the $150,000 debt over to Mark in its division of the marital estate. Because the district court arrived at the same net value for Lamp & Lighting of Lincoln as the referee and did not carry over the double credit for the debt, there was no error in the district court's valuation of the business.

c. Valuation of Personal Property

The district court adopted the referee's allocation of personal property, but valued the property awarded to Sonia at $27,365 and the property award to Mark at $23,870. The referee had awarded the property to Sonia at $13,340 and the property to Mark at $21,495. It appears that the court awarded the personal property within the marital home to Sonia at the value assigned by an appraiser, reduced by the appraised values of the individual items awarded to Mark. However, the court awarded these items to Mark at the higher value Mark proposed and not the appraised value. This was an abuse of discretion.

The valuation of personal property is a question of fact, and the referee's valuations had the effect of a special verdict. The district court does not appear to have found either the appraised values or Mark's values for the personal property to be against the clear weight of the evidence, because it accepted the values assigned by both for different items of property. Because the referee's findings cannot be set aside unless they are against the clear weight of the evidence, the district court abused its discretion in assigning different values to the personal property awarded.

d. Separate Valuation of Shipping Containers

The district court separately valued the shipping containers used by Sark Tile and awarded them to Mark as personal property. However, the shipping containers were already accounted for in the referee's valuation of Sark Tile. Because the referee's valuation of Sark Tile was not against the clear weight of the evidence, the district court erred in separately valuing the shipping containers.

e. Summary

We reverse the Court of Appeals' decision to the extent that it is inconsistent with this opinion. Specifically, we find that the district court did not err in its award of the West O Development/Dollar General building to Sonia as nonmarital property, in its determination that Sonia was entitled to a credit of $220,300 against the value of the marital home in recognition of the monetary gift from her father, or in its valuation of Lamp & Lighting of Lincoln. We agree with the Court of Appeals that the district court abused its discretion by substituting its valuations of Sark Tile and the personal property awarded for those of the referee and in separately valuing the shipping containers as personal property. Accordingly, we modify the district court's marital property distribution and decrease Sonia's share of the marital estate by $14,025 (the difference between the court's value for the personal property awarded and the referee's value) and decrease Mark's share by $142,174 (the difference between the court's values for Sark Tile, the shipping containers, and the personal property awarded and the referee's values for the same).

(ii) Child Custody

The referee found that joint legal custody of all three of the parties' minor children was in their best interests. It recommended a split physical custody arrangement, with Mark having primary physical custody of the parties' son and Sonia

having primary physical custody of the parties' two daughters. Based upon the recommendations of a counselor, the proposed parenting plan did not provide a parenting schedule for the two oldest children. Parenting time with Mark for the youngest child was scheduled on alternating weekends, with one overnight on the alternating weeks.

The district court found that a split and joint custody arrangement with modifications to the proposed parenting plan designed to reduce potential conflicts was in the best interests of the children. In its decree, the court ordered that Sonia have permanent legal and physical care, custody, and control of the parties' two daughters, while Mark have permanent legal and physical care, custody, and control of the parties' son with each "subject to the rights of parenting time for the noncustodial parent as set forth in the parenting plan." However, the court-ordered parenting plan provided that the parties would share joint legal custody of all three children, with Mark having primary physical custody of the parties' son, Sonia having primary physical custody of the parties' oldest daughter, and shared joint physical custody of the parties' youngest daughter. Like the proposed parenting plan, the court-ordered parenting plan did not provide a parenting schedule for the two oldest children. It did provide a joint physical custody arrangement for the youngest child with Mark and Sonia having equal parenting time on alternating weeks.

The district court did not abuse its discretion in modifying the proposed parenting plan, because it had an independent responsibility to determine custody and parenting time according to the children's best interests.[41] And, it provided written findings of why the modifications to reduce potential conflicts were in the children's best interests. Therefore, only two issues remain.

[11] First, the parties agreed on appeal that the decree's language concerning physical custody of the youngest child was

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[41] See *supra* note 31 and accompanying text.

inconsistent with that in the parenting plan. In our review, we find that at times, the court characterizes the custody arrangement as "split and joint" and at other times, it uses language consistent with sole custody arrangements. If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.[42]

Our statutes define joint physical custody as "mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time."[43] Here, the parents' custody was awarded subject to the parenting time in the parenting plan. That plan provided that the youngest child will have "parenting time with her Father and Mother on alternating weeks, commencing on Friday after school until the following Friday after school." Summer parenting time is equally divided, with each parent having parenting time for exactly one half of the summer break. This meets the statutory definition of joint physical custody.

Second, Sonia alleged that the district court erred in allocating parenting time over the Christmas holiday. The court ordered "[e]very year the parent who does not have parenting time on Christmas Day as a result of the weekly rotation . . . shall have parenting time beginning on December 24 at noon until December 24 at 11:30 p.m." In light of the specific findings of the animosity between the parents and the difficulties of past parenting time exchanges, we do not find that the district court abused its discretion in ordering a default holiday schedule that minimizes communication between the parties and preserves the child's typical schedule.

Ultimately, the labels make little difference. The provisions of the decree adequately set forth each party's rights and responsibilities.

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[42] *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999).

[43] See § 43-2922(12).

(iii) Child Support, Private School Tuition, and Alimony

The district court made findings and conclusions concerning child support, payment of the children's private school tuition, and alimony which differed from those in the referee's report. However, because the referee's findings and recommendations on these issues are governed by the child support referee statutes, the district court was free to accept or reject any or all of the referee's findings and recommendations.[44] Our review is limited to whether the district court abused its discretion in the child support, private school tuition, and alimony ordered. Finding none, we affirm the district court's decree as it relates to these issues.

2. Acceptance of Benefits

Marks assigns that the Court of Appeals erred in applying the acceptance of the benefits doctrine to find that he waived his right to appeal the award of three commercial properties to Sonia.

(a) Additional Facts

Sonia was awarded three commercial properties in the district court's decree that the referee had recommended be awarded to Mark: "Mini Storage," the West O Development/Dollar General building, and 901 Sun Valley. Before filing an appeal, Mark moved to determine a supersedeas bond. The district court entered an order setting the supersedeas bond at $600,000 and providing that Mark would not be required to transfer any ownership interest he may have in the real estate awarded to Sonia during the pendency of any appeal if he filed the bond. However, there is nothing in the record before us or in the court's trial docket entry that shows Mark ever filed a supersedeas bond.

After filing his appeal, Mark executed quitclaim deeds conveying his interest in three commercial properties to Sonia,

[44] See § 43-1613.

refinanced loans, utilized the proceeds of rent and receipts from businesses awarded to him, and created a new corporation to hold title to properties awarded to him under the decree. Sonia then sold one of the commercial properties awarded to her in an arm's-length sale to a third party.

The Court of Appeals found that Mark had waived his right to appeal the award of the three commercial properties to Sonia, because his voluntary conveyance of the properties evidenced an intent to be bound by the decree. It applied the exception to the doctrine outlined in *Kassebaum v. Kassebaum*[45] to find that Mark had not waived his right with regard to the other issues on appeal.

(b) Standard of Review

[12,13] Whether a party waived his or her right to appellate review is a question of law.[46] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[47]

(c) Analysis

Mark argues that executing the quitclaim deeds was not an acceptance of a benefit, but, rather, was an "involuntary acceptance of a detriment."[48] We agree and conclude that the acceptance of the benefits doctrine did not apply in this instance, because Sonia—not Mark—accepted the benefits in that transaction. However, we find that Mark is nonetheless equitably estopped from challenging the award of Mini Storage.

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[45] *Kassebaum v. Kassebaum*, 178 Neb. 812, 815, 135 N.W.2d 704, 706 (1965) ("'[i]f the outcome of the appeal could have no effect on the appellant's right to the benefit accepted, its acceptance does not preclude the appeal'") (quoting 4 Am. Jur. 2d *Appeal and Error* § 253 (1962)). Accord *Liming v. Liming, supra* note 22.

[46] *Liming v. Liming, supra* note 22.

[47] *Frohberg Elec. Co. v. Grossenburg Implement*, 297 Neb. 356, 900 N.W.2d 32 (2017).

[48] Supplemental brief for appellant on petition for further review at 13.

(i) Mini Storage

[14] The doctrine of equitable estoppel is applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he or she has acquiesced or of which he or she has accepted any benefit.[49] Mark had the opportunity to supersede the divorce decree and elected not to file a supersedeas bond. He refinanced loans such that the three commercial properties were unencumbered by his debt and executed quitclaim deeds on the properties in favor of Sonia. And, at least with regard to Mini Storage, Sonia relied on Mark's actions and exercised her ownership right to sell the property to a third party. That property cannot now be recovered on appeal. Therefore, Mark waived his right to challenge Sonia's ownership of Mini Storage.

(ii) West O Development/ Dollar General Building and 901 Sun Valley

Equitable estoppel does not apply to Mark's assignment of error concerning West O Development/Dollar General building and 901 Sun Valley, because Sonia did not detrimentally rely on Mark's actions. But, Mark does not identify how the award of those properties to Sonia constituted an abuse of discretion—his argument is limited to the court's "failing to review the Referee's Report."[50] As explained above, the district court owed deference only to the referee's *factual findings* and could reach its own determinations on what to order in its decree.

Because we find no abuse of discretion in the court's award of the two commercial properties to Sonia, we affirm that part of the district court's decree.

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[49] *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

[50] Brief for appellant at 30.

(iii) Other Assignments of Error on Appeal

In applying the exception to the acceptance of the benefits doctrine to Mark's other assignments of error, the Court of Appeals reviewed each assignment to determine whether the outcome of the appeal could affect his acceptance of the related benefits. Without concluding whether this was the correct analysis, we find that another exception to the doctrine applied.

[15] A spouse who accepts the benefits of a divorce judgment does not waive the right to appellate review under circumstances where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse was entitled as a matter of right to the benefits accepted such that the outcome of the appeal could have no effect on the right to those benefits, or the benefits accepted are pursuant to a severable award which will not be subject to appellate review.[51] Sonia did not challenge Mark's right to the benefits he accepted either at trial or on appeal. Because Mark accepted only those benefits which Sonia conceded his right to, Mark did not waive his right to appellate review of his assignments of error discussed above.

3. Contempt Orders

(a) Standard of Review

[16] 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 is reviewed for abuse of discretion.[52]

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[51] *Liming v. Liming, supra* note 22.

[52] *Martin v. Martin*, 294 Neb. 106, 881 N.W.2d 174 (2016).

(b) Analysis

(i) Mark's Appeal

Mark argues that (1) the district court inappropriately modified its decree of dissolution while the appeal of the decree was pending when it ordered Sonia to pay restitution for her violation of the decree, (2) the restitution was insufficient, and (3) the court abused its discretion when it refused to permit him to offer evidence or rebut Sonia's evidence in her motion for contempt. However, Mark did not appeal from the order finding him in contempt and did not make an offer of proof for the two rebuttal witnesses he was not allowed to call. Therefore, we find that Mark failed to preserve his third argument for appeal and we address only his first two.

[17] Through its inherent powers of contempt, a court may order restitution for damages incurred as a result of failure to comply with a past order.[53] In ordering Sonia to compensate Mark for the personal property she did not turn over to him, the district court did not modify the district court decree. Instead, it ordered restitution for the loss of the personal property to which Mark was entitled. This was an appropriate remedy for a finding of contempt.

Mark further maintains that restitution was inadequate to compensate him for his loss and requests that the issue be remanded for a recalculation of the items Sonia did not turn over. Though the district court did not itemize its accounting, it is apparent that it ordered restitution in the amount that the missing personal property was initially valued when set over to Mark in the decree. The valuation was not challenged then and it cannot be challenged now on appeal. Accordingly, we find no merit to Mark's arguments on appeal.

(ii) Sonia's Cross-Appeal

Sonia cross-appealed from the order finding Mark in contempt and argues that the district court abused its discretion

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[53] *Sickler v. Sickler*, 293 Neb. 521, 878 N.W.2d 549 (2016).

when it failed to find Mark in contempt for his unauthorized entry into her residence and commercial building and the removal and destruction of property on the premises.

[18] Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party.[54] They are not instituted to provide relief for other wrongdoings by a private party where other relief is available by statute. The district court's jurisdiction over the decree did not preclude Sonia from seeking separate relief in tort for trespass and conversion. Therefore, it did not err in denying the same relief under the guise of a contempt order.

V. CONCLUSION

For the reasons stated above, we affirm in part, and in part reverse and remand case No. S-16-054 with directions that the district court is to divide the marital estate in accordance with this opinion. We affirm the orders of contempt in case No. S-16-793 in all respects.

Judgment in No. S-16-054 affirmed in part, and in part reversed and remanded with directions.
Judgment in No. S-16-793 affirmed.

Kelch, J., not participating in the decision.
Wright and Stacy, JJ., not participating.

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[54] *Id.*

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

State of Nebraska, appellee, v.
Matthew J. Kidder, appellant.
908 N.W.2d 1

Filed March 9, 2018. No. S-16-1124.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Criminal Law: Convictions: Appeal and Error.** In criminal cases, the purpose of harmless error review is to ensure convictions are not set aside for small errors or defects that have little, if any, likelihood of having changed the result of the trial.
4. **Criminal Law: Appeal and Error.** Harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.
5. **Convictions: Appeal and Error.** It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.
6. **Appeal and Error.** When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.
7. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is

not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.

8. **Trial: Evidence: Appeal and Error.** In conducting harmless error analysis, an appellate court looks to the entire record and views the erroneously admitted evidence relative to the rest of the untainted, relevant evidence of guilt.
9. **Verdicts: Evidence: Appeal and Error.** Overwhelming evidence of guilt can be considered in determining whether the verdict rendered was surely unattributable to the error, but overwhelming evidence of guilt is not alone sufficient to find the erroneous admission of evidence harmless.
10. **Evidence: Appeal and Error.** When conducting harmless error review, an appellate court may consider whether the improperly admitted evidence was cumulative and tended to prove the same point as other properly admitted evidence.
11. **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.
12. **Sentences.** A sentence validly imposed takes effect from the time it is pronounced, and any subsequent sentence fixing a different term is a nullity.
13. ____. Any attempt to modify a sentence validly imposed is of no effect, and the original sentence remains in force.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed in part, and in part vacated and remanded with directions.

Thomas C. Riley, Douglas County Public Defender, L. Robert Marcuzzo, Douglas A. Johnson, and Natalie M. Andrews for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Stacy, J.

Matthew J. Kidder appeals his convictions for first degree murder and use of a deadly weapon to commit a felony. We affirm his convictions, but find plain error in the sentence imposed on the conviction for use of a deadly weapon to commit a felony. We therefore vacate that sentence only and remand the cause with directions.

FACTS

On June 25, 2015, Jessica Nelson's mother received a telephone call advising that Nelson had not shown up for work. Her mother went to Nelson's house to check on her and discovered Nelson's body partially submerged in the bathtub, unclothed, with the water running. She was curled up in a fetal position, and one hand was clutching a cell phone charging cord. Nelson's clothes were piled in the tub near her feet. Blood was pooled under Nelson's head, and there was a ligature mark on her neck.

Police officers arrived and processed the scene as a homicide. Investigators found no point of forced entry into the home. They took photographs and collected Nelson's cell phone, the charging cord, and the clothes from the bathtub. Blood was found outside the bathroom, in the living room, and in Nelson's bedroom. Swabs were taken of the cell phone cord and the various biological substances found throughout the house. Investigators noticed Nelson's right thumbnail was bent back, so they also swabbed under her fingernails and took fingernail clippings.

An autopsy revealed bruises and abrasions on Nelson's neck, hemorrhaging in her eyes, and a ligature mark on her neck that was consistent with the cell phone cord. The cause of death was strangulation. There was also evidence Nelson had been sexually assaulted. She had a laceration and bruising in her vaginal area, as well as contusions to her head, abdomen, and bowel.

Text Messages From Kidder

Nelson's cell phone was analyzed, and detectives found what they described as "eerie" text message conversations with a telephone number later confirmed to belong to Kidder. Nelson and Kidder had known each other since childhood.

The text conversation began on February 4, 2015. The first message arranged for Kidder to shovel snow from Nelson's driveway. For the next several months, Kidder texted Nelson, often suggesting they meet up. Typically, Nelson either turned Kidder down or did not respond.

On April 16, 2015, Kidder texted saying he needed someplace to "h[a]ng out" while he waited to run an early morning errand, and he asked if he could stop at Nelson's house. Nelson agreed, but stated she would likely still be asleep and would leave the door unlocked. She told Kidder he could watch television, nap on the couch, or use the chairs outside while he waited. Later, the following text conversation occurred:

> [Kidder:] Ill admit, a little part of me wanted to run in and doggy pile you, but i didnt feel like being stabbed or beat up. Lol.
>
> [Nelson:] Lol yeah that def would've happened. Im a grouch when my sleep is interrupted unless you're [my son], then I'm less grouchy lol[.]
>
> [Kidder:] Lol.
>
> Maybe next time.
>
> [Nelson:] If you want to die.
>
> I do keep a good sized knife in my nightstand drawer.
>
> [Kidder:] Challenge accepted.
>
> . . . .
>
> We will need to lay down some ground rules though. No hair pulling, no biting. Lol.
>
> [Nelson:] Or you could just leave me alone when I'm sleeping. Save us all the hassle[.]

Kidder continued to text Nelson regularly, and some of Kidder's messages were sexual in nature. On June 19, a few

days before the murder, Kidder sent Nelson the following sequence of text messages:

> [Kidder:] Scale of feeling playful stabby to murdered on my sleep.
>
> Yeah. Trying to make a joke, and now shes mad at me. Lol.
>
> In*
>
> I figured itd be a funny "breaking the ice" joke since every other guy sends dick pics for their first or all communication and im the one who asked off
>
> the wall questions.

Nelson did not respond to these text messages; nor did she respond to the text message Kidder sent several days later, on the evening of June 24, asking, "Who's down to hang out or catch a movie saturday night?"

DNA Evidence

Forensic analysts found two DNA profiles on the cell phone cord collected from the crime scene. Nelson could not be excluded as one of the contributors, and Kidder could not be excluded as the other contributor. The probability of someone other than Nelson and Kidder being the contributors of the DNA profiles on the cell phone cord was 1 in 254 million for Caucasians, 1 in 14.3 billion for African Americans, and 1 in 1.68 billion for American Hispanics.

The swab taken from under the fingernails on Nelson's left hand revealed similar results: Two profiles were present, Nelson could not be excluded as the contributor for one, and Kidder could not be excluded as the contributor for the other. The probability of someone other than Nelson and Kidder being the contributors to the DNA found under Nelson's left fingernail was 1 in 101 million for Caucasians, 1 in 10.6 billion for African Americans, and 1 in 936 million for American Hispanics.

A mixture of DNA was found under Nelson's right thumbnail, which was bent back. Nelson could not be excluded

as the major contributor, and Kidder could not be excluded as the minor contributor. The probability of someone other than Kidder being the minor contributor was 1 in 1,550 for Caucasians, 1 in 33,330 for African Americans, and 1 in 5,800 for American Hispanics. The analyst testified that the lower probabilities were a function of the fact that only a partial DNA profile was developed.

Historical Cell Site Location Information

Detectives obtained Kidder's cell phone records from his service provider. Using historical cell site location information, detectives determined that Kidder's cell phone used a cell tower in the area near Nelson's home at 11:56 p.m. on June 24, 2015, and again at 12:02 a.m. on June 25. Almost 30 minutes later, at 12:29 a.m., Kidder's cell phone used cell towers in the vicinity of his residence.

Kidder's Statements

Several days after the murder, police interviewed Kidder. They noticed he had a cut on his hand, consistent with a fingernail. Kidder said he received the cut while working on June 24, 2015, but he did not report it to his employer. Kidder explained that he worked from 3 to 11:40 p.m. most weekdays and that he checked Facebook during his breaks. Kidder's workplace was near Nelson's house. Kidder provided police with a DNA sample and exemplar fingerprints and allowed police to download information from his cell phone.

Several weeks later, Kidder was taken to a police station for additional questioning about Nelson's murder. After waiving his *Miranda*[1] rights, Kidder was asked about Nelson and stated:

> I kinda classify women into like three stages: ones I could be friends with, ones I just want to see naked, and ones I

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

> want to sleep with. . . . [Nelson] was kinda in between I want to see her naked and no feelings . . . just because she had a nice rack. . . . She had nice boobs.

Kidder repeatedly denied visiting Nelson's home on June 24, 2015—the night of the murder. But he told police he was at her home on June 23 to help her move furniture, and he made a point of mentioning he sweated heavily on Nelson's couch and mattress. At the conclusion of the interview, Kidder was arrested for Nelson's murder.

While Kidder was in jail, he called his father. The jail call was recorded. During the call, Kidder admitted he was at Nelson's house for about 20 minutes on the night she was killed.

Kidder's Statements to Cellmate

While in jail, Kidder shared a cell with Randy Anderson for approximately 20 hours. Afterward, Anderson contacted police and offered to testify about statements Kidder made to Anderson while they were cellmates. When Anderson contacted police, he was awaiting sentencing on plea-based convictions for burglary and making terroristic threats.

At trial, Anderson testified that Kidder told him the following: On June 24, 2015, Kidder saw Nelson's Facebook post about being home alone. After getting off work around midnight, Kidder went to Nelson's home and knocked on the side door. Nelson unlocked the chain on the door and let him in. Almost immediately, Kidder somehow caused an injury to Nelson's face. She screamed, and Kidder began strangling her with his hands. As they struggled, Nelson cut Kidder's hand with her fingernail. Eventually Nelson lost consciousness. Kidder then took her to the bedroom and removed her sweatpants. Kidder did not directly admit that he sexually assaulted Nelson, but he did admit that he strangled her to death with the cell phone cord, then placed her in the bathtub and ran the water to "rins[e] DNA."

Anderson also knew several details about the crime and the crime scene before they became public knowledge. For example, Anderson knew that (1) after the murder, Kidder washed his shoes and stuffed them with newspaper to dry them; (2) Nelson had a chain lock on her door; (3) Nelson was in the fetal position in the bathtub; (4) Nelson had an L-shaped sectional couch that was cut during the assault; and (5) Nelson was wearing sweatpants the night she was killed.

Evidence From Kidder's Laptop Computer

After Kidder was arrested, police obtained a warrant to search Kidder's home. One of the items seized pursuant to the warrant was a laptop computer found in Kidder's bedroom. A few days later, police obtained a second search warrant, authorizing an examination of Kidder's laptop computer to search and copy the following data: user account information, media files such as images and videos, document files, Internet browsing history and associated cache files, email messages, and chat and instant messages.

While searching Kidder's Internet browsing history files, a forensic analyst found that Kidder's laptop computer was used to search an Internet pornography website using terms like "strangled," "forced fucked," "fucked by intruder," and "pantyhose bound." Because the searches were conducted while the laptop computer was in private browsing mode, the available history was limited. But the forensic analyst was able to determine the website was accessed between June 20 and July 17, 2015. The analyst also determined that a video titled "Psycho-Thrillers presents Waitress Kidnapped, Raped, and Strangled" had been downloaded on July 17. That video depicted a man kidnapping a waitress, forcing her to have sex at gunpoint, strangling her with a belt when she resisted, and continuing to sexually assault her after she was dead. Three other videos with similar content were also found on Kidder's laptop computer.

Motions to Suppress and Motion in Limine

Kidder moved to suppress the evidence obtained from the search of his laptop computer, arguing that neither search warrant was supported by probable cause. In addition, he argued the warrant to search the laptop computer was overbroad and insufficiently particular.

Kidder also filed a motion in limine seeking to exclude the evidence obtained from his laptop computer. He argued the evidence was hearsay, irrelevant, and unfairly prejudicial. He also argued a Neb. Evid. R. 404[2] hearing was necessary to determine the admissibility of the evidence because it involved prior bad acts.

The district court overruled the motions to suppress. It found that the search warrants were supported by probable cause or, alternatively, that either the good faith exception or the independent source doctrine applied. Regarding testimony about the Internet browsing history and violent pornography, the district court found it was admissible without a rule 404 hearing because it was "intrinsic evidence forming the factual setting of the crime or forming an integral part of the crime." The court did not permit the videos to be shown to the jury or received into evidence. But at trial, the forensic analyst was permitted, over objection, to testify about the search terms found in Kidder's Internet browsing history and to describe, in general terms, the content of the downloaded video that depicted a woman being sexually assaulted, strangled to death with a belt, then further assaulted.

Evidence of Prior Sexual Assault

The jury heard evidence that in 2008, Kidder had sexually assaulted one of his friends in her home. Kidder had gone to the woman's home, claiming to be locked out of his house.

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[2] See Neb. Rev. Stat. § 27-404 (Reissue 2016).

She let him in, and after a few minutes of talking, Kidder grabbed the woman and threw her to the ground. He got on top of her and placed his hands on her neck. She began to scream, so Kidder moved his hands to her mouth and nose, closing her airways. She briefly shoved his hands off and screamed "no," but Kidder's hands returned over her face and his grip got tighter. Eventually, she shoved Kidder's hands off again, but this time she told him "okay." Kidder then sexually assaulted the woman and left. Kidder subsequently entered a plea of no contest to a charge of attempted first degree sexual assault. The district court in the instant case ruled that evidence of the 2008 sexual assault was admissible under Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Reissue 2016). No error is assigned to this ruling on appeal.

Verdicts and Sentencing

The jury found Kidder guilty on count I, first degree murder, and on count II, use of a deadly weapon to commit a felony. The district court imposed a sentence of life imprisonment on count I. On count II, the court initially imposed a consecutive prison sentence of 50 to 50 years but, after a sidebar conference requested by defense counsel, reduced the term to 20 to 20 years. The State urges us to find plain error on this basis, so we set out the pertinent portion of the sentencing colloquy in its entirety:

> [The court:] So, it is the judgment and sentence of this Court . . . that you be imprisoned in an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of life on Count [I] and 50 to 50 years on Count [II]. Both sentences to be served consecutively. I'll give you credit of 475 days you have against that sentence.
>
> Also pursuant to Nebraska statute, you'll be required to give a sample of your DNA.
>
> Is there anything further?
>
> [Defense counsel]: Your Honor, may I approach?

> THE COURT: You may.
>
> [Defense counsel]: Thank you.
>
> (Off-the-record discussion at the bench)
>
> THE COURT: For clarification for the record, the offense date in this case is June 25th, 2015, which was two months prior to the law change. The law changed on Class [II] felonies in August of 2015, making it a one to 50. This was prior to the law change, which then brings the penalty range on the Class [II] as a 1 to 20.
>
> So, therefore, I am going to clarify and in conformance with the proper statute, the Count [II], the judgment and sentence of the Court is that you be sentenced under an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of 20 to 20, which is the maximum sentence for the law at that time. Those two sentences will [run] consecutively.

The trial court entered a sentencing order reflecting the life sentence pronounced on count I and the modified sentence of 20 to 20 years' imprisonment on count II. Kidder timely appealed his convictions.

ASSIGNMENTS OF ERROR

Kidder assigns, restated, that the district court erred in (1) overruling his motion to suppress evidence acquired as a result of seizing and searching his laptop computer and (2) overruling his motion in limine and permitting the State to offer testimony about his Internet browsing history.

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.[3] Regarding historical facts, an appellate court reviews the trial

[3] *State v. Hidalgo*, 296 Neb. 912, 896 N.W.2d 148 (2017).

court's findings for clear error.[4] But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[5]

[2] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[6]

ANALYSIS

Both of Kidder's assigned errors pertain to the admission of evidence discovered through forensic analysis of his laptop computer. He argues it was error to admit this evidence because it was obtained using search warrants that lacked probable cause and were overly broad and insufficiently particular. He also argues that a rule 404 hearing was required to determine the admissibility of such evidence.

The State counters that the search warrants were supported by probable cause and were sufficiently particular, and it argues no rule 404 hearing was necessary because the laptop computer evidence was inextricably intertwined with the charged crimes. Alternatively, the State argues that any error in admitting the evidence was harmless.

For the reasons discussed below, we agree any error was harmless and thus do not address the merits of whether the evidence was properly admitted.

Harmless Error

[3] Pursuant to Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103(1) (Reissue 2016), "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial

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[4] *Id.*

[5] *Id.*

[6] *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016), *cert. denied* 580 U.S. 1164, 137 S. Ct. 1212, 197 L. Ed. 2d 254 (2017).

right of the party is affected[.]" When it comes to evidentiary error, this statutory authority forms the foundation for this court's harmless error jurisprudence. Generally speaking, in criminal cases, the purpose of harmless error review is to ensure convictions are not set aside "'for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'"[7]

[4,5] Harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.[8] It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.[9]

[6,7] When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.[10] In other words, harmless error review looks to the basis on which the jury actually rested its verdict.[11] The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.[12]

[8-10] In conducting this analysis, an appellate court looks to the entire record and views the erroneously admitted evidence relative to the rest of the untainted, relevant evidence of guilt.[13] Overwhelming evidence of guilt can be considered

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[7] *State v. Britt*, 293 Neb. 381, 423-24, 881 N.W.2d 818, 847 (2016).

[8] *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

[9] *Id.*

[10] *Id.*

[11] *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

[12] *Id.*

[13] *State v. Britt, supra* note 7; *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014); *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

in determining whether the verdict rendered was surely unattributable to the error, but overwhelming evidence of guilt is not alone sufficient to find the erroneous admission of evidence harmless.[14] An additional consideration is whether the improperly admitted evidence was cumulative and tended to prove the same point as other properly admitted evidence.[15]

The record in this case demonstrates that any error in overruling the motion to suppress and the motion in limine was harmless. Both motions related exclusively to evidence obtained from Kidder's laptop computer. That evidence showed that sometime between June 20 and July 17, 2015, Kidder used explicit terms to search with his laptop computer for violent pornographic videos depicting acts that were similar to the manner in which Nelson was killed. We must consider this evidence relative to the rest of the evidence of Kidder's guilt.

First, there was uncontroverted physical evidence establishing Kidder's guilt. Kidder's DNA was found on Nelson's fingernails and on the cell phone cord used to strangle her. A few days after Nelson's body was discovered, Kidder was observed to have a cut on his hand consistent with a fingernail mark, and when Nelson's body was discovered, her thumbnail was bent back.

Next, there was detailed evidence of a confession. Kidder's cellmate testified that Kidder confessed to Nelson's murder. The cellmate's credibility was strengthened by the fact that he knew details about the crime and the crime scene that had not been released to the public.

Finally, in addition to the physical evidence and the confession, there was considerable circumstantial evidence establishing Kidder had both the motive and the opportunity to commit the crimes. Kidder left work shortly before the crimes

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[14] *State v. Britt, supra* note 7; *State v. DeJong, supra* note 13.

[15] *State v. Britt, supra* note 7; *State v. Trice*, 292 Neb. 482, 874 N.W.2d 286 (2016).

occurred, and cell site location information placed his cell phone in the vicinity of Nelson's home around the time she was assaulted and strangled. Kidder also admitted to his father, in a recorded telephone conversation, that he was at Nelson's house for about 20 minutes on the night of the murder. Kidder admitted to investigators he wanted to "see [Nelson] naked," and Kidder's text messages to Nelson contained sexual overtures that were either rebuffed or ignored. There was evidence that in 2008, Kidder had choked and sexually assaulted a friend after she allowed him into her home. Likewise, Nelson was a friend of Kidder's and there were no signs of forced entry into Nelson's home.

The untainted, relevant evidence of Kidder's guilt was overwhelming, and the laptop computer evidence was cumulative of other relevant evidence tending to prove motive. Thus, even if the evidence obtained from Kidder's laptop computer was erroneously admitted at trial, we find the guilty verdicts were surely unattributable to that evidence. Any error in admitting the evidence from Kidder's laptop computer was harmless beyond a reasonable doubt. We therefore reject both of Kidder's assignments of error and affirm his convictions.

Plain Error in Sentencing

The State asks that we find plain error in the sentence imposed on count II. It contends the trial court's initial sentence to a prison term of 50 to 50 years was validly imposed and took effect as soon as it was pronounced and that the court's subsequent reduction of the term to 20 to 20 years' imprisonment was a nullity. We agree.

[11] 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.[16]

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[16] *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

The judge's remarks during sentencing suggest that during an off-the-record sidebar discussion, the court was advised that the sentence it had just pronounced on count II was outside the penalty range for Class II felonies. But the sentence originally imposed was not outside the penalty range.

On count II, Kidder was found guilty of use of a deadly weapon, other than a firearm, to commit a felony.[17] At the time of Kidder's offense, and at the time of his sentencing, this crime was classified as a Class II felony,[18] punishable by a minimum of 1 year's and a maximum of 50 years' imprisonment.[19] Thus, the court's initial pronouncement on count II (imposing 50 to 50 years' imprisonment) was valid, and the question becomes whether the subsequent modification of that valid sentence was plain error.

[12,13] We have consistently applied the rule that a sentence validly imposed takes effect from the time it is pronounced,[20] and we have explained that any subsequent sentence fixing a different term is a nullity.[21] We have applied this rule to attempts to modify a valid pronouncement during the sentencing hearing[22] and to attempts to modify a valid sentence that has been put into execution.[23] Thus, any attempt

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[17] See Neb. Rev. Stat. § 28-1205(1)(a) and (b) (Reissue 2016).

[18] § 28-1205(1)(b).

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

[20] See, *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014); *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009); *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000); *State v. Kinney*, 217 Neb. 701, 350 N.W.2d 552 (1984); *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981); *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977), *overruled on other grounds, State v. Cousins, supra* note 20.

[21] *State v. Kinney, supra* note 20; *State v. Cousins, supra* note 20; *State v. Snider, supra* note 20.

[22] See, *State v. Kinney, supra* note 20; *State v. Cousins, supra* note 20.

[23] See, *State v. Clark, supra* note 20; *State v. Schnabel, supra* note 20.

to modify a sentence validly imposed is of no effect, and the original sentence remains in force.[24]

It is possible, in limited circumstances, to correct an inadvertent mispronouncement of a valid sentence before the defendant has left the courtroom,[25] but that is not the circumstance here. The district court did not mispronounce its initial sentence of 50 to 50 years' imprisonment on count II. To the contrary, it is evident from the judge's sentencing remarks that she intended to sentence Kidder to the maximum term of imprisonment authorized by the law. Because the sentence originally pronounced was valid, it took effect as soon as it was pronounced and any attempt thereafter to modify it to a term of 20 to 20 years' imprisonment was plainly erroneous and of no legal effect.

We thus vacate that portion of the sentencing order imposing a term of 20 to 20 years' imprisonment on count II and remand the cause to the district court with directions to reinstate the valid term originally pronounced on that count.

CONCLUSION

For the foregoing reasons, we reject Kidder's assignments of error and affirm his convictions. We find plain error in modifying the term of the sentence validly imposed on count II and therefore vacate that portion of the sentencing order and remand the cause to the district court with directions to reinstate the term of 50 to 50 years' imprisonment originally pronounced. In all other respects, the judgment of the district court is affirmed.

Affirmed in part, and in part vacated and remanded with directions.

Kelch, J., not participating in the decision.

Wright, J., not participating.

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[24] *Id.*

[25] See *State v. Clark, supra* note 20.

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

State of Nebraska, appellee, v. Dammon T. Haynes, appellant.

908 N.W.2d 40

Filed March 9, 2018. No. S-17-031.

1. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.
2. **Postconviction: Constitutional Law.** A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.
3. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
4. **Postconviction: Right to Counsel: Appeal and Error.** The failure of the district court to provide court-appointed counsel in a postconviction proceeding is reviewed for an abuse of discretion.
5. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.
6. **Postconviction: Sentences: Appeal and Error.** The Nebraska Postconviction Act is intended to provide relief in those cases where a miscarriage of justice may have occurred; it is not intended to be a procedure to secure a routine review for any defendant dissatisfied with his or her sentence.
7. **Postconviction: Pleas: Waiver.** The Nebraska Postconviction Act does not provide a procedure whereby the defendant can avoid the waiver inherent to a voluntary entry of a guilty plea or plea of no contest.

8. **Pleas: Waiver: Indictments and Informations: Effectiveness of Counsel: Jurisdiction.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. The only exceptions are for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction.
9. **Postconviction: Appeal and Error.** On appeal from the denial of postconviction relief without an evidentiary hearing, the question is not whether the movant was entitled to relief by having made the requisite showing. Instead, it must be determined whether the allegations were sufficient to grant an evidentiary hearing.
10. **Postconviction.** The allegations in a motion for postconviction relief must be sufficiently specific for the district court to make a preliminary determination as to whether an evidentiary hearing is justified.
11. **Postconviction: Pleadings: Proof: Constitutional Law.** In a proceeding under the Nebraska Postconviction Act, the application is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights, and the pleading of mere conclusions of fact or of law are not sufficient to require the court to grant an evidentiary hearing.
12. **Postconviction: Proof: Constitutional Law.** An evidentiary hearing must be granted when the facts alleged, if proved, would justify relief, or when a factual dispute arises as to whether a constitutional right is being denied.
13. **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.
14. **Postconviction: Effectiveness of Counsel: Proof.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
15. **Effectiveness of Counsel: Pleas.** In a plea context, deficiency depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.
16. ____: ____. The prejudice requirement in a plea context is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
17. ____: ____. In determining the prejudice component of alleged ineffective assistance of counsel in a plea context, the likelihood of the

defense's success had the defendant gone to trial should be considered along with other factors, such as the likely penalties the defendant would have faced if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case.

18. **Postconviction: Effectiveness of Counsel.** In a motion for postconviction relief, self-serving declarations that fail to allege specific facts that will be presented in an evidentiary hearing will not be sufficient on their own to raise a question of prejudice in an allegation of ineffective assistance of counsel.
19. **Postconviction: Pleas: Effectiveness of Counsel.** A motion for postconviction relief seeking to set aside a conviction pursuant to a plea on the grounds that it was the result of ineffective assistance of counsel must allege objective facts that raise a question of whether a rational defendant would have insisted on going to trial.
20. **Postconviction: Appeal and Error.** When considering whether the district court correctly denied a motion for postconviction relief without an evidentiary hearing, an appellate court will not consider factual allegations made for the first time on appeal.
21. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.
22. ____: ____: ____. The test of mental capacity to plead is the same as that required to stand trial.
23. **Postconviction: Witnesses.** A significant degree of specificity is required in postconviction motions for claims relating to potential witnesses.
24. **Right to Counsel: Effectiveness of Counsel.** A defendant representing himself or herself pro se cannot thereafter assert his or her own incompetency.
25. **Postconviction: Appeal and Error.** Plain error cannot be asserted in a postconviction proceeding to raise claims of error by the trial court.
26. **Effectiveness of Counsel: Appeal and Error.** 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.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed.

Dammon T. Haynes, pro se.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

Heavican, C.J., Cassel, Stacy, and Funke, JJ.

Heavican, C.J.

I. NATURE OF CASE

This is an appeal from the denial of postconviction relief without an evidentiary hearing or the appointment of counsel. The petitioner makes numerous arguments that his trial counsel, who also represented him on direct appeal, were ineffective. Petitioner also argues that he was sentenced to nonexistent crimes of being a habitual criminal, which he asserts resulted in void sentences. We affirm the judgment below.

II. BACKGROUND

1. Charges

Dammon T. Haynes was charged with three counts under case No. CR14-701. Count I charged him with stalking, second offense, in violation of Neb. Rev. Stat. §§ 28-311.03 and 28-311.04(2)(a) (Reissue 2008), a Class IV felony. Count II charged him with terroristic threats, in violation of Neb. Rev. Stat. § 28-311.01(1)(a) (Reissue 2008), a Class IV felony. Count III, habitual criminal, described that Haynes has twice been convicted of a crime, sentenced, and committed to prison for terms of not less than 1 year each and, thus, "is a Habitual Criminal as described in Neb. Rev. Stat. §29-2221."

At the same time, under case No. CR14-1202, Haynes was charged with two counts. Under count I, he was charged with tampering with a witness, in violation of Neb. Rev. Stat. § 28-919(1) (Reissue 2008), a Class IV felony. Count II, habitual criminal, described that Haynes has twice been convicted of a crime, sentenced, and committed to prison for terms of not less than 1 year each and, thus, "is a Habitual Criminal as described in Neb. Rev. Stat. §29-2221."

Under other case numbers, Haynes was charged with possession of a controlled substance, witness tampering, and identity theft.

2. Pleas

Haynes entered into a plea agreement with the State. In case No. CR14-701, Haynes pled no contest to the charges of count I, stalking, second offense, and count II, terroristic threats. In case No. CR14-1202, Haynes pled no contest to count I, tampering with a witness.

The pleas were negotiated in exchange for dismissal of the other charges, under different case numbers, of possession of a controlled substance, witness tampering, and identity theft. The State also agreed not to file any further charges based on Haynes' conduct up to the date of the pleas. The State had apparently been preparing to charge Haynes with 16 additional misdemeanor counts.

The day Haynes pled to the charges, the State entered into evidence a psychiatric report demonstrating that Haynes was competent and the court specifically found Haynes competent to stand trial.

The court considered cases Nos. CR14-701 and CR14-1202 together during the plea colloquy, as well as during the enhancement and sentencing hearing.

During the plea colloquy, the court confirmed with Haynes that he understood the nature of the charges, the terms of the plea agreement, the sentencing range for the crimes, and the possible habitual criminal enhancement. The court explained that the charges of terroristic threats and tampering with a witness were subject to habitual criminal enhancement, while the charge of stalking, second offense, was not.

Haynes affirmed that his pleas were freely and voluntarily made. Haynes stated that he had been given enough time to discuss the case with his counsel and that he was satisfied with their representation.

As a factual basis for the pleas, the State provided that it would have adduced evidence that on or about January 22 through February 12, 2014, Haynes harassed and threatened the victim, his ex-girlfriend, after she broke off their relationship and moved in with her mother. Haynes continued to call, drive by the victim's house, and send text messages, even after

a protection order was in place. Some messages were sent to the victim's mother, advising her to keep the victim away from the "back windows," because "he attempted to get his boys to chill," but "the call was already made." On one occasion, the victim and her mother witnessed Haynes drive by and point his fingers out the window as if they were a gun. On another occasion, the victim and her mother witnessed Haynes drive by and yell, "[H]ey bitch, I'm coming back. This house is going to get shot up tonight." During the same time period, Haynes filled out change of address forms for the victim without her consent, pretended to be the victim in order to have her cable turned off, and sent "jitney cabs" to the victim's house during all hours of the night.

After being jailed on the charges, Haynes made approximately 44 calls to the victim, using another inmate's telephone number. During the conversations, Haynes asked the victim not to go to court. Haynes also sent letters through other inmates to contacts on the outside, asking them to tell the victim to stop talking to law enforcement and prosecutors.

The court found that Haynes' pleas of no contest were entered freely, knowingly, intelligently, and voluntarily. Haynes was adjudged guilty of the charges of stalking, terroristic threats, and tampering with a witness.

3. Sentencing

For purposes of habitual criminal enhancement, the State entered into evidence prior convictions, and the court found the prior convictions valid and supporting enhancement. The presentence investigation report (PSI) indicated an extensive criminal history, including convictions for assault, terroristic threats, stalking, harassment by telephone, intimidation by telephone, and violations of protection orders. The victims were past girlfriends and an ex-wife. The PSI reflects that Haynes has been arrested 23 times for crimes of domestic violence and has had 16 protection orders filed against him by 14 different people in the last 18 years. Attached to the PSI were several victim impact statements related to prior convictions.

Defense counsel asked the court to order a new PSI on the grounds that the officer who prepared the PSI was biased against Haynes. Counsel explained that the investigator had been Haynes' probation officer in 1999 and had prepared a PSI in another case in 2009. Counsel suggested that someone else would be able to "give a more independent evaluation." The court denied the motion, noting that although the report demonstrated familiarity with Haynes, it was mostly a factual recitation of past and present charges.

The State argued at the sentencing hearing that the court should consider Haynes' past convictions and the domestic abuse and stalking of former girlfriends and his ex-wife.

The district court observed that Haynes had an extensive criminal history and was "one of the worst" domestic violence offenders the court had ever seen. The court stated that it had reached this conclusion based on the factual statements in the PSI and the victim statements, not on any commentary in the PSI reflecting the investigator's personal familiarity with Haynes.

In case No. CR14-701, the court sentenced Haynes to concurrent sentences of 12 to 24 years' imprisonment, with 289 days' credit for time served. In case No. CR14-1202, the court sentenced Haynes to 12 to 24 years' imprisonment, to be served consecutively to the sentences in case No. CR14-701.

4. Direct Appeal

Haynes filed a direct appeal, represented by the same defense counsel as at the trial stage. He asserted on appeal that the sentences were excessive.

The Nebraska Court of Appeals, in a memorandum opinion, found that the sentences were not excessive.[1] However, it vacated and remanded that portion of the sentence in case No. CR14-701 that imposed habitual criminal enhancement on the charge of stalking, second offense. The court noted

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[1] *State v. Haynes*, Nos. A-14-1082, A-14-1083, 2015 WL 4626756 (Neb. App. Aug. 4, 2015) (selected for posting to court website).

that because the sentences were concurrent, the error was for all practical purposes harmless, but nevertheless needed to be corrected.[2]

5. Motion for Postconviction Relief

Thereafter, Haynes, representing himself pro se, filed a motion for postconviction relief. Haynes asserted 12 acts of ineffective assistance of counsel. He generally alleged that but for these acts of ineffective assistance of counsel, he would have insisted on going to trial.

First, Haynes alleged that counsel was deficient for failing to discuss, apprise, or review "any of the discovery turned over by the state." Second, Haynes alleged counsel failed to investigate, interview, or depose other "witnesses," who would have testified that his relationship with the victim was "wholesome" and "not the negative transgression or aggression the state and police officials deploy." Third, Haynes alleged that counsel should have driven by the victim's residence to obtain more "detailing descriptive streets." Fourth, Haynes alleged that counsel was deficient in failing to locate, interview, or depose the victim, who would have given "a very different version of events that [sic] what the state produced" and "would have testified that the charges lodged against [Haynes] were unfounded, and concocted by her mother."

Fifth, Haynes alleged that there were several questions that he asked counsel, which he listed, to "formulate a defense" in Haynes' favor. Sixth, Haynes alleged that counsel was ineffective by "failing to apprise [Haynes] of the nature of the charges lodged against him; the consequences of the charges [Haynes] was said to had [sic] committed; and a reasonable explanation as to whether or not he should proceed to trial on those charges." Seventh, Haynes asserted that counsel should have challenged law enforcement's warrantless seizure of his outgoing mail while in jail and use of that mail to contact recipients and discourage their continued communication with him.

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[2] *Id.*

Eighth, Haynes alleged that 7 months of "solitary confinement," and its restrictions, particularly telephone restrictions, limited his ability to contact counsel and thereby "impeded [Haynes'] participation in his case," allegedly denying him due process. The restrictions also limited his access to outside sources who could have allegedly helped him "prepare and help counsel's [sic] with a propper [sic] defense" and rendered it "impossible for [Haynes] to obtain information that would have undermined the states [sic] case via the charges." He asserted that counsel was ineffective for failing to challenge these restrictions. Haynes also generally asserted that the restrictive confinement rendered his plea involuntary.

Ninth, Haynes alleged under the heading "Failure to Investigate and Prepare Defense" that the county attorney met with the victim before charges were filed. Tenth, Haynes asserted that counsel was deficient in failing to assert on direct appeal that the presentence investigator was biased against him. Eleventh, Haynes asserted that counsel should have raised on appeal the allegation that his plea was not supported by an adequate factual basis.

Twelfth, Haynes alleged counsel was ineffective for failing to raise as error on direct appeal the habitual criminal count in case No. CR14-701. Haynes theorized, without citation to any relevant authority, that all charges under the same information must be subject to habitual criminal enhancement in order for the habitual criminal statute to legally apply to the case.

Haynes also made several allegations of "plain error" that did not appear to relate to an ineffective assistance of counsel claim.

The allegations of Haynes' motion will be set forth in further detail in our opinion.

6. District Court Order

The district court denied the motion for postconviction relief without an evidentiary hearing or the appointment of counsel.

With respect to the claims of ineffective assistance of counsel, the court stated that Haynes had failed to set forth specific facts relating to prejudice and only generically offered the self-serving declaration that but for the deficient performance, he would have insisted on going to trial.

The court elaborated that on all claims relating to a failure to investigate, Haynes did "not state what additional evidence would have been gathered, or how a different result would have been obtained." The court stated that this was reason alone to deny the motion without an evidentiary hearing on the allegations.

Alternatively to the lack of specificity regarding prejudice, the court reasoned, regarding the telephone restrictions during administrative confinement, that Haynes failed to set forth how defense counsel could have challenged a decision by the Department of Correctional Services. The court noted that counsel is not ineffective for failing to bring a motion that does not have merit.[3] Regarding the claim that counsel failed to inform Haynes of the nature of the charges, the court alternatively reasoned that the plea colloquy refuted such a claim.[4]

As for the allegations of prosecutorial misconduct and the presentence investigator's conflict of interest, the court concluded Haynes had "failed to set forth any facts or law establishing inclusion of such issues would have 'changed the result of the appeal.'"[5]

With regard to any claim of "plain error," separate from Haynes' ineffective assistance of counsel claims, the court relied on our statement in *State v. Sepulveda*[6] that plain error cannot be asserted in a postconviction proceeding to raise claims of error by the trial court.

Haynes appeals.

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[3] See *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

[4] See, *State v. Dragon*, 287 Neb. 519, 843 N.W.2d 618 (2014); *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

[5] See *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009).

[6] *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009).

III. ASSIGNMENTS OF ERROR

Largely verbatim, Haynes asserts that (1) his claims of ineffective assistance of counsel are "meritable," warranting the need of an evidentiary hearing to show cause; (2) the grounds and claims submitted for postconviction relief exhibit "colorable claims" worthy of the relief sought; (3) the district court erred in denying Haynes' motion for postconviction relief; (4) the district court erred in denying Haynes' motion to appoint counsel; (5) the district court erred in allowing the State to use false and highly prejudicial claims that Haynes sexually assaulted women in the past; (6) the district court erred when overruling Haynes' request to remove the presentence investigator due to bias; and (7) the district court erred in allowing the State to place Haynes in "[s]olitary [c]onfinement" during the pretrial stages, prohibiting him from contacting his attorneys by telephone.

IV. STANDARD OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.[7]

[2,3] A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.[8] Thus, 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.[9]

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[7] *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

[8] *State v. Determan*, 292 Neb. 557, 873 N.W.2d 390 (2016).

[9] *Id.*

[4] We review the failure of the district court to provide court-appointed counsel in a postconviction proceeding for an abuse of discretion.[10]

V. ANALYSIS

Haynes appeals from the denial of postconviction relief without an evidentiary hearing or the appointment of counsel. He sought to set aside his convictions, which were entered pursuant to pleas of no contest. He also alleged errors in sentencing. The district court concluded that Haynes had failed to allege sufficient facts that, even if proved true at an evidentiary hearing, would render his judgment void or voidable. As to certain allegations, the court also found them to be affirmatively refuted by the record.

[5,6] Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.[11] The Nebraska Postconviction Act is intended to provide relief in those cases where a miscarriage of justice may have occurred; it is not intended to be a procedure to secure a routine review for any defendant dissatisfied with his or her sentence.[12]

[7,8] The Nebraska Postconviction Act likewise does not provide a procedure whereby the defendant can avoid the waiver inherent to a voluntary entry of a guilty plea or plea of no contest. The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.[13] "The only exceptions are for the defenses of insufficiency of the indictment,

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[10] See *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990).

[11] See, *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006); *State v. Lytle*, 224 Neb. 486, 398 N.W.2d 705 (1987); Neb. Rev. Stat. § 29-3001 (Reissue 2016).

[12] See *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

[13] *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996); *State v. Dreimanis*, 8 Neb. App. 362, 593 N.W.2d 750 (1999).

information, or complaint; ineffective assistance of counsel; and lack of jurisdiction."[14]

[9] On appeal from the denial of postconviction relief without an evidentiary hearing, the question is not whether the movant was entitled to relief by having made the requisite showing.[15] Instead, we must determine whether the allegations were sufficient to grant an evidentiary hearing.[16] Section 29-3001(2) states:

> Unless 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 . . . grant a prompt hearing thereon, and determine the issues and make findings of fact and conclusions of law with respect thereto.

[10-12] But the allegations in the motion for postconviction relief must be sufficiently specific for the district court to make such a preliminary determination as to whether an evidentiary hearing is justified.[17] In a proceeding under the Nebraska Postconviction Act, the application is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights, and the pleading of mere conclusions of fact or of law are not sufficient to require the court to grant an evidentiary hearing.[18] An evidentiary hearing must be granted when the facts alleged, if proved, would justify relief, or when a factual dispute arises as to whether a constitutional right is being denied.[19] In the absence of alleged facts that would render the judgment void or voidable, the proper course is to

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[14] *State v. Start*, 239 Neb. 571, 574, 477 N.W.2d 20, 22-23 (1991). See, also, *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992); *State v. Wiemer*, 3 Neb. App. 821, 533 N.W.2d 122 (1995).

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

[16] See *id*.

[17] See *State v. Lytle, supra* note 11.

[18] *State v. Turner*, 194 Neb. 252, 231 N.W.2d 345 (1975).

[19] See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

dismiss the motion for postconviction relief for failure to state a claim.[20]

[13] With these principles in mind, we turn to Haynes' arguments on appeal. We consider only those arguments that were both adequately assigned and argued in his appellate brief. This court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[21]

1. Alleged Ineffective Assistance of Counsel Leading to Pleas of No Contest

Haynes principally asserts ineffective assistance of counsel. He argues that but for these acts of ineffective assistance of counsel, there was a "great probability," sufficient to undermine confidence in the outcome, that Haynes would have insisted on going to trial.[22] Because Haynes was represented both at trial and on direct appeal by the same lawyer or lawyers from the same office, this motion for postconviction relief is his first opportunity to assert ineffective assistance of counsel.

[14] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[23] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[24]

[15,16] In a plea context, deficiency depends on whether counsel's advice was within the range of competence demanded

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[20] See *State v. Ryan*, 287 Neb. 938, 845 N.W.2d 287 (2014).

[21] *Walters v. Sporer*, 298 Neb. 536, 905 N.W.2d 70 (2017).

[22] Brief for appellant at 14.

[23] *State v. McLeod, supra* note 3.

[24] *Id*.

of attorneys in criminal cases.[25] The prejudice requirement in a plea context is satisfied if the defendant shows a "reasonable probability" that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.[26]

[17] The likelihood of the defense's success had Haynes insisted on going to trial is relevant to this prejudice analysis.[27] It is relevant to the consideration of whether "'a rational defendant [would have] insist[ed] on going to trial.'"[28] The likelihood of the defense's success had the defendant gone to trial should be considered along with other factors, such as the likely penalties the defendant would have faced if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case.[29]

[18] At an evidentiary hearing, "[s]elf-serving declarations that [the claimant] would have gone to trial will not be enough; he must present objective evidence showing a reasonable probability that he would have insisted on going to trial."[30] Neither will such self-serving declarations be sufficient on their own to state a claim requiring an evidentiary hearing.[31]

[19] The district court was correct that a motion for postconviction relief seeking to set aside a conviction pursuant to a plea on the grounds that it was the result of ineffective

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

[26] *State v. Lee*, 290 Neb. 601, 602, 861 N.W.2d 393, 395 (2015). See, also, e.g., *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015); *State v. Yos-Chiguil, supra* note 15; *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009); *State v. McLeod, supra* note 3; *State v. Barnes, supra* note 11; *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006); *State v. Silvers, supra* note 19.

[27] See *State v. Yos-Chiguil, supra* note 15.

[28] *Id.* at 631, 798 N.W.2d at 844, quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

[29] See *State v. Yos-Chiguil, supra* note 15.

[30] *Id.* at 632, 798 N.W.2d at 844.

[31] See *State v. Barrera-Garrido*, 296 Neb. 647, 895 N.W.2d 661 (2017).

assistance of counsel must allege objective facts that raise a question of whether a rational defendant would have insisted on going to trial. And we agree with the district court that most of Haynes' claims failed to allege facts raising a question of whether a rational defendant would have insisted on going to trial. Other allegations are affirmatively refuted by the trial record. None of the allegations warranted an evidentiary hearing.

We address each of the allegations in turn.

(a) Meeting Between Victim and County Attorney

Haynes first argues that counsel was ineffective for failing to challenge the county attorney's meeting with the victim before charges were filed. In his motion for postconviction relief, Haynes alleged under the heading "Failure to Investigate and Prepare Defense" that the county attorney met with the victim before charges were filed. He asserted this violated due process, because it gave the county attorney firsthand information and gave the county attorney time to "plant fear" in the victim.

Haynes did not make factual allegations as to how this "fear" affected the truthfulness of the victim's account to law enforcement or how it otherwise impacted his defense. In other words, Haynes failed to allege facts raising a dispute as to whether a rational defendant would have insisted on going to trial.

Haynes' attempt to focus on counsel's failure to raise this issue on direct appeal does not change our analysis. As stated, in an appeal seeking to reverse a conviction pursuant to a plea of no contest, the appellate court will consider only claims of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction.[32] Haynes' motion failed to raise the prospect that had the

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[32] *State v. Start, supra* note 14. See, also, *State v. Russell, supra* note 14; *State v. Wiemer, supra* note 14.

purported due process issue been raised on direct appeal, it would have changed the result.[33] But, in fact, Haynes' allegation amounts simply to an allegation of ineffective assistance of counsel at trial, because trial counsel representing the defendant on appeal cannot be expected to raise his or her own ineffectiveness in failing to present an issue at trial.[34] And Haynes' counsel did not bring this alleged due process issue to the attention of the district court before Haynes entered his plea.

(b) Failure to Discuss State's Discovery

Haynes next asserts on appeal that counsel "failed to discuss, apprise, or review any of the discovery turned over by the [S]tate"[35] and that had counsel done so, counsel would have known the police reports were filed by the victim's mother.

Haynes did not assert in his motion for postconviction relief, however, that counsel would have discovered that the police reports were filed by the victim's mother. We note that Haynes fails to explain how the fact that the victim's mother filed the police reports would have undermined the State's case against Haynes and thereby created a reasonable probability that he would have insisted on going to trial. But, regardless, we will not consider arguments made for the first time on appeal.[36]

Haynes' assertion in his motion that counsel failed to discuss with him "any of the discovery" turned over by the State was insufficiently specific. Without an allegation as to what the State's discovery evidence was, Haynes failed to allege sufficient facts pertaining to whether a rational defendant would have insisted on going to trial.

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[33] See *State v. Jim, supra* note 5.

[34] See, e.g., *State v. Payne*, 289 Neb. 467, 855 N.W.2d 783 (2014).

[35] Brief for appellant at 13.

[36] See *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

(c) Questions Presented to Defense Counsel

Next, Haynes states in his brief that there were "many questions asked to counsel."[37] He lists these questions as including: (1) "Why are all of the imposed restrictions being placed on me given the fact that the alleged victim refuses to help prosecution?" (2) "Why is the Habitual Criminal tag being sought agains [sic] me even with my charges being the low end class 4 felonies?" (3) With no physical voilence [sic] associated with this case why is the County Attorney not allowing the alleged victim and myself communicate [sic] for the well being of our young daughter?" and (4) "What are my chance [sic] if I proceed to trial given the fact that the alleged victim has shown no interest in helping build a case?"[38]

This list of questions asked is less an argument than a statement of purported historical fact. The fact that this list was presented somewhere under the heading of "Failure to Investigate and Prepare Defense" does not make it an argument. We find this an insufficient argument for this court to be able to address it.[39]

However, we note that this same insufficiency clearly supported the district court's conclusion that Haynes had failed to state a claim warranting an evidentiary hearing.

(d) Administrative Confinement and Outgoing Mail

Haynes asserts that counsel was ineffective for failing to challenge his administrative confinement. He focuses primarily on restrictions on his ability to make telephone calls. Haynes argues that he was prejudiced by telephone restrictions, because they impeded his ability to call counsel and prevented him from calling unidentified persons who might

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[37] Brief for appellant at 13.

[38] *Id*.

[39] See *State v. Wagner*, 295 Neb. 132, 888 N.W.2d 357 (2016).

have helped him procure evidence of an alibi. This alibi evidence supposedly would have entailed train tickets and timecards for his job, demonstrating that he was working or out of town "during times that several Police reports were filed."[40]

Somewhat relatedly, Haynes asserts that counsel should have challenged law enforcement officers' warrantless confiscation of his outgoing mail while in jail and their contact with the recipients, encouraging them not to have further contact with Haynes. Again, Haynes believes this hindered his ability to procure evidence for his defense.

As the district court noted, Haynes failed to assert by what motion or action his counsel could have challenged such a decision of the Department of Correctional Services. While Haynes seems to classify these acts as prosecutorial misconduct, he fails to cite to any authority for that characterization.

[20] Haynes likewise failed to raise sufficiently specific facts demonstrating that a reasonable person would have insisted on going to trial, had counsel successfully challenged his administrative confinement. As with other assertions of ineffective assistance of counsel, Haynes has attempted to add more specific factual allegations for the first time in his appellate brief. When considering whether the district court correctly denied the motion without an evidentiary hearing, we will not consider factual allegations made for the first time on appeal.[41] Haynes did not allege in his motion that train tickets and timecards would have presented an alibi. Rather, he generically alleged that he was hindered in his defense.

In any event, Haynes failed to raise a question of prejudice from his telephone restrictions or law enforcement's discouraging mail recipients from further contact with Haynes, because he did not allege that counsel was unable to contact him, that he was unable to contact counsel through other means, or that

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[40] Brief for appellant at 15.

[41] See *Walters v. Sporer, supra* note 21.

counsel was unable to conduct an adequate discovery without Haynes' direct communication with these unidentified outside sources. Finally, whatever train tickets and timecards could have been procured, Haynes does not assert that these would have demonstrated he was nowhere in the vicinity of the crimes at any point from January 22 to February 12, 2014, as alleged in the information.

In other words, the allegations relating to counsel's failure to challenge administrative confinement, confiscation of his mail, and contact with mail recipients, failed to sufficiently raise a triable issue warranting an evidentiary hearing.

Haynes seems to generally argue that counsel failed to protect his mental health, noting that "[t]hose surroundings with no outside communication can cause serious issues mentally."[42] But Haynes does not assert that he actually suffered from such serious mental issues. He merely broadly states that "[t]he plea . . . was not done knowingly, willingly, or voluntarily, due to the restrictions placed on [Haynes], along with [Haynes'] being placed in solitary confinement for over seven months . . . ."[43]

[21,22] Even if we generously read these arguments as asserting that Haynes was incompetent—and that counsel was ineffective for failing to seek a competency hearing or moving to withdraw Haynes' plea—Haynes' motion failed to allege facts that would have raised doubts as to his competency. A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.[44] The test of mental capacity to plead is the same as that required to stand trial.[45]

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[42] Brief for appellant at 6.

[43] *Id.* at 14.

[44] *State v. Vo, supra* note 4.

[45] *Id.*

Haynes' allegations, even if true, would not establish a "threshold level of doubt"[46] concerning his competency that would make counsel's inaction deficient. Haynes failed to allege what facts would have brought to counsel's attention an incapacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.[47] Haynes' allegation that he was in "solitary confinement," standing alone, is not a fact that would cause a criminal lawyer with ordinary training and skill in the area to question a defendant's competency.

Finally, the record refutes any allegation that Haynes was incompetent. A medical evaluation established Haynes' competency, and the district court specifically found Haynes competent before hearing his plea. Haynes' responses to questions from the court during the plea colloquy were appropriate and reflected his knowledge that he was appearing in court for the purpose of entering a no contest plea and that he understood the consequences of such action as they were explained to him by the judge.

The district court was correct in denying an evidentiary hearing on the claims relating to his administrative confinement and confiscation of his outgoing mail while in jail.

(e) Failure to Visit Apartment Complex

Haynes asserts that counsel was somehow ineffective for failing to visit the apartment complex where he, the victim, and the victim's mother all allegedly lived. He asserts that counsel should have been able to detail the "descriptive streets or locate where [Haynes] was said to venture driving by [the victim's] home."[48] These allegations do not bring into question either counsel's deficiency or any possible prejudice.

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[46] *State v. Griffin*, 20 Neb. App. 348, 355, 823 N.W.2d 471, 477 (2012).

[47] See, *State v. Vo, supra* note 4; *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996).

[48] Brief for appellant at 13.

(f) Failure to Interview Character Witnesses

Haynes argues that counsel failed to interview "witnesses" he informed counsel of, who would have stated that he was the sole provider for the household and that "ill feelings" of the victim's mother "caused these issues to happen."[49] His allegations in the motion for postconviction relief stated somewhat similarly that "witnesses" would have said Haynes and the victim had "a relationship in which [Haynes] was the sole provider for the household in wholesome relations and not the negative transgression or aggression the state and police officials deploy."

[23] We require a significant degree of specificity in postconviction motions for claims relating to potential witnesses.[50] And, because this case involves a plea, any claim based on potential witnesses is all the more hypothetical and subject to scrutiny. We have explained:

> "The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place."[51]

Haynes did not provide the names or descriptions of the uncalled witnesses. Haynes describes the general nature of the testimony the witnesses would have provided, but this potential testimony generally vouching for the wholesome and nonaggressive nature of Haynes' relationship with the victim only marginally impacts the likelihood of the defense's success had Haynes insisted on going to trial.

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[49] *Id*. at 12.

[50] See, *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017); *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

[51] *State v. Yos-Chiguil, supra* note 15, 281 Neb. at 634, 798 N.W.2d at 845 (Heavican, C.J., concurring), quoting *Premo v. Moore*, 562 U.S. 115, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

More to the point, Haynes apparently discussed these potential witnesses with counsel and was able to consider with counsel the hypothetical effect of their potential testimony before deciding to plead. Thus, counsel determined as a matter of strategy that it was unnecessary to depose these witnesses to confirm Haynes' assertion as to what they would say regarding their perception of Haynes' relationship with the victim. The allegation in the motion that counsel had not "call[ed], locate[d] and acquire[d] witnesses," before Haynes decided to accept the State's plea bargain offer, fails to call into question whether a reasonable person would have instead insisted on going to trial.

(g) Failure to Interview and Depose Victim

Lastly, Haynes asserts that had counsel interviewed and deposed the victim, she would have said the allegations were "unfounded" and revealed that her mother made all the police reports. In the motion for postconviction relief, Haynes similarly alleged that counsel was ineffective for failing to "locate, interview or depose the said victim" and that "[h]ad she been located, interviewed, or deposed, she would have testified that the charges lodged against [Haynes] were unfounded, and concocted by her mother . . . [w]hich all led to . . . a coerced and minipulated [sic] plea . . . at the ill advice and ineffective representation of counsel's." Haynes concluded that but for defense counsel's ineffectiveness, there was a "great probability" and a "high probability," "sufficient to undermine confidence in the outcome," that Haynes would not have pled and would have gone to trial.

[24] Haynes had moved, pro se, to depose the victim. But at the hearing to accept his plea, Haynes affirmed to the court that he wished to withdraw his motion to depose the victim. The record is as follows:

> [Defense counsel]: . . . At this time we move to withdraw the Notice and Motion to Take Deposition that was filed by my client on August 4th. We've had an

> opportunity to talk to my client. It was a pro se motion, and he understands what is going on here and shares in our wish to withdraw that motion.
>
> THE COURT: Is that correct . . . ?
>
> [Haynes]: Yes, ma'am.

A defendant representing himself or herself pro se cannot thereafter assert his or her own incompetency.[52] Though he had counsel, Haynes acted pro se in moving to depose the victim and in withdrawing that motion. Haynes spoke for himself at the hearing. He cannot now claim in his motion for postconviction relief that his decision not to depose the victim was in error.

2. Sentencing

We turn now to several arguments Haynes makes concerning his sentencing.

(a) Habitual Criminal Enhancement Must Apply to All or None

First, Haynes asserts that counsel was ineffective for failing to challenge habitual criminal enhancement on the grounds that there can be no enhancement unless all the charges in the information are amendable to habitual criminal enhancement. He concludes that because, under case No. CR14-701, the stalking charge was not amendable to habitual criminal enhancement, neither was count II, terroristic threats. The only law cited by Haynes in support of this conclusion is that cited by the Court of Appeals in holding that second-offense stalking could not be doubly enhanced through the habitual criminal statute.

There is simply no merit to Haynes' legal assertion that all charges in an information must be amendable to habitual criminal enhancement in order for any charge to be subject to enhancement under the habitual criminal statute. We therefore

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[52] See *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

agree with the district court that this allegation fails to raise any issue of deficient performance or prejudice.

(b) Void Sentence for "Crime" of Being Habitual Criminal

Haynes further argues, for the first time on appeal, that his sentences were void, suffering the same infirmities as found in *Meyer v. Frakes*.[53] Because a void judgment can be attacked at any time in any proceeding,[54] we will address this argument despite Haynes' failure to raise it below.

The habitual criminal statute states that "the facts with reference thereto shall be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted."[55] Thus, there is no error in setting forth habitual criminal status as a count in the information. But Haynes asserts that, as in *Meyer v. Frakes*,[56] he was convicted of the crime of being a habitual criminal and was separately sentenced for such crime. In *Meyer*, we said that "a separate sentence for the nonexistent crime of being a habitual criminal is void," because "[t]here is no such offense as being a habitual criminal."[57]

The record demonstrates that unlike the defendant in *Meyer*, Haynes was not, in fact, convicted and sentenced of being a habitual criminal. He did not plead no contest to being a habitual criminal. The court did not convict him of being a habitual criminal. And the court did not issue a separate sentence for the "crime" of being a habitual criminal. Instead, as is proper, the court enhanced Haynes' sentences for the crimes of terroristic threats and tampering with a witness. We find no merit to Haynes' argument that pursuant to *Meyer*, his sentences were void.

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[53] *Meyer v. Frakes*, 294 Neb. 668, 884 N.W.2d 131 (2016).

[54] *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011).

[55] Neb. Rev. Stat. § 29-2221(2) (Reissue 2016).

[56] *Meyer v. Frakes, supra* note 53.

[57] *Id.* at 673-74, 884 N.W.2d at 136-37.

(c) Prosecutorial Misconduct and Other Alleged Sentencing Errors

Lastly, Haynes argues several points of alleged prosecutorial misconduct or trial error during the sentencing hearing, unattached to any claim of ineffective assistance of counsel or any claim that his plea was involuntary. He presented these below as "plain error." The allegations relate to the court's consideration of his relationship with past girlfriends, allegedly false letters from past girlfriends, allegedly false accusations by the State of past sexual assaults, and a letter written from jail to an adult son. In sum, Haynes argues that the State improperly presented and the court improperly considered false "prior bad acts." He also argues that a letter to his son should not have been considered, because it had been seized without a warrant.

[25] As the district court correctly noted, plain error cannot be asserted in a postconviction proceeding to raise claims of error by the trial court.[58] Haynes cannot avoid the strictures of an ineffective assistance of counsel claim by reframing the allegation as plain error. Consideration of plain error occurs only at the discretion of an appellate court.[59]

[26] The only allegation of ineffective assistance of counsel raised in terms of sentencing is counsel's failure to pursue on appeal the objection to the PSI investigator's alleged bias. Counsel's failure to raise an issue on appeal could be ineffective assistance of counsel only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.[60] We agree with the district court that a claim based on the alleged bias of the PSI investigator would not have been successful on appeal. This is especially true because the district court stated that it was not considering any statement in the PSI report that could have derived from

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[58] *State v. Sepulveda, supra* note 6.

[59] See *id.*

[60] *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

the investigator's prior contact with Haynes. Therefore, this allegation, like the others, does not raise a claim warranting an evidentiary hearing.

3. Appointment of Counsel

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.[61] When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.[62] Based upon our conclusion that Haynes' postconviction motion presented no justiciable issues for postconviction relief, we conclude that the district court did not abuse its discretion in denying his motion for appointment of counsel.

VI. CONCLUSION

For the foregoing reasons, we affirm the order of the district court denying Haynes' motion for postconviction relief without an evidentiary hearing or the appointment of counsel.

Affirmed.

Kelch, J., participating on briefs.

Wright and Miller-Lerman, JJ., not participating.

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[61] *State v. McLeod, supra* note 3.

[62] *Id.*

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

TransCanada Keystone Pipeline, LP, appellant and cross-appellee, v. Nicholas Family Limited Partnership et al., appellees and cross-appellants.

TransCanada Keystone Pipeline, LP, appellant and cross-appellee, v. William F. Dunavan et al., appellees and cross-appellants.

TransCanada Keystone Pipeline, LP, appellant, v. Bartels Farms Inc., appellee.

TransCanada Keystone Pipeline, LP, appellant, v. John F. Small et al., appellees.

908 N.W.2d 60

Filed March 9, 2018. Nos. S-17-116 through S-17-134, S-17-366, S-17-367, S-17-369, S-17-424, S-17-741 through S-17-745, S-17-747, S-17-748, S-17-750, S-17-751, S-17-753 through S-17-760.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
3. **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.
4. **Hearsay: Words and Phrases.** 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.

5. **Rules of Evidence: Affidavits.** An affidavit is admissible in certain enumerated situations, including motion practice, which includes the use of affidavits relating to preliminary, collateral, and interlocutory matters.
6. **Attorney Fees: Pleadings.** A motion for attorney fees under Neb. Rev. Stat. § 76-726 (Reissue 2009) is a collateral and independent request from the underlying merits of the case between the parties.

Appeals from the District Court for Holt County, Mark D. Kozisek, Judge, on appeal thereto from the County Court for Holt County, Alan L. Brodbeck, Judge.

Appeals from the District Court for York County, Mary C. Gilbride, Judge, on appeal thereto from the County Court for York County, Linda S. Caster Senff, Judge.

Appeal from the District Court for Saline County, Vicky L. Johnson, Judge, on appeal thereto from the County Court for Saline County, Linda A. Bauer, Judge.

Appeals from the District Courts for Nance, Boone, and Polk Counties, Rachel A. Daugherty, Judge, on appeal thereto from the County Courts for Nance, Boone, and Polk Counties, Stephen R.W. Twiss, Judge.

Judgments of District Courts reversed, and causes remanded with directions.

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

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

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

Heavican, C.J.

INTRODUCTION

These 40 appeals have been consolidated into 4 for purposes of appeal. At issue in each case is whether the individual

landowners are entitled to an award of attorney fees under Neb. Rev. Stat. § 76-726 (Reissue 2009). We conclude that the landowners did not offer sufficient proof as to their entitlement to an award of attorney costs and fees.

FACTUAL BACKGROUND

TransCanada Keystone Pipeline, LP (TransCanada), is a limited partnership wishing to construct an oil pipeline, Keystone XL, through the State of Nebraska. On January 20, 2015, and in connection with this proposed construction, TransCanada filed a number of eminent domain proceedings in various counties, seeking to acquire right-of-way and other property interests.

On January 16, 2015, just prior to TransCanada's initiation of these proceedings, certain property owners (including some of the same landowners involved in these eminent domain proceedings) filed, in York County District Court, a constitutional challenge to the pipeline route as approved by Nebraska's Governor. As a result of this challenge, TransCanada and the landowners agreed to stay the eminent domain proceedings while the constitutional challenge was being litigated.

TransCanada dismissed its condemnation petitions on October 1, 2015, except that the Holt County petitions were dismissed on September 30, in order for TransCanada to pursue approval of a pipeline route by the Public Service Commission:

> TransCanada . . . ("Keystone") . . . hereby dismisses, *without prejudice*, its Petition for Condemnation in this matter. Keystone will be seeking route approval pursuant to Neb. Rev. Stat. § 57-1401 et seq., also known as the Major Oil Pipeline Siting Act. *In the event the route approval is granted, Keystone will reinstitute eminent domain proceedings if necessary*.

The landowners filed the motions for attorney fees and costs at issue in these consolidated appeals on October 6, 2015, except that the Holt County motions were filed on October 2.

The motions were brought pursuant to § 76-726 and requested that the various county courts award to the landowners costs, expenses, and attorney fees for work done in connection with both the county court eminent domain proceedings and the constitutional challenge. These requests were accompanied by affidavits from (1) the individual landowners, (2) counsel for the landowners, and (3) other attorneys attesting to the reasonableness of the attorney fees charged. In each instance, TransCanada objected to the landowner affidavits on the basis of hearsay.

In each of these cases, the county court granted the requests for attorney fees and TransCanada appealed. In the cases docketed at Nos. S-17-116 through S-17-134 (Holt County cases), the district court (1) found that the county court erred in admitting the landowner affidavits because they were hearsay, but that the admission was not reversible error because TransCanada did not insist upon a ruling on its objection and thus waived the objection; (2) found that the dismissals without prejudice amounted to an abandonment of the condemnation proceedings; and (3) reversed the awards of attorney fees and costs, because there was no evidence that the landowners actually incurred costs or fees as required by § 76-726, and remanded the causes to the county court for redetermination.

In the case docketed at No. S-17-424 (Saline County case), the district court found that (1) the county court did not err in admitting the landowner affidavits and did not err in failing to rule on TransCanada's hearsay objection because TransCanada did not insist upon a ruling and thus waived the objection, (2) the dismissals without prejudice amounted to an abandonment of the condemnation proceedings, and (3) the award of attorney fees and costs was proper because the landowner affidavit testimony showed an agreement to pay fees.

In the cases docketed at Nos. S-17-366, S-17-367, and S-17-369 (York County cases), the district court found that (1) the dismissals without prejudice amounted to an abandonment of the condemnation proceedings and (2) the fees sought may

be proved by affidavit, but the affidavits offered into evidence did not allow the court to determine the amount actually incurred, and thus, the award was reversed and the cause was remanded for further proceedings.

Finally, in the cases docketed at Nos. S-17-741 through S-17-745, S-17-747, S-17-748, S-17-750, S-17-751, and S-17-753 through S-17-760 (Nance, Boone, and Polk County cases), the district court found that (1) the dismissals without prejudice amounted to an abandonment of the condemnation proceedings and (2) the attorney fees sought may be proved by affidavit and the award was proper because the landowners' affidavit testimony showed an agreement to pay attorney fees.

ASSIGNMENTS OF ERROR

Cases Nos. S-17-116 through S-17-134.

In these appeals, TransCanada assigns that that district court for Holt County erred in (1) finding that TransCanada waived its hearsay objections to the landowners' affidavits and holding that the county court did not err in admitting those affidavits and (2) remanding the causes to the county court for further proceedings on the amount of attorney fees and costs the landowners actually incurred.

On cross-appeal, the landowners assign that the district court erred in (1) failing to affirm the county court's award of attorney fees, (2) finding there was insufficient evidence to show that the landowners actually incurred the attorney fees awarded by the county court, (3) finding that an application for attorney fees under § 76-726 requires evidence of legal fees "actually 'paid,'" and (4) finding that the landowners' affidavit evidence was hearsay.

Case No. S-17-424.

In this appeal, TransCanada assigns that the district court for Saline County erred in (1) finding that the landowners' affidavit evidence was admissible to prove attorney fees and costs under § 76-726 and that TransCanada waived its hearsay

objection and (2) affirming the county court's award of attorney fees and costs without proof of payment and without evidence showing the amount of attorney fees actually charged or how those fees were charged.

Cases Nos. S-17-366, S-17-367, and S-17-369.

In these appeals, TransCanada assigns that the district court for York County erred in (1) finding that the landowners' affidavit evidence was admissible to prove attorney fees and costs under § 76-726 and (2) construing § 76-726 to hold that reimbursement was allowed without proof of payment and accordingly remanding the cause to the county court for a determination of the attorney fees actually incurred.

On cross-appeal, the landowners assign that the district court erred in (1) failing to affirm the county court's award of legal fees and (2) finding there was insufficient evidence to show that the landowners actually incurred the attorney fees awarded by the county court.

Cases Nos. S-17-741 through S-17-745, S-17-747, S-17-748, S-17-750, S-17-751, and S-17-753 through S-17-760.

In these appeals, which by stipulation of the parties were all heard in the Nance County District Court, TransCanada assigns that the district court for Nance County erred in (1) finding that the landowners' affidavit evidence was admissible to prove attorney fees and costs under § 76-726 and (2) affirming the county court's award of attorney fees and costs without proof of payment and without evidence showing the amount of attorney fees actually charged or how those fees were charged.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an

independent conclusion irrespective of the decision made by the court below.[1]

[2] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[2]

[3] 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.[3]

ANALYSIS

These appeals generally present three issues: (1) whether TransCanada waived its hearsay objection, (2) whether the affidavits were admissible, and (3) whether the proof in these cases was sufficient.

Attorney fees in these cases were requested under the authority of § 76-726, which provides in relevant part:

> (1) The court having jurisdiction of a proceeding instituted by an agency as defined in section 76-1217 to acquire real property by condemnation shall award the owner of any right, title, or interest in such real property such sum as will, in the opinion of the court, reimburse such owner for his or her reasonable costs, disbursements, and expenses, including reasonable attorney's, appraisal, and engineering fees, actually incurred because of the condemnation proceedings if (a) the final judgment is that the agency cannot acquire the real property by condemnation or (b) the proceeding is abandoned by the agency. If a settlement is effected, the court may award to the plaintiff reasonable expenses, fees, and costs.

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[1] *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004).

[2] *Id.*

[3] *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 903 N.W.2d 432 (2017).

Waiver.

In its appeals in the Holt County and Saline County cases, TransCanada assigns that the district court erred in finding that it waived its hearsay objection by failing to insist upon a ruling. We need not address the waiver issue as presented by these cases, because, as is addressed in more detail below, we reject the hearsay issue in the York County and Nance County appeals.

Admissibility of Affidavits.

TransCanada next argues that the affidavits were inadmissible, both because they consisted of hearsay and because § 76-726 requires a higher level of proof.

[4] We turn first to TransCanada's hearsay contention. 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."[4] As TransCanada correctly notes, it is "beyond question" that these affidavits contain hearsay.[5]

[5] But as TransCanada also points out, under Neb. Rev. Stat. § 25-1244 (Reissue 2016), an affidavit is admissible in certain enumerated situations, including "motion practice," which includes the use of affidavits relating to preliminary, collateral, and interlocutory matters.[6] TransCanada suggests, without authority, that a motion for attorney fees under § 76-726 fits under none of these categories; the landowners argue that these types of motions are obviously collateral for purposes of § 25-1244 motion practice.

[6] We have previously suggested, as the landowners now contend, that a motion for attorney fees is a "collateral and independent request from the underlying merits of the case

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[4] Neb. Rev. Stat. § 27-801(3) (Reissue 2016).

[5] See, e.g., brief for appellant in cases Nos. S-17-116 through S-17-134 at 12.

[6] *Id.*

between the parties."[7] This makes logical sense—without the underlying action, there would be nothing for which to seek an award of attorney fees.

In fact, we have suggested that affidavits are a preferred method of introducing such evidence:

> The best practice will always be to provide an affidavit or other evidence such as testimony or exhibits as detailed above, and we certainly encourage doing so. With such evidence, a party is assured that both the trial court and the appellate court will not be required to scour a record in an effort to support attorney fees in any particular case.
>
> We will not absolutely require the filing of an affidavit. . . . But we emphasize that the filing of an affidavit or presentation of other evidence will always be the preferable way to support the award of attorney fees. Litigants who do not file an affidavit or present other evidence risk the loss of attorney fees, because of the difficulty of discerning such information from the record alone.[8]

We hold accordingly in this case. Affidavits are generally admissible in collateral matters, and a motion for attorney fees under § 76-726 is such a collateral matter.

TransCanada also contends that affidavits are insufficient under § 76-726 and that live testimony is required. It cites no authority for this proposition. Having examined the language of § 76-726, we find it to be without merit. We find no error in the district court's admission of the affidavits in this case.

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[7] *Kaminski v. Bass*, 252 Neb. 760, 768, 567 N.W.2d 118, 123 (1997). See, also, *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004).

[8] See *Garza v. Garza*, 288 Neb. 213, 221, 846 N.W.2d 626, 633 (2014). See, also, *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017).

Sufficiency of Proof.

TransCanada next contends that there was insufficient proof to support the award of attorney fees and costs for two reasons: (1) The landowners were only entitled to an award of attorney fees actually paid by them to counsel, and the affidavits did not establish that any funds had been paid out by the individual landowners to counsel, and (2) the record, even including the challenged affidavits, was insufficient to establish that any individual landowner was actually indebted to counsel.

We turn to TransCanada's argument that under § 76-726, the landowners were only entitled to an award of attorney fees actually paid by them to counsel. In making this assertion, TransCanada notes that § 76-726 is different from other attorney fees statutes because it provides for reimbursement.

We agree with TransCanada insofar as it notes that this attorney fees statute is different from most other statutes allowing for an award of attorney fees. Most other statutes simply provide, where relevant, that reasonable attorney fees may be awarded.[9] But § 76-726(1) provides for "reimburse[ment of] costs, disbursements, and expenses . . . actually incurred."

But just because § 76-726 is a "reimbursement" statute, it does not follow that the landowners must have actually paid counsel in order to be entitled to an award of attorney fees. Merriam Webster defines "reimburse" as meaning "to pay back . . . someone[,] REPAY."[10] Black's Law Dictionary defines "incur" as a verb meaning "[t]o suffer or bring on oneself (a liability or expense)."[11] And "actual" is defined as "[e]xisting in fact; real."[12] This is supported by this court's prior case

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[9] See, e.g., Neb. Rev. Stat. §§ 25-21,108, 29-3004, and 30-4017 (Reissue 2016) and 59-821 (Reissue 2010).

[10] Webster's Third New International Dictionary of the English Language, Unabridged 1914 (1993).

[11] Black's Law Dictionary 885 (10th ed. 2014).

[12] *Id.* at 42.

law defining the phrase "actually incurred," in a case involving the Nebraska Trust Deeds Act, as "a fee that is based on services rendered."[13]

The plain language of § 76-726, then, requires only that the landowners be indebted to counsel for services rendered and that the attorney fees charged be reasonable. There is no support in that language for the conclusion that the fees and costs must have already been paid for by the landowner.

As an initial matter, we observe that there is no dispute over the reasonableness of attorney fees requested in this case, and affidavits from other practicing attorneys attesting to that reasonableness are part of our record. The conclusion regarding reasonableness, though, has no bearing on whether the landowners' affidavits were sufficient to support an award of attorney fees and costs. Accordingly, we turn to that question.

In Holt County, the landowners in some affidavits only generally averred that they were represented by counsel. A few other Holt County affidavits included language stating that the landowners "[were] indebted to [counsel] for the success they achieved and agree that the fees they seek for services are the landowners' reasonable obligation. We want TransCanada to be ordered to pay this sum, along with expenses incurred on our behalf." In York, Saline, and Nance Counties, the landowners averred that they

> entered into a written fee agreement with [counsel] and are indebted to them for legal services they provided and expenses they advanced on our behalf. . . .
>
> . . . .
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> . . . We entered into [a] written engagement agreement with [counsel] requiring us to pay for all legal services and to reimburse [counsel] for expenses they expended on our behalf.

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[13] *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 323, 506 N.W.2d 699, 703 (1993).

> . . . .
>
> . . . We are indebted to [counsel] for the success they achieved and agree that the fees and expenses they seek for services are reasonable and the landowners' obligation. We want TransCanada to be ordered to pay the sums requested, along with expenses incurred on our behalf because this includes the money we have paid for legal services and expenses and our debts incurred.

No written fee agreement or invoice for legal services was offered as evidence in support of the motions for attorney fees and costs. Nor did the landowners, in their affidavits, aver any specific amount owed by them to counsel.

We observe that affidavits from one or both counsel of record regarding the attorney fees actually incurred by the landowners were offered and admitted as evidence before each of the county courts. Under certain circumstances, such affidavits might supplement other evidence admitted at an attorney fees hearing and support the award of fees.[14]

But in this case, these affidavits from counsel were not specific as to any individual landowner and—with respect to work done and fees charged—were virtually identical to one another, including seeking payment of the same amount of money based upon the same number of hours of work. In fact, these affidavits raised more questions than they answered, notably about the nature of the fee agreement between the landowners and counsel, whether any fee agreement was akin to a contingency agreement, and the nature of how attorney fees sought in these eminent domain proceedings might be related to the York County constitutional challenge. As such, we conclude that on these facts, these affidavits are insufficient to support the award of attorney fees.

Because the landowners' affidavits did not allege the amount each had actually incurred, and because there was no other

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[14] See *Garza v. Garza, supra* note 8.

evidence sufficient to support the award of attorney fees, we find that the county courts' awards were in error.

Resolution.

We conclude that none of the landowners established that they were entitled to attorney fees. As such, we reverse the decisions of the Saline and Nance County District Courts. We remand the causes to those courts, with instructions for those courts to remand the causes to the county courts, with directions for those courts to vacate the awards of attorney fees.

We observe that the Holt and York County District Courts vacated the amount of the awards of attorney fees, but remanded the causes for further proceedings. We agree with TransCanada that such a remand was error. Accordingly, in those cases, we reverse the district courts' decisions remanding for further proceedings.

CONCLUSION

For the reasons set forth above, the decisions of the district courts are reversed and the causes are remanded with directions.

Reversed 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

In re Application of William M. McDonnell for Admission to the Nebraska State Bar.

908 N.W.2d 32

Filed March 9, 2018. No. S-17-668.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** Under Neb. Ct. R. § 3-126 (rev. 2013), the Nebraska Supreme Court considers the appeal of an applicant from a final ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. ____: ____. The Nebraska Supreme Court has the responsibility to adopt and implement systems to protect the public and to safeguard the justice system by assuring that those admitted to the bar are of such character and fitness as to be worthy of the trust and confidence such admission implies.
4. **Attorneys at Law.** Lawyers are essential to the primary governmental function of administering justice and have historically been officers of the courts.
5. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court has delegated administrative responsibility for bar admissions solely to the Nebraska State Bar Commission.
6. **Attorneys at Law: Proof.** The burden of demonstrating that an applicant is qualified for admission to the Nebraska State Bar is on the applicant.
7. **Rules of the Supreme Court: Attorneys at Law.** Bar admission rules are intended to weed out unqualified applicants, not to deny admission to a qualified applicant.

Original action. Application granted.

William M. McDonnell, pro se.

Douglas J. Peterson, Attorney General, and Timothy R. Ertz for Nebraska State Bar Commission.

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

Funke, J.

William M. McDonnell is a physician and health law specialist seeking admission to the Nebraska bar. He filed an application with the Nebraska State Bar Commission (Commission) seeking admission without examination as a Class 1-B applicant.[1] The Commission denied McDonnell's application on the basis that he failed to show he was "substantially engaged in the practice of law" for 3 of the 5 years preceding his application.[2] The Commission granted McDonnell's request for a hearing, reviewed the evidence, and again denied his application. McDonnell appeals.

Based on our de novo review of the record, we find McDonnell has carried his burden to establish that he was "substantially engaged in the practice of law" preceding his application, as required under § 3-119(B)(1). We therefore grant McDonnell's Class 1-B application.

BACKGROUND

McDonnell graduated from the University of Virginia School of Law in 1987. After completing a judicial clerkship with the U.S. District Court for the Eastern District of Virginia in 1988, he was admitted to the Virginia State Bar by examination. In 1989, McDonnell was admitted by motion to the District of Columbia bar and began practicing at a private law firm in Washington, D.C. From 1989

[1] See Neb. Ct. R. § 3-119(B) (rev. 2016).

[2] See § 3-119(B)(1).

to 1994, McDonnell held various legal positions, including positions with the U.S. Securities and Exchange Commission and the U.S. Department of Treasury. In 1995, McDonnell commenced medical school at the University of Arkansas, and in 1999, he began employment as a physician. From 1999 through 2006, McDonnell worked as a resident physician, emergency department physician, and pediatric emergency medicine fellow physician.

In 2006, McDonnell began employment with the University of Utah, with dual appointments in the university's S.J. Quinney College of Law and the school of medicine. McDonnell worked as an adjunct professor of law as well as a pediatric emergency department physician. He held these positions through May 2014.

While employed at the University of Utah, McDonnell devoted 25 percent of his time and activities to his appointment at the college of law and 75 percent of his time to his appointment at the school of medicine. McDonnell's position as an attending physician required him to work between 18 and 21 hours each week in the emergency department at the university's primary children's medical center. McDonnell asserted that he worked an average of 60 hours per week in his dual position, and devoted 15 hours per week to working as a law professor.

As a law professor, McDonnell served as a course director, developed curricula for health law courses, conducted scholarly research, published writings on health law and policy topics, and provided continuing education lectures to medical professionals and attorneys. McDonnell taught one 3-credit-hour law school course for one semester each academic year. His relevant course work included preparing and presenting 104 class lectures of approximately 90 minutes in length. McDonnell attended faculty research meetings and met with student interest groups throughout the year. Additionally, he served as a faculty research supervisor for a law student conducting independent health law research.

In 2014, McDonnell relocated to Omaha, Nebraska, where he accepted a position as chief of the division of pediatric emergency medicine and medical director of the children's emergency department at the University of Nebraska Medical Center and Children's Hospital and Medical Center. In March 2016, McDonnell applied for admission to the Nebraska bar. McDonnell maintained an active membership in the Washington, D.C., bar at the time of his application.

After considering McDonnell's application for admission, the Commission issued a written letter on February 2, 2017, denying his request. The Commission determined that McDonnell's experience did not fulfill the requirement of being "'actively' and 'substantially' engag[ed] in the practice of law" for 3 of the 5 years preceding his application. McDonnell then requested a hearing before the Commission, which was held on April 14, 2017. At the hearing, McDonnell testified and provided exhibits, including his employment contract with the University of Utah and course materials he produced as a law professor. After the hearing, the Commission affirmed its denial of McDonnell's application for admission. McDonnell appealed to this court.

ASSIGNMENT OF ERROR

McDonnell assigns, restated, that the Commission erred in denying his application seeking admission to the Nebraska bar.

STANDARD OF REVIEW

[1] The Nebraska Supreme Court considers the appeal of an applicant from a final ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the Commission.[3]

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[3] Neb. Ct. R. § 3-126 (rev. 2013); *In re Application of Collins*, 288 Neb. 519, 849 N.W.2d 131 (2014).

ANALYSIS

[2,3] The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.[4] This court thus has the responsibility to adopt and implement systems to protect the public and to safeguard the justice system by assuring that those admitted to the bar are of such character and fitness as to be worthy of the trust and confidence such admission implies.[5] The bar admission practices of other states, and the policies behind those practices, do not govern admission practices in Nebraska.[6]

[4] Lawyers are essential to the primary governmental function of administering justice and have historically been officers of the courts.[7] Our decisions in disciplinary cases demonstrate the continued necessity of regulating the bar and ensuring that ethical rules for lawyers are maintained and enforced.[8] The practice of law in this state is a privilege.

[5,6] This court has delegated administrative responsibility for bar admissions solely to the Commission.[9] The burden of demonstrating that an applicant is qualified for admission is on the applicant.[10]

Applicable Admission Rules

Section 3-119 sets forth three processes by which an attorney admitted to the bar of another state may apply for admission to the Nebraska bar without first undergoing the

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[4] *In re Application of O'Siochain*, 287 Neb. 445, 842 N.W.2d 763 (2014). See Neb. Const. art. II, § 1, and art. V. §§ 1 and 25.

[5] *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996).

[6] *Id.*

[7] See *id.*

[8] See *In re Petition for Rule to Create Vol. State Bar Assn.*, 286 Neb. 1018, 841 N.W.2d 167 (2013).

[9] *In re Application of Collins, supra* note 3.

[10] Neb. Ct. R. § 3-125 (rev. 2013).

Nebraska bar examination. Section 3-119(B), applicable to "Class 1-B applicants," provides:

> Class 1-B applicants who may be admitted to practice in Nebraska upon approval of a proper application are those:
>
> (1) who have been licensed and are active and in good standing before the highest court of another state, territory, or district of the United States preceding application for admission to the bar of Nebraska and have actively and substantially engaged in the practice of law in another state, territory, or district of the United States for 3 of the 5 years immediately preceding application for admission; and
>
> (2) who, at the time of their admission, had attained educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska.

The plain language of § 3-119(B)(1) contains two "active" requirements: an active license requirement and an active practice of law requirement. The first clause of § 3-119(B)(1) requires that a Class 1-B applicant be licensed, active, and in good standing in another state's bar. Our rules define the "active and in good standing" requirement:

> An applicant who is "active and in good standing" means an applicant who is admitted to the bar of another state and is not disbarred, is not under disciplinary suspension, has not resigned from the bar of such other state while under disciplinary suspension or while under disciplinary proceedings, or is not the subject of current or pending disciplinary proceedings, or who, having been disbarred or suspended, has been duly and fully reinstated.[11]

The second clause of § 3-119(B)(1) requires that a Class 1-B applicant have "actively and substantially engaged in the

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[11] Neb. Ct. R. § 3-101(Q) (rev. 2016).

practice of law" for 3 of the 5 years preceding the application for admission. Our rules do not define the terms "actively and substantially engaged" as utilized in the active practice of law requirement of § 3-119(B)(1).

Section 3-101(P)(5) defines "practice of law" to include "[e]mployment as a teacher of law at a law school approved by the American Bar Association throughout the applicant's employment."

In addition to § 3-119, our admission rules include Neb. Ct. R. § 3-112 (rev. 2013), the "Essential eligibility requirements for practice of law." The additional requirements for the practice of law under § 3-112, as relevant here, include:

> (A) the ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;
>
> (B) the ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, and others;
>
> . . . .
>
> (E) the ability to reason, analyze, and recall complex factual information and to integrate such information with complex legal theories;
>
> . . . .
>
> (J) the ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

McDonnell's Application Satisfies First Clause of § 3-119(B)(1)

The undisputed evidence before us indicates that at the time of his Nebraska application, McDonnell possessed an active law license in the District of Columbia and was in good standing. As a result, McDonnell meets the requirement of being licensed, active, and in good standing in another state, territory, or district of the United States.

The evidence also indicates that from March 2011 through May 2014, McDonnell was employed as a law professor at the S.J. Quinney College of Law, University of Utah. McDonnell completed regular and routine duties as a law professor, including lecturing, researching, and publishing.

At oral argument in this matter, the Commission agreed that McDonnell had shown he was "actively" engaged in the practice of law as a law professor in Utah. As a result, we conclude that McDonnell met the "practice of law" requirement, because he was employed as a law professor, and that his employer, the S.J. Quinney College of Law, is accredited by the American Bar Association.

Therefore, the only disputed issue in considering McDonnell's Class 1-B application is whether McDonnell was "substantially engaged in the practice of law" as a law professor at the S.J. Quinney College of Law.

McDonnell Meets "[S]ubstantially [E]ngaged in the [P]ractice of [L]aw" Requirement

The relevant time period for evaluating whether McDonnell was "substantially engaged in the practice of law" is from March 2011 through March 2016.

McDonnell argues his application satisfies the "substantially engaged in the practice of law" requirement, because the plain language of our rules does not require exclusive or full-time employment as a law professor. McDonnell further argues that under a reasonable interpretation of this court's admission rules, he meets the "substantially engaged" requirement, because he showed that he fulfilled his employment obligations by designing health law courses, presenting lectures, grading examinations, providing student mentorship, and producing law-related scholarly research. He also claims that he meets the "substantially engaged" requirement, because he worked as a law professor for 8 consecutive years, including 39 consecutive months during the relevant 5-year period.

McDonnell also asserts that the "substantial" requirement is best understood as excluding certain categories of applicants who clearly do not maintain an active practice. For example, McDonnell argues an applicant who is an emeritus or honorary professor, or a retired partner of a law office, would not satisfy the "substantially engaged" test, because the fact that an applicant holds a distinguished title is not an indication of that individual's competency immediately prior to the time of application.

The Commission concedes the rules do not require full-time employment but contends that the rules require "substantial" experience and that this requirement is designed to protect the public. The Commission does not attempt to define the parameters of the "substantial" experience requirement in quantitative terms and claims this court need not prescribe a fixed threshold to the word "substantially." The Commission does argue that the "substantially engaged" requirement is a means of assessing that an applicant has maintained the competency, skill, and fitness required to practice law[12] and should generally require that attorneys devote more than one-quarter of their employment activities to the practice of law. The Commission further argues that McDonnell's work as an adjunct law professor was not significant enough to meet the "substantially engaged" requirement.

We agree with the Commission that our analysis of whether McDonnell has met the "substantially engaged in the practice of law" requirement should focus on whether McDonnell possesses the competency, skill, and fitness required to practice law and whether he poses a threat to the public. In doing so, we consider our admission rules as a whole.

[7] This court has stated that it will not require a strict application of our admission rules if, in doing so, it would operate in such a manner as to deny admission to a qualified

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[12] See, *Spencer v. Utah State Bar*, 293 P.3d 360 (Utah 2012); *In re Conner*, 181 Vt. 555, 917 A.2d 442 (2006).

applicant for a reason unrelated to the essential purpose of our rules.[13] The rules are intended to weed out unqualified applicants.[14]

Under § 3-119(B)(2), an applicant for admission must have, at the time of his or her admission, attained educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska.

In *In re Appeal of Dundee*,[15] we held the education requirement contained in § 3-119(B)(2) meant that Class 1-B applicants must hold a juris doctor degree from a law school approved by the American Bar Association. We have recognized that requiring applicants to hold a juris doctor guarantees to Nebraska clients that Nebraska lawyers possess a certain minimum understanding of the law, because they have taken basic, core legal courses deemed "'minimally necessary to be a properly-trained attorney.'"[16] We have also found an applicant's proof of education is relevant to determining the applicant's abilities as an attorney.[17]

In this matter, the record shows that McDonnell obtained a juris doctor from the University of Virginia School of Law, a law school accredited by the American Bar Association. In addition, the Commission concedes that McDonnell satisfied the education requirement for bar admission.

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[13] *In re Application of Budman*, 272 Neb. 829, 724 N.W.2d 819 (2006); *In re Application of Brown*, 270 Neb. 891, 708 N.W.2d 251 (2006); *In re Application of Gluckselig*, 269 Neb. 995, 697 N.W.2d 686 (2005).

[14] *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998).

[15] *In re Appeal of Dundee, supra* note 5.

[16] *Id.* at 811, 545 N.W.2d at 759 (quoting *Florida Bd. of Bar Examiners in re Hale*, 433 So. 2d 969 (Fla. 1983)). See, *In re Application of O'Siochain, supra* note 4; *In re Application of Budman, supra* note 13; *In re Application of Brown, supra* note 13; *In re Application of Collins-Bazant, supra* note 14.

[17] See, *In re Application of Brown, supra* note 13; *In re Application of Collins-Bazant, supra* note 14.

In addition to the education requirement, we have adopted the "Essential eligibility requirements for practice of law," which set out the standards for conduct and fitness against which all applicants are measured.[18] Also, the Legislature has enacted Neb. Rev. Stat. § 7-102(1) (Reissue 2012) which states that "[n]o person shall be admitted . . . unless it is shown to the satisfaction of the Supreme Court that such person is of good moral character." Our rules state that "[t]he purpose of character and fitness screening before admission to the practice of law in Nebraska is to ensure the protection of the public and to safeguard the justice system."[19]

McDonnell's application indicates that he is a person of good moral character and that he meets the essential eligibility requirements for the practice of law as set out in § 3-112. In addition, the Commission concedes that McDonnell satisfied the character and fitness requirement for bar admission, and at oral argument before this court, it did not contend that McDonnell would pose a threat to the public.

McDonnell also presented evidence to demonstrate his abilities as an attorney. He has been a licensed attorney since 1988, he practiced law until 1995, and he resumed the practice of law through his employment as a law professor in 2006. As a law professor, he taught a law school course, developed curricula for health law courses, conducted scholarly research, published writings on health law and policy topics, provided continuing education lectures to medical professionals and attorneys, attended faculty research meetings, met with student interest groups, and served as a faculty research supervisor for a law student conducting independent health law research.

Based upon McDonnell's education, character, fitness, and employment history, we find that he maintains the competency, skill, and fitness required to practice law. As a result,

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[18] See § 3-112.

[19] Neb. Ct. R. § 3-116 (rev. 2013).

McDonnell carried his burden of proving that he was "substantially engaged" in his employment as a law professor for an appropriate amount of time preceding his application.

Our admission rules do not define the "substantially engaged in the practice of law" requirement, and we need not endorse a particular definition to decide this case. Rather, our admission rules dictate a qualitative analysis as opposed to a quantitative analysis. This decision should not be viewed as setting a threshold requirement for Class 1-B applications.

CONCLUSION

Based upon our de novo review of the record, we conclude that McDonnell has carried his burden of proving that he met the application requirements for a Class 1-B applicant. As a result, McDonnell's application for admission to the Nebraska bar is granted.

Application granted.

Kelch, J., not participating in the decision.

Wright, J., not participating.

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

Stacey L. Komar, appellant, v. State of Nebraska et al., appellees.

908 N.W.2d 610

Filed March 16, 2018. No. S-16-127.

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: Limitations of Actions.** Before suit can be filed under the State Tort Claims Act, a claimant must submit the claim in writing to the Risk Manager within 2 years after the claim accrued.
4. ____: ____. Generally speaking, a claimant cannot file suit under the State Tort Claims Act until the Risk Manager or State Claims Board makes a final disposition of the claim. However, if the board has not made final disposition of a claim after 6 months, the claimant is permitted to withdraw the claim and file suit.
5. ____: ____. The 2-year limitations period referenced in Neb. Rev. Stat. § 81-8,227(1) (Reissue 2014) governs not just the time for submitting claims to the Risk Manager, but also the time for beginning suit under the State Tort Claims Act.
6. **Tort Claims Act: Limitations of Actions: Notice.** Under Neb. Rev. Stat. § 81-8,227(1) (Reissue 2014), the time to begin suit under the State Tort Claims Act shall be extended for a period of 6 months from the date of mailing of notice to the claimant by the Risk Manager or State Claims Board as to the final disposition of the claim or from the date of withdrawal of the claim under Neb. Rev. Stat. § 81-8,213 (Reissue 2014) if the time to begin suit would otherwise expire before the end of such period.

7. ____: ____: ____. Claimants who allow the State Claims Board to reach a decision must file suit on the claim within 2 years after the claim accrued, or within 6 months after the board mails notice of final disposition, whichever occurs later. On the other hand, claimants who withdraw their claim must file suit on the claim within 2 years after the claim accrued, or within 6 months after the first date on which the claim could have been withdrawn, whichever occurs later.

Petition for further review from the Court of Appeals, Pirtle, Bishop, and Arterburn, Judges, on appeal thereto from the District Court for Douglas County, W. Russell Bowie III, Judge. Judgment of Court of Appeals affirmed.

Denise E. Frost, of Johnson & Mock, P.C., L.L.O., for appellant.

Brien M. Welch and John A. McWilliams, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

Stacy, J.

This case involves a dispute over the calculation of the 2-year statute of limitations under the State Tort Claims Act (STCA).[1] The district court for Douglas County dismissed the action as time barred, and the Nebraska Court of Appeals affirmed.[2] On further review, we agree the claim is time barred and affirm the dismissal.

BACKGROUND

According to the allegations of the complaint, on January 15, 2013, Stacey L. Komar learned that an employee of the State of Nebraska had accessed her electronically stored medical records without her permission. Approximately 17 months

[1] See Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2014).

[2] *Komar v. State*, 24 Neb. App. 692, 897 N.W.2d 310 (2017).

later, on June 27, 2014, Komar presented a tort claim to the Risk Manager for the State Claims Board alleging the employee had invaded her privacy by accessing her medical records without permission. Under the STCA, Komar had to present her claim to the Risk Manager as a prerequisite to bringing suit.[3]

Komar's claim remained pending before the State Claims Board for more than 1 year without final disposition. On July 14, 2015, she withdrew the claim. The next day, Komar filed a complaint in the Buffalo County District Court, alleging invasion of privacy and naming as defendants the State of Nebraska, the Board of Regents of the University of Nebraska, and Nebraska Medicine (collectively the State).

District Court Action

The State moved to dismiss Komar's complaint, arguing it was barred by the STCA statute of limitations set out in § 81-8,227(1). That statute provides:

> [E]very tort claim permitted under the [STCA] shall be forever barred unless within two years after such claim accrued the claim is made in writing to the Risk Manager in the manner provided by such act. The time to begin suit under such act shall be extended for a period of six months from the date of mailing of notice to the claimant by the Risk Manager or State Claims Board as to the final disposition of the claim or from the date of withdrawal of the claim under section 81-8,213 if the time to begin suit would otherwise expire before the end of such period.

This court has held that the 2-year limitations period referenced in § 81-8,227(1) governs not just the time for submitting claims to the Risk Manager, but also the time for beginning suit.[4]

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[3] See §§ 81-8,212 and 81-8,213.

[4] *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), *overruled on other grounds, Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002).

In analyzing the timeliness of Komar's complaint, the district court found her claim accrued on January 15, 2013—the date she learned of the alleged invasion of privacy. It reasoned that under § 81-8,227(1), Komar had until January 15, 2015, to file her complaint, unless the 6-month extension applied. No party has disputed either the accrual date or this preliminary calculation of the applicable limitations period.

Komar claimed she was entitled to the 6-month extension under § 81-8,227(1) and argued the extension began to run on the date she actually withdrew her claim, so her complaint filed the next day would be timely. The State argued that under this court's holdings in *Coleman v. Chadron State College*[5] and *Hullinger v. Board of Regents*,[6] the 6-month extension began to run on the first day Komar could have withdrawn her claim, not on the date she actually withdrew it.

In both *Coleman* and *Hullinger*, this court held:

> "[A] claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within the 2-year statute of limitations, *has 6 months from the first day on which the claim may be withdrawn from the claims board in which to begin suit*."[7]

The district court found the first day Komar could have withdrawn her claim to begin suit was December 28, 2014, and, applying the rationale from *Coleman* and *Hullinger*, calculated that the last date on which Komar could timely have filed suit was June 28, 2015. Because she did not file suit until July 15, the district court dismissed her action as time barred. Komar appealed.

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[5] *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), *overruled on other grounds, Collins, supra* note 4.

[6] *Hullinger, supra* note 4.

[7] *Id.* at 871-72, 546 N.W.2d at 783 (emphasis supplied) (quoting *Coleman, supra* note 5).

Court of Appeals

The Court of Appeals affirmed.[8] Like the district court, it reasoned Komar's claim accrued on January 15, 2013, and she had 2 years thereafter to bring suit unless the 6-month filing extension of § 81-8,227(1) applied. In addressing whether Komar was entitled to the filing extension, the Court of Appeals reasoned:

> Komar . . . filed her claim with the [Risk Manager] on June 27, 2014, a little more than 17 months after her claim accrued, but still within the 2-year statute of limitations. Pursuant to the language of § 81-8,213, Komar could have withdrawn her claim from the [State Claims] Board and filed her complaint in the district court as early as December 28, 2014. On December 28, there remained approximately 19 days before the expiration of the 2-year statute of limitations for Komar's claim. If Komar had withdrawn her claim during these 19 days, she would have had an additional 6 months from the date of her withdrawal to file her complaint in the district court, pursuant to the language of § 81-8,227(1). However, Komar did not withdraw her claim from the Board until July 14, 2015, almost 6 months after the 2-year statute of limitations had expired.[9]

Like the district court, the Court of Appeals calculated June 28, 2015, was the last date on which Komar could timely have filed suit. Because she did not file suit until July 15, the Court of Appeals concluded Komar's action was time barred and affirmed the district court's dismissal.

Komar petitioned for further review, urging this court to overrule our holdings in *Coleman* and *Hullinger* and interpret § 81-8,227(1) to authorize a 6-month filing extension that runs from the date a claim is actually withdrawn, rather than the first date on which the claim could have been withdrawn

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[8] *Komar, supra* note 2.

[9] *Id.* at 696, 897 N.W.2d at 313-14.

under § 81-8,213. We granted further review to address the proper application and computation of the 6-month filing extension under this factual scenario.

ASSIGNMENT OF ERROR

On further review, Komar assigns several errors which we consolidate into one: The Court of Appeals erred in concluding her complaint was time barred under § 81-8,227(1).

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.[10]

[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.[11]

ANALYSIS

Statutory Background

[3,4] Tort claims against the State are governed by the STCA. Before suit can be filed under the STCA, a claimant must submit the claim in writing to the Risk Manager within 2 years after the claim accrued.[12] Generally speaking, a claimant cannot file suit under the STCA until the Risk Manager or State Claims Board makes a final disposition of the claim.[13] However, if no final disposition of a claim has been made after 6 months, the claimant is permitted to withdraw the claim and file suit under the STCA.[14]

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[10] *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018).

[11] *Id.*

[12] § 81-8,227(1).

[13] § 81-8,213.

[14] *Id.*

[5,6] The 2-year limitations period referenced in § 81-8,227(1) governs not just the time for submitting claims to the Risk Manager, but also the time for beginning suit under the STCA.[15] Under certain circumstances, the STCA provides a 6-month extension for beginning suit:

> The time to begin suit under [the STCA] shall be extended for a period of six months from the date of mailing of notice to the claimant by the Risk Manager or State Claims Board as to the final disposition of the claim or from the date of withdrawal of the claim under section 81-8,213 if the time to begin suit would otherwise expire before the end of such period.[16]

Overview of Case Precedent

This court has had several opportunities to interpret and apply the 6-month filing extension of § 81-8,227(1). We have addressed its application when the State Claims Board makes a final disposition[17] and when a claimant withdraws the claim to begin suit, as Komar did here.[18]

This court first interpreted § 81-8,227 in *Coleman v. Chadron State College*.[19] In that case, the tort claim was submitted to the State Claims Board 22 months after the cause of action accrued. Ten months later, the board had not made final disposition, so the claimant withdrew the claim and, a few weeks later, filed suit in district court. The district court dismissed the action as time barred, and the claimant appealed.

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[15] *Hullinger, supra* note 4.

[16] § 81-8,227(1).

[17] See, *Collins, supra* note 4, *disapproved on other grounds, Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007); *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000), *abrogated on other grounds, A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[18] See, *Hullinger, supra* note 4; *Coleman, supra* note 5.

[19] *Coleman, supra* note 5.

We observed that under § 81-8,227(1), the 2-year limitations period "shall be extended for a period of six months from . . . the date of withdrawal of the claim under section 81-8,213 if the [2-year period] to begin suit would otherwise expire before the end of such period." We provided an example of how the 6-month extension would work in a typical case:

> If, for example, one filed his or her claim in the 17th month after the claim accrued and withdrew the claim in the 23rd month after it accrued, § 81-8,227 provides that he or she is given an additional 6 months in which to file suit, as the 2-year period of limitation would otherwise expire during the ensuing 6 months.[20]

In *Coleman*, the defendant argued the claimant was not entitled to the 6-month extension, because by the time the claimant withdrew his claim to file suit, the 2-year limitations period already had expired. This court recognized the "dilemma" confronted by those who submitted claims to the State Claims Board 18 months or more after their claim accrued, but within the 2-year limitations period.[21] We described these claimants as "fourth quarter" claimants,[22] and we observed that the interplay between §§ 81-8,213 and 81-8,277(1) presented a predicament for such claimants:

> The source of [the claimant's] predicament is § 81-8,213. As stated, that section mandates that before suit may be filed in court, a claim may not be withdrawn from the State Claims Board for at least 6 months. In order to comply with § 81-8,213, [the claimant], who filed his claim with the board in the 22d month after his claim accrued, was prevented from filing his lawsuit in the district court before the 24-month statute of limitations ran. In essence, one statute prevents filing of a

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[20] *Id.* at 499, 466 N.W.2d at 532.

[21] *Id.* at 500, 466 N.W.2d at 532.

[22] *Id.* at 501, 466 N.W.2d at 533.

> claim in court and another requires filing of that same claim in court. This appears to be a classic example of the "right hand not knowing what the left hand is doing."[23]

We applied the statutory rule of construction that a court will, if possible, avoid construing a statute in a way that leads to absurd, unjust, or unconscionable results,[24] and we held:

> A statutory scheme which precludes one from withdrawing a claim from the State Claims Board and thereby prevents that person from filing suit before the statute of limitations runs leads to absurd, unjust, or unconscionable results. We, therefore, hold that a claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within the 2-year statute of limitations, has 6 months from the first day on which the claim may be withdrawn from the claims board in which to begin suit. This interpretation ensures that effect is given to the legislative intent embodied in §§ 81-8,213 and 81-8,227 and that both are applied in a consistent and commonsense fashion. Furthermore, fourth-quarter claimants are given the same opportunity as those who file earlier to withdraw their claim and file suit within 6 months thereafter.[25]

Because the claimant in *Coleman* filed his lawsuit within 6 months after the first day on which he could have withdrawn his claim, we found the 6-month extension applied to render his lawsuit timely.

Five years later, in *Hullinger v. Board of Regents*,[26] we applied the same rule to a different factual scenario. The

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[23] *Id.* at 499, 466 N.W.2d at 532.

[24] See, *Dean v. State*, 288 Neb. 530, 849 N.W.2d 138 (2014); *In re Boundaries of McCook P.P. Dist.*, 217 Neb. 11, 347 N.W.2d 554 (1984).

[25] *Coleman, supra* note 5, 237 Neb. at 501, 466 N.W.2d at 533.

[26] *Hullinger, supra* note 4.

claimant in *Hullinger* submitted his claim to the State Claims Board just 2 days before the end of the 2-year limitations period. He let the claim pend for more than a year before he withdrew it, and 5½ months later, he filed suit in district court. We reiterated the rule, announced in *Coleman*, that fourth-quarter claimants have 6 months from the date the claim first could have been withdrawn from the board in which to begin suit.

But unlike the claimant in *Coleman*, we found that by the time the claimant in *Hullinger* withdrew his claim and filed suit, the 6-month extension period had already expired. The claimant in *Hullinger* urged an interpretation of § 81-8,227(1) that would allow claimants to withdraw a claim at any point after the 6-month repose period and still receive an additional 6 months after withdrawal to begin suit. We rejected that interpretation as inconsistent with *Coleman* and contrary to the purposes of a statute of limitations. We noted such a construction would effectively allow claimants to extend the 2-year limitations period for as long as they wanted and then receive an additional 6 months to file suit once they finally withdrew the claim. We observed that "[t]he mischief which a statute of limitations is intended to remedy is general inconvenience resulting from delay in assertion of a legal right which it is practicable to assert."[27]

In *Sharkey v. Board of Regents*,[28] we again considered the applicability of the 6-month extension under § 81-8,822(1). In that case, the claimants' cause of action accrued on October 6, 1993. The claimants submitted their first claim to the State Claims Board on February 15, 1994, and received notice of the board's denial roughly 4 months later on June 13, 1994. They submitted a second claim on January 24, 1995, and that claim was denied on June 2, 1995. Thereafter, the claimants filed suit on their claims in district court on September 20, 1995.

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[27] *Id.* at 873, 546 N.W.2d at 784.

[28] *Sharkey, supra* note 17.

Although suit had been filed within 2 years of the date the claim accrued, the district court dismissed the suit as untimely, reasoning the claimants had not begun suit within 6 months after receiving notice that their first claim had been denied. We noted that the rule announced in *Coleman* was an extension of time in which to bring suit, not a limitation as the district court concluded. Because the claimants in *Sharkey* had filed suit within 2 years of the accrual of their claim, we held their suit was timely, and the 6-month extension under § 81-8,227(1) was inapplicable.

And finally, in *Collins v. State*,[29] we had the opportunity to consider how the 6-month extension under § 81-8,227(1) is calculated when a claimant elects not to withdraw the claim after 6 months and instead waits for the State Claims Board to make a final disposition. The claimant in *Collins* submitted her claim to the board 6 days before the 2-year limitations period expired. More than 7 months later, the board rejected the claim. The claimant in *Collins* filed suit on the claim just over 5 months later. The district court applied the reasoning of *Coleman* and *Hullinger*, and found the suit was time barred because it had been filed more than 6 months after the first date on which the claim could have been withdrawn. On appeal, we explained that our holdings in *Coleman* and *Hullinger* do not apply when a claimant allows the board to reach a decision:

> Under the plain language of § 81-8,227, a claimant has 6 months to file suit after notice of the denial of the claim is mailed by the claims board. The reasoning of *Coleman* and *Hullinger* does not apply to claims that are decided by the claims board. Accordingly, we hold that a claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within 2 years as provided by § 81-8,227(1), has 6 months to file suit from the date

[29] *Collins, supra* note 4.

> the board gives written notice to the claimant as to the final disposition of the claim. . . . Because [the claimant] filed suit within 6 months after the claims board denied her claim, her suit was not time barred.[30]

[7] These cases illustrate the following general rules for calculating the statute of limitations under the STCA. Claimants who allow the State Claims Board to reach a decision must file suit on the claim within 2 years after the claim accrued, or within 6 months after the board mails notice of final disposition, whichever occurs later.[31] On the other hand, claimants who withdraw their claim must file suit on the claim within 2 years after the claim accrued, or within 6 months after the first date on which the claim could have been withdrawn, whichever occurs later.[32]

Komar's Action Is Time Barred

Applying these principles to the present case, we agree with the district court and the Court of Appeals that Komar's suit is time barred. Komar's claim accrued on January 15, 2013. She filed her claim with the Risk Manager for the State Claims Board on June 27, 2014, a little more than 17 months after it accrued and well within the 2-year statute of limitations. Section 81-8,213 prevented Komar from withdrawing her claim for a period of 6 months.

Nebraska has a statutory rule for computing time,[33] and we have held this rule governs time calculations of the 6-month time period under the STCA.[34] As such, the 6-month period is computed by excluding the day the claim was filed, and including the last day of the period unless it falls on a

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[30] *Id.* at 272, 646 N.W.2d at 621.

[31] *Id.*; *Sharkey, supra* note 17.

[32] See, *Hullinger, supra* note 4; *Coleman, supra* note 5.

[33] See Neb. Rev. Stat. § 25-2221 (Reissue 2016).

[34] See *Geddes, supra* note 17.

Saturday, Sunday, or a day on which the courts of record may legally be closed, in which event the period shall run until the end of the next day on which the courts of record will be open.[35] Using this computation, the district court and Court of Appeals found the first day on which Komar could have withdrawn her claim was December 28, 2014. However, because that date fell on a Sunday, the first date on which Komar could have withdrawn her claim was actually December 29, 2014.

If Komar had withdrawn her claim on December 29, 2014, she would have been entitled to the 6-month filing extension under the plain language of § 81-8,227(1), because the 2-year statute of limitations would otherwise have expired during the ensuing 6-month period. Indeed, the typical factual scenario Justice Fahrnbruch described in *Coleman* in 1991 is precisely how the 6-month extension would have functioned in the present case if Komar had withdrawn her claim on the first date allowed by § 81-8,213.

But Komar did not withdraw her claim until much later, on July 14, 2015, and did not file suit until July 15. By that time, the 2-year statute of limitations had expired, as had the 6-month extension under § 81-8,227. The district court and Court of Appeals correctly found this action was time barred.

Komar urges this court to overrule our holdings in *Coleman* and *Hullinger*, and instead interpret § 81-8,227(1) to authorize a 6-month filing extension that runs from the date a claim is actually withdrawn, rather than the first date on which the claim could have been withdrawn under § 81-8,213. For the same reasons we rejected this interpretation in *Hullinger*, we reject it here. Such a construction would allow claimants to extend the 2-year limitations period for as long as they wanted and then receive an additional 6 months to file suit once they finally withdrew the claim. In addition, the

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[35] *Id.*

expansive interpretation urged by Komar runs contrary to the settled rule that statutes purporting to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign.[36]

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Appeals.

Affirmed.

Kelch, J., not participating in the decision.
Wright, J., not participating.

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[36] See *Amend, supra* note 10.

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

In re Estate of Bernadine M. Karmazin, deceased. Denise Baumgart and Kenneth Karmazin, appellees and cross-appellants, v. Judy O'Sullivan, Personal Representative of the Estate of Bernadine M. Karmazin, deceased, appellant and cross-appellee.

908 N.W.2d 381

Filed March 16, 2018. No. S-17-228.

1. **Decedents' Estates: Appeal and Error.** An appeal from the county court's allowance or disallowance of a claim in probate will be heard as an appeal from an action at law. In reviewing a judgment of the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
2. **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.
3. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
4. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
5. **Pleadings.** The pleadings in a cause are not mere ordinary admissions for the purposes of use in that suit, but are judicial admissions.
6. **Pleadings: Evidence: Waiver.** In effect, pleadings are not a means of evidence, but a waiver of all controversy, so far as the opponent may desire to take advantage of them, and therefore, a limitation of the issues.

7. **Appeal and Error.** A party cannot complain of error which the party has invited the court to commit.
8. **Actions: Pleadings: Parties: Joinder.** Joinder or substitution of the real party in interest shall have the same effect as if the action had been commenced by the real party in interest.
9. **Property: Taxes.** Real property tax liability rests with the owner or owners of the real property at the time real property taxes are charged, accrued, or assessed, i.e., due and payable.
10. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.

Appeal from the County Court for Hall County: Arthur S. Wetzel, Judge. Affirmed in part, and in part reversed and remanded with direction.

Brenda K. Smith and Gretchen L. McGill, of Dvorak Law Group, L.L.C., for appellant.

Mark A. Beck, of Beck Law Office, P.C., L.L.O., for appellees.

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

Cassel, J.

I. INTRODUCTION

A life tenant leased real estate to a remainderman for 1 year ending on October 31, 2015. The life tenant died in August. The principal issue is whether the lease clause requiring the lessor to pay unspecified real estate taxes made her liable for 2015 taxes that became due and payable on December 31. The county court allowed the remaindermen's claims for these taxes. Although two interpretations are possible, the one requiring the estate to pay taxes becoming due after the lease expired was not reasonable. We reverse that portion of the order and otherwise affirm.

II. BACKGROUND

Bernadine M. Karmazin (decedent) conveyed a remainder interest in certain property to Kenneth Karmazin (Karmazin) and in other property to Denise Baumgart. Decedent retained a life estate interest in the property.

In 2014, decedent entered into two lease agreements with Karmazin. The lease terms required Karmazin to pay cash rent to decedent for land intended for crops, pasture, or hay. The leases were for a 1-year term, commencing November 1, 2014, and ending on October 31, 2015. They provided that "Real Estate Taxes will be paid by [decedent]." Karmazin's rent payments were due April 1, August 1, and November 1, 2015.

On August 23, 2015, decedent died. After the commencement of informal probate proceedings, a notice to creditors published in a local newspaper stated that creditors of the estate must file their claims with the court on or before December 15, 2015, or be forever barred. The estate did not mail to either Baumgart or Karmazin (collectively the claimants) a copy of the notice to creditors.

On December 15, 2015, an attorney for the estate wrote a letter to the personal representative regarding liability for real estate taxes. The attorney stated that because decedent died in 2015, the estate's obligation to pay real estate taxes ended with the real estate taxes that became delinquent in 2015, in other words, the 2014 taxes.

On April 11, 2016, Baumgart filed an "Application to Determine Tax Liability." She alleged that in "late 2015, demand was placed upon the Personal Representative to pay the 2015 real estate taxes," which resulted in the December 15, 2015, letter. She asked that the court determine the estate's liability for the 2015 real property taxes and require the estate to reimburse 2015 taxes paid. The estate disallowed the claim. On July 28, the claimants filed an amended application to determine tax liability and liability for rent paid by Karmazin. The estate also disallowed this claim.

The claimants filed a petition for allowance of the claim. They identified the amount of the claim as "unknown." The estate objected. It alleged that the claims were barred under Neb. Rev. Stat. § 30-2485(b) (Reissue 2016). It also alleged that the claimants failed to properly file a claim because they did not identify an amount.

During a hearing, the parties stipulated that the estate did not pay any of the 2015 real estate taxes on the property. Baumgart testified that she was a remainderman of certain property in Nuckolls County, Nebraska, that the property "became [hers]" when decedent died, and that she paid the 2015 real estate taxes. Karmazin similarly testified that he was a remainderman in real estate in Nuckolls County pursuant to a deed, that he became the sole owner upon decedent's death, and that he paid taxes and interest. Over objection, the court allowed the claimants to submit deeds at a later time showing life estate and remainder interests. The claimants subsequently filed an affidavit to which they attached copies of deeds evidencing the ownership of the relevant parcels of real estate.

The county court determined that Karmazin did not timely submit his claim for rent. With regard to real estate taxes, the court stated that under operation of law, the liability for real estate taxes would lie with the owner of the property at the time the taxes became due and payable. However, the court determined that because the lease agreements controlled the lessor's and lessee's respective obligations to pay taxes, the law's default rule did not apply. The court found the leases to be ambiguous, noting that they did not specify the tax year. Ultimately, the court ordered the estate to reimburse Baumgart for payment of real estate taxes in the amount of $2,097.74 and to reimburse Karmazin $8,929.46, plus interest of $68.40.

The estate filed a timely appeal, and the claimants asserted a cross-appeal. We moved the case to our docket.[1]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

III. ASSIGNMENTS OF ERROR

The estate assigns, consolidated, that the court erred in (1) determining the claimants had standing, (2) allowing testimony from the claimants regarding their status as remaindermen of the estate, (3) admitting deeds without proper foundation, (4) determining the claimants made a proper claim under the probate code, (5) determining the lease agreements were ambiguous, and (6) determining the estate must reimburse the claimants for payment of real estate taxes and interest.

On cross-appeal, the claimants allege that the court erred in determining that Karmazin failed to properly file his claim for rent.

IV. STANDARD OF REVIEW

[1] An appeal from the county court's allowance or disallowance of a claim in probate will be heard as an appeal from an action at law.[2] In reviewing a judgment of the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[3] The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.[4]

[2,3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[5] The meaning of a contract and whether a contract is ambiguous are questions of law.[6]

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[2] *In re Estate of Alberts*, 293 Neb. 1, 875 N.W.2d 427 (2016).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Frohberg Elec. Co. v. Grossenburg Implement*, 297 Neb. 356, 900 N.W.2d 32 (2017).

V. ANALYSIS

1. Standing

The estate contends that the claimants failed to establish standing. The claimants based their claim on their remainder interests in the property. But the estate argues that they failed to offer valid evidence of ownership.

[4] The estate conflates standing with proof of the validity of a claim. Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.[7] The probate code gives standing to purported creditors of an estate.[8] Because the claimants purported to be creditors of the estate, they had standing to assert their claims.

2. Interest in Property

The estate argues that the claimants' failure to offer deeds into evidence defeats their claim of an ownership interest. It relies upon *In re Estate of Olsen*.[9] In that case, we stated that in cases involving questions of title, ownership, and right to possession in the proof of deeds, leases, and mortgages and other instruments of title, the best evidence rule requires that the instrument itself be produced, unless a sufficient foundation is laid for the production of secondary evidence of the contents of such instrument, such as by showing its loss or destruction or that it is in the possession or control of an adverse party who has neglected to produce it after notice to do so.[10]

[5,6] But here, the estate admitted in its pleadings the claimants' ownership interests. The pleadings in a cause are not mere ordinary admissions for the purposes of use in that

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[7] *Stewart v. Heineman*, 296 Neb. 262, 892 N.W.2d 542 (2017).

[8] See, generally, § 30-2485 and Neb. Rev. Stat. §§ 30-2486 and 30-2488 (Reissue 2016).

[9] *In re Estate of Olsen*, 254 Neb. 809, 579 N.W.2d 529 (1998).

[10] *Id.*

suit, but are judicial admissions.[11] In effect, pleadings are not a means of evidence, but a waiver of all controversy, so far as the opponent may desire to take advantage of them, and therefore, a limitation of the issues.[12] In the estate's objection to the claim, it stated that "[p]ursuant to Claimant's Amended Application, [decedent] died in 2015, and Claimants owned a remainder interest in the Property subject to the life estate interest of [decedent]." The objection next stated that "Claimants were the owners of the Property as of December 31, 2015." Because of the estate's judicial admissions of the claimants' remainder interests, the claimants were not bound to produce the actual deeds at the hearing.

3. Amount of Each Claim

The estate next contends that the claimants failed to make a proper claim under the probate code. It submits that the failure to identify the amount of the claims was a fatal defect. We disagree.

The estate relies on *J.R. Simplot Co. v. Jelinek*.[13] In that case, a creditor filed a "'Demand for Notice'" (demand) which stated that the creditor had "'a financial interest in the estate of the deceased and holds an outstanding claim'" but did not include a basis for the potential claim nor an amount due.[14] We concluded that the demand was "at most 'notice to a representative of an estate regarding a possible demand or claim against the estate.'"[15] We observed that the demand did not refer to the statute governing presentation of claims,[16] but, rather, referenced a statute providing that interested parties

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[11] *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012).

[12] *Id.*

[13] *J.R. Simplot Co. v. Jelinek*, 275 Neb. 548, 748 N.W.2d 17 (2008).

[14] *Id.* at 556, 748 N.W.2d at 25.

[15] *Id.* at 557, 748 N.W.2d at 25.

[16] See § 30-2486.

can request notice from the court of filings pertaining to an estate.[17] We further noted that the claimant had earlier filed a "'Statement of Claim'" which "provided a description of the claim, a due date, and the name and address of the claimant or authorized party."[18]

We do not read *J.R. Simplot Co.* as mandating that an amount due be specified. We noted in the facts section of the opinion and again in the analysis that the demand did not list a basis for the claim or an amount due. But those omissions merely buttressed our ultimate conclusion that the demand did not qualify as a statement of a claim under § 30-2486(1).

Significantly, the statute governing presentation of claims does not require that the amount of the claim be specified. Instead, § 30-2486(1) provides that a claimant "may file a written statement of the claim." The statute identifies matters that shall be stated: "If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described."[19] The statute provides that the failure to correctly describe such matters "does not invalidate the presentation made."[20]

Here, the amount of the claims was easily ascertainable and not subject to dispute. The claimants sought reimbursement for 2015 real estate taxes paid. The amount of such taxes was a matter of public record. Karmazin additionally requested reimbursement for rent, and he attached a copy of the leases which showed the payment dates and amounts due. The application notified the estate of the basis for the claims, and the amounts of the claims could be determined with certainty. We find no merit to the estate's assignment of error.

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[17] See Neb. Rev. Stat. § 30-2413 (Reissue 2016).

[18] *J.R. Simplot Co. v. Jelinek, supra* note 13, 275 Neb. at 558, 748 N.W.2d at 26.

[19] § 30-2486(1).

[20] *Id.*

Although not statutorily required, the better practice is to identify an amount of a claim. Doing so advances the purpose of § 30-2485—"'facilitation and expedition of proceedings for distribution of a decedent's estate, including an early appraisal of the respective rights of interested persons and prompt settlement of demands against the estate.'"[21]

4. Rent

On cross-appeal, the claimants assert that the county court erred in finding Karmazin's claim for rent to be barred. At issue is a payment made after decedent's death. The claimants now contend that Karmazin's claim is not yet due or, alternatively, that it arose before decedent's death. But they advanced a different view at the trial level.

[7] Any error by the county court in finding that the claim arose after death was invited. In a brief filed with the court, the claimants took the position that the claim arose after decedent's death and that they had 4 months after the claim arose to file a claim.[22] Similarly, the estate asserted in its responsive brief that the claim arose after decedent's death. The court ruled accordingly. A party cannot complain of error which the party has invited the court to commit.[23] Because the claimants contended before the county court that the claim arose after decedent's death, they cannot now argue that it arose before her death.

The statute does not authorize a court to extend the time for filing a claim that arose after death. Section 30-2485(a)(1) allows the court to grant a creditor additional time upon "good cause shown" for a claim that arose prior to a decedent's death. But there is no similar "good cause" provision for a claim that arose after the decedent's death.[24]

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[21] *J.R. Simplot Co. v. Jelinek, supra* note 13, 275 Neb. at 554, 748 N.W.2d at 23.

[22] See § 30-2485(b)(2).

[23] *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014).

[24] See § 30-2485(b).

Karmazin did not timely present his claim for rent. The claim concerned rent due on November 1, 2015. Karmazin asserted the claim on July 28, 2016. Because he did not assert it within 4 months after it arose, we conclude the county court did not err in finding Karmazin's claim for rent to be barred.

5. Real Estate Taxes

(a) Timeliness of Claim

The estate argues that Karmazin did not timely present a claim for the 2015 real estate property taxes. Those taxes became due and payable on December 31, 2015.[25] Thus, the estate contends that any claim for such taxes must have been made by May 1, 2016, and that Karmazin did not present his claim until July 28.

[8] Whether Karmazin's claim was timely turns on whether the claim for taxes in the July 2016 amended application related back to the claim for taxes in the April 11 application. It did. In the April 11 application, Baumgart stated that she and "her siblings owned a remainder interest in certain real property, subject to the life estate interest of [decedent]." We digress to note that the filing of this claim on behalf of Baumgart's "siblings" did not constitute an unauthorized practice of law.[26] The application requested a determination of "the Estate's liability for 2015 taxes on real property that the Decedent held a life estate interest and received all 2015 income therefrom." The July application added Karmazin's name as an "[a]pplicant." In effect, it joined a real party in interest. "Joinder or substitution of the real party in interest shall have the same effect as if the action had been commenced by the real party in interest."[27] Thus, the amended

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[25] See Neb. Rev. Stat. § 77-203 (Reissue 2009).

[26] See *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008).

[27] Neb. Rev. Stat. § 25-301 (Reissue 2016).

application related back to the original.[28] And because the April application was filed within 4 months of when the claim arose, Karmazin's claim for real estate taxes was not barred.

(b) Liability for Taxes

The estate argues that the county court erred in determining that the estate must reimburse the claimants for 2015 property taxes. We agree.

(i) Default Rule

[9] The default rule is that the owner of real property on December 31 is liable for the taxes assessed and levied for that calendar year. Real property tax liability rests with the owner or owners of the real property at the time real property taxes are charged, accrued, or assessed, i.e., due and payable.[29] As mentioned above, the 2015 real estate taxes became due and payable on December 31, 2015. On that date, the remaindermen were the sole owners of the real property. Thus, under the default rule, the claimants would be responsible for payment of the 2015 taxes.

(ii) Lease Agreements

The default rule can be modified by contract. Here, lease agreements between decedent and Karmazin provided that "Real Estate Taxes will be paid by [decedent]." Due to the leases, the county court determined that the default rule did not apply. The court reasoned:

> It is clear the decedent/life tenant received cash rent for crops planted and harvested in 2015. Logic and equity further dictate the estate should be responsible for the payment of real estate taxes for 2015. The Court determines

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[28] See *Fisher v. Heirs & Devisees of T.D. Lovercheck*, 291 Neb. 9, 864 N.W.2d 212 (2015).

[29] See *In re Estate of Olsen, supra* note 9.

> the intent of the parties was for the tenant to pay rent and the landlord to pay real estate taxes associated with the crop year 2015.

But the county court erred in resorting to consideration of equity. We are presented with an action at law, not in equity.[30] Thus, equitable principles do not apply.

The county court also determined that logic compelled the conclusion that the estate was liable for the taxes. It found the leases to be ambiguous. And in attempting to determine the intent of the contracting parties, it reasoned that it was logical for the estate to pay taxes associated with the 2015 crop year. We disagree on both of these points of law.

[10] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[31] Here, the leases did not specify whether decedent would be responsible for the 2014 taxes or the 2015 taxes. But the leases are ambiguous only if both of the conflicting interpretations are *reasonable*.

We are mindful of the nature of these specific leases. In the absence of a different agreement, a yearly lease of farmland begins on March 1 and ends on February 28 of the succeeding year.[32] But the leases here supplied a different term: November 1, 2014, to October 31, 2015.

In terms of real property taxation, several dates are important. Property is assessed for taxation purposes on January 1.[33] On or before October 15, the county board of equalization levies taxes for that calendar year.[34] The taxes levied for that calendar year become due and payable on December 31,

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[30] See *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016).

[31] *Frohberg Elec. Co. v. Grossenburg Implement, supra* note 6.

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

[33] Neb. Rev. Stat. § 77-1301(1) (Cum. Supp. 2016).

[34] Neb. Rev. Stat. § 77-1601(1) (Reissue 2009).

in other words, on the last day of the year.[35] In counties with a population of less than 100,000—such as Nuckolls County—the first half of the prior year's taxes becomes delinquent on May 1, and the second half becomes delinquent on September 1.[36]

One interpretation of the leases is that decedent would pay the taxes due or delinquent during the term of the leases. Those would be the 2014 real estate taxes. The 2014 taxes became due on December 31, 2014, and would be delinquent in May and September of 2015—all within the term of the lease.

The claimants proposed, and the county court adopted, a different interpretation. This interpretation, premised upon rent received for crops planted and harvested in 2015, would be that decedent would be responsible for the taxes assessed and levied during the lease term, that is, the 2015 taxes. But those taxes did not become due until December 31, 2015. Typically, they would not be paid until sometime in 2016. Moreover, under this interpretation, either decedent would not have been *liable at all for the 2014 taxes* (which became due and, if not paid by the delinquency dates, delinquent during the lease term) or decedent would have been liable for *both the 2014 and 2015 real estate taxes* in the 1-year term of the lease. This interpretation is not reasonable.

We conclude that the leases are not ambiguous. Although there are two conflicting interpretations of the contract language, only one of them is reasonable. That interpretation made decedent responsible for the 2014 taxes.

The answer becomes clearer if decedent's death is removed from the equation. Under the default rule, decedent—as the owner of the property on December 31, 2015—would have been responsible for the 2015 taxes. And if the leases had been renewed for another 1-year term—from November 1, 2015, to October 31, 2016—decedent would have been liable for the

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[35] § 77-203.

[36] See Neb. Rev. Stat. § 77-204 (Reissue 2009).

2015 taxes, because they became due and payable during the term of the lease. With or without a lease, the owner of the land would be responsible for the 2015 taxes.

The confusion stems from Karmazin's status as both a tenant under the lease and an owner of the remainder. As the tenant, the lease agreements did not make him responsible for the taxes. But upon decedent's death, the claimants became the sole owners of the land Karmazin leased. As the owners of the land on December 31, 2015, the claimants were liable for the taxes that became due and payable on that date.

Because the estate did not own the property on December 31, 2015, and the leases did not obligate decedent to pay taxes that had not yet become due, we conclude the county court erred in ordering the estate to reimburse the claimants for the real estate taxes they paid. We reverse that part of the court's order and remand the cause with direction to deny this claim.

VI. CONCLUSION

We conclude that the county court did not err in finding Karmazin's claim for rent to be barred. Because the claimants were the owners of the property on December 31, 2015, and the leases did not obligate decedent to pay the taxes due on that date, we reverse that portion of the court's judgment and remand the cause with direction.

Affirmed in part, and in part reversed and remanded with direction.

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 on behalf of the State of Indiana and Fernando L., a minor child, appellee, v. Rogelio L., appellant.

907 N.W.2d 920

Filed March 16, 2018. No. S-17-348.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law. An appellate court resolves questions of law independently of the lower court's conclusion.
4. **Child Support: Rules of the Supreme Court.** In calculating a parent's child support obligation, the Nebraska Child Support Guidelines permit a court to deduct a parent's obligation to support subsequent children from his or her monthly income in some circumstances.
5. ____: ____. The Nebraska Supreme Court interprets the expression "subsequent children" in Neb. Ct. R. § 4-220 to mean children born after an existing support order.
6. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
7. **Child Support: Rules of the Supreme Court: Taxes.** In calculating a parent's monthly net income for child support purposes, Neb. Ct. R.

§ 4-205(A) (rev. 2016) allows a deduction for taxes, as established by standard deductions applicable to the number of exemptions provided by law.

8. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Adams County: Terri S. Harder, Judge. Affirmed in part, and in part reversed and remanded with directions.

Jamie L. Arango, of Arango Law, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

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

Miller-Lerman, J.

INTRODUCTION

Rogelio L. appeals the order of the district court for Adams County that dismissed his March 2, 2016, complaint for a downward modification of his child support obligation to his son, Fernando L., originally ordered at $388 per month on August 18, 2010. The district court concluded that Rogelio had not shown a material change in circumstances warranting a reduction in his monthly child support obligation to Fernando. No tax returns or financial documents were in evidence; Rogelio testified about his income and admitted that he did not pay taxes. The district court determined that Rogelio should not receive any deduction from his total monthly income for taxes. The district court also found that Rogelio's three "after-born" children could not be used to lower his child support obligation to Fernando. Rogelio appeals. We find no error in the district court's determination regarding taxes and affirm this ruling. However, because we conclude that the district court based its child support calculation on an incorrect understanding of the birth order of Rogelio's children relative to Fernando and the 2010 child

support order, we reverse this aspect of the order and remand the cause with directions.

BACKGROUND

2010 Order

In 2010, the State brought an action against Rogelio pursuant to the Uniform Interstate Family Support Act to establish Rogelio's paternity of and child support obligation to his son Fernando, who was born in June 2004 and lived with his mother in Indiana. In an order filed August 18, 2010, the district court for Adams County found that Rogelio was Fernando's father and ordered him to pay child support of $388 per month. The district court based its calculation on Rogelio's net monthly income of $1,291.31, which took into account his regular support of two other children. While the original support order did not include the names or ages of these other children, it is apparent from the record as a whole that they are Sheryl L., born in 2007, and a son, born in 2009. The record indicates, but does not explicitly state, that Rogelio's son born in 2009 died in 2012.

2016 Complaint

On March 2, 2016, Rogelio filed a complaint for modification of his child support obligation to Fernando. He alleged that there had been a material change in circumstances, because his income had decreased by an amount that would reduce his child support obligation by at least 10 percent and because his income fell below the federal poverty guidelines. See, Neb. Ct. R. § 4-217; Neb. Ct. R. § 4-218 (rev. 2018).

2016 Referee Report

The matter was referred to a child support referee who conducted a hearing and prepared a report. The bill of exceptions from the hearing is not in the record before us. However, the referee's report, filed October 31, 2016, recounted Rogelio's testimony that he netted $400 per week (projected as $1,733.33 per month) working as a handyman and that he paid no

taxes—income taxes or payroll taxes—on this income. The referee stated that according to Rogelio, he had "one older child than the child at issue in this action," which "older child" was "8 years old," as well as two younger children, ages 1 and 2. As an aside, we note that Fernando, born in June 2004, was 12 years old at the time of the referee's report, making the finding that an "8-year-old" was "older" inaccurate.

Using a net monthly income of $1,733.33 and applying a setoff for regular support of the "8-year-old" child, but not for the two younger children, the referee reduced Rogelio's child support obligation to Fernando from $388 per month to $346 per month. The referee, however, rejected Rogelio's arguments that he should receive a deduction for his income tax liability and that his income fell below the poverty level.

2017 District Court Order

Rogelio filed exceptions to the referee's report that had recommended a reduction of his child support from $388 to $346 per month. He requested that the district court reverse and vacate the referee's report. Rogelio alleged, inter alia, that the referee was mistaken in the birth order and ages of his children and the application of poverty guidelines. A hearing was conducted on February 28, 2017, and the record of that hearing has been submitted to us. At that hearing, Rogelio testified and the district court received evidence consisting of three birth certificates and several child support calculations. Rogelio did not offer the bill of exceptions from proceedings with the referee. Ultimately, the district court dismissed Rogelio's complaint in an order filed March 17, 2017, from which this appeal is taken.

At the hearing on the matter on February 28, 2017, Rogelio clarified the birth order and ages of his children. He produced evidence that at the time of the hearing, he and his current spouse had three children, all of whom were born after Fernando's birth in 2004. The birth years of the other children are: 2007, 2014, and 2015. The record indicates that Fernando also had another child, a son born in 2009, who died in 2012.

We summarize the evidence concerning these children again in the analysis below. Taking the record as a whole, the evidence shows that Fernando and two other children were born before the 2010 child support order; support for the two other children was included in the 2010 child support calculation; one of those two other children died after the 2010 order but before the current modification proceedings; and, in addition, two children were born after the 2010 child support order.

Rogelio testified that healthcare for Fernando's three surviving half siblings is covered by Medicaid and that Rogelio's spouse was not employed but was able to work.

At the hearing, Rogelio testified that he formerly worked for a company that paid him $15 per hour and withheld taxes from his paycheck. However, he testified that at the time of this hearing, his current employer paid him $10 per hour in cash for working 40 hours per week and he does not pay any taxes. He stated he understood that he was required by law to pay taxes and that if he did not do so now, he would be forced to do so in the future.

As noted, the record does not contain any income tax returns or pay stubs, but the district court received proposed child support calculations offered by Rogelio and the State. Rogelio's calculations deducted amounts for taxes to determine his net monthly income. The State's calculations did not deduct taxes, and the district court adopted the State's calculations.

In an order filed March 17, 2017, the district court dismissed Rogelio's request for modification. Regarding the children, it concluded that there were certain factual errors in the referee's report regarding their ages and birth order. Specifically, the district court noted that Fernando was the oldest of Rogelio's children. But it found that all of Rogelio's other children were "after-born," presumably in relation to Fernando and after the existing 2010 child support order. Based on this finding, the district court made no deduction for Rogelio's other children either as "Child Support Previously Ordered" or as "Regular Support." Regarding taxes, the district court rejected Rogelio's argument that although he does

not pay taxes, he should receive a deduction from his total monthly income for the taxes he should be paying. That is, like the referee, the district court adopted the State's position that Rogelio should not receive a deduction for taxes he does not pay.

With these determinations in mind, the district court recalculated Rogelio's child support obligation for Fernando. It concluded that Rogelio's obligation should have increased rather than decreased, because he could not receive a deduction for support of his other children and because, without a deduction for taxes, his monthly net income had actually increased. Rogelio appeals from the March 17, 2017, order.

ASSIGNMENTS OF ERROR

Rogelio claims, combined and restated, that the district court erred when it (1) performed child support calculations based on incorrect findings regarding the children's birth order and existing child support and (2) failed to deduct his tax liability from his monthly income. He also contends that a poverty assessment of his circumstances should be made in this case.

STANDARDS OF REVIEW

[1,2] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Pearson v. Pearson*, 285 Neb. 686, 828 N.W.2d 760 (2013). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Schwarz v. Schwarz*, 289 Neb. 960, 857 N.W.2d 802 (2015).

[3] Interpretation of the Nebraska Child Support Guidelines presents a question of law. *Schwarz v. Schwarz, supra*. We resolve questions of law independently of the lower court's conclusion. *Id.*

ANALYSIS

Child Support and Other Children

Rogelio contends that the district court erred in performing child support calculations based on incorrect findings regarding the children's birth order. He claims that the district court erred when it failed to distinguish between children born after Fernando but before the 2010 child support order and children born subsequent to the 2010 child support order. Given the record, we agree that the district court erred.

[4] In calculating a parent's child support obligation, the Nebraska Child Support Guidelines permit a court to deduct a parent's obligation to support subsequent children from his or her monthly income in some circumstances. Neb. Ct. R. § 4-205(E) (rev. 2016) provides that "[s]ubject to § 4-220, credit may be given for biological or adopted children for whom the obligor provides regular support." Neb. Ct. R. § 4-220 sets forth a limitation on credit for support of subsequent children:

> An obligor shall not be allowed a reduction in an existing support order solely because of the birth, adoption, or acknowledgment of subsequent children of the obligor; however, a duty to provide regular support for subsequent children may be raised as a defense to an action for an upward modification of such existing support order.

[5,6] Based on our reading of § 4-220, we interpret the expression "subsequent children" to mean children born after an existing support order. This interpretation of "subsequent children" is consistent with the jurisprudence of modification, which contemplates a circumstance that was not present at the time of the original decree. It is well settled that a party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered. *State on behalf of B.M. v. Brian F.*, 288 Neb. 106, 846 N.W.2d 257

(2014). And our understanding of "subsequent children" as children born after the existing support order is borne out in our case law. See, e.g., *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005) (regarding child born after existing support order as subsequently born child for purposes of paragraph T of guidelines, predecessor to § 4-220).

In this case, the district court referred to all of Rogelio's children, other than Fernando, as "after-born" and, therefore, concluded that Rogelio could not use them in a calculation to lower his support. In essence, the district court classified all three of Rogelio's children who were younger than Fernando as children born subsequent to the existing support order for the purposes of § 4-220. As Rogelio points out, since Sheryl was born in 2007, this finding is inconsistent with the evidence; and it shows an incorrect reading of the 2010 support order.

Taking the record as a whole, the birth order of Rogelio's children, relative to the original 2010 support order for Fernando, is as follows:

Date	**Event**
June 2004	Fernando born
December 2007	Sheryl born
2009	Unnamed son born
August 18, 2010	Order of child support for Fernando
2012	Unnamed son dies
August 2014	Zoey L. born
August 2015	Roy L. born

We note that the existing 2010 child support order showed deductions for the regular support of two children; given the record, the two children must be Sheryl, born in 2007, and a son who was born in 2009 and died in 2012. Clearly, in 2017, the district court was correct in not considering a deduction for regular support of Rogelio's deceased son; however, the same cannot be said for Sheryl.

At its core, this case seeks to modify the 2010 order, which was premised on the existence of Fernando plus Rogelio's obligation to two other children. A trial court has discretion

to choose whether and how to calculate a deduction for subsequent children. See, § 4-220; *Schwarz v. Schwarz*, 289 Neb. 960, 857 N.W.2d 802 (2015). However, in this case, the district court has mistakenly referred to Sheryl, whose existence and regular support was acknowledged in the 2010 order, as a child subsequent to the 2010 order. The district court did not incorporate or analyze Rogelio's entitlement to a deduction for Sheryl's support, as is allowed under the guidelines and as was done in the existing 2010 support order under review by the district court. We believe that the district court's misstatement of the facts led to an erroneous application of the relevant law and calls into question the soundness of the calculation upon which the district court's order is based. Consequently, we conclude that the district court abused its discretion and we reverse, and remand with directions to render a calculation based on the record, including evidence received at the hearing on February 28, 2017.

Tax Liability

Rogelio asserts that the district court erred in declining to allow him a deduction from his total monthly income for taxes for which he was liable but did not pay. Due to a failure of proof, we find no error in the district court's treatment of Rogelio's tax liability in the 2017 order, and we affirm this aspect of the district court's order.

[7] In calculating a parent's monthly net income for child support purposes, § 4-205(A) allows a deduction for taxes, as established by standard deductions applicable to the number of exemptions provided by law. The guidelines further provide that copies of at least 2 years' tax returns, financial statements, and current wage stubs should be furnished to the court for purposes of determining the parents' income in order to calculate child support. Neb. Ct. R. § 4-204 (rev. 2016); Neb. Ct. R. ch. 4, art. 2, worksheet 1 (rev. 2016). Our cases recognize that a failure to provide the proper documents limits the district court's analysis. See, e.g., *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002).

In the instant case, Rogelio did not submit any tax returns or other documentary evidence of his wages at the time of the modification hearing before the district court. However, he did testify that he was paid $400 per week in cash and that he did not pay any taxes, although he acknowledged that he was required by law to pay them.

The record in *State on behalf of Andrew D. v. Bryan B.*, 22 Neb. App. 914, 864 N.W.2d 249 (2015), presented a circumstance involving a limited record. In that case, the father did not keep consistent business records and had not filed personal or business tax returns for several years. On appeal, the father claimed that the trial court erred in basing his income on speculation. In rejecting the father's contention, the Nebraska Court of Appeals observed, "[The father] put himself in the position in which he now claims error. There was no clear evidence of his income because he voluntarily failed to file tax returns . . . and does not keep reliable or complete business records." *Id.* at 922, 864 N.W.2d at 256.

We find the reasoning in *State on behalf of Andrew D. v. Bryan B., supra*, to be instructive here. Rogelio presented the district court with limited evidence upon which to base its child support calculations, and Rogelio's own testimony that he did not pay taxes supported the district court's refusal to deduct them from his income. Although at oral argument, Rogelio referred to income-related documents which were purportedly before the referee, Rogelio did not put the proceedings with the referee in evidence and they were therefore not available for the district court's or this court's consideration. Compare *State on behalf of Lockwood v. Laue*, 24 Neb. App. 909, 900 N.W.2d 582 (2017). Accordingly, the district court did not abuse its discretion when it declined to deduct Rogelio's tax liability from his monthly income and we affirm the portion of the district court's order concerning a deduction for taxes.

Poverty Assessment

[8] Rogelio claims that the district court erred when it did not consider the basic subsistence limitation set forth in

§ 4-218, which provides that a parent's support, child care, and health care obligation shall not reduce his or her net income below the federal poverty guidelines. Given that we have rejected the district court's child support calculation and, with the exception of the tax-related ruling, reversed the March 17, 2017, order and remanded the cause with directions, we need not consider this issue. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014). However, following a child support calculation on remand in accordance with the guidelines, consideration of the basic subsistence limitation may be warranted.

CONCLUSION

For the reasons stated above, we conclude that the district court did not err in its ruling regarding taxes and we affirm this portion of the order. However, we conclude that the district court abused its discretion in basing its child support calculation on a flawed understanding of the evidence regarding the birth order of the children and Rogelio's support obligations as required by the 2010 order, and we reverse, and remand with directions to enter an order in accordance with a child support calculation based on the record, including evidence received at the hearing on February 28, 2017.

Affirmed in part, and in part reversed and remanded with directions.

Wright and Kelch, JJ., not participating.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Mark P. Nunez, appellant.
907 N.W.2d 913

Filed March 16, 2018. No. S-17-398.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Search and Seizure: Police Officers and Sheriffs.** Inventory searches are considered reasonable because they serve at least three needs unrelated to criminal investigation: (1) to protect the owner's property while it remains in police custody, (2) to protect police against claims that they lost or stole the property, and (3) to protect police from potential danger.
3. **Search and Seizure.** The propriety of an inventory search is judged by a standard of reasonableness, and such a search must be conducted in accordance with standard operating procedures.
4. ____. An inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.
5. **Search and Seizure: Police Officers and Sheriffs: Evidence: Proof.** Under the inevitable discovery doctrine, challenged evidence is 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.
6. **Constitutional Law: Search and Seizure.** A failure to strictly follow established policy does not render an inventory search unconstitutional per se.

7. ____: ____. Whether a search is permissible under the Fourth Amendment depends on whether it is reasonable, and the test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts.

Appeal from the District Court for Washington County: John E. Samson, Judge. Affirmed.

Sean M. Conway and Kate O. Rahel, of Dornan, Troia, Howard, Breitkreutz & Conway, P.C., L.L.O., for appellant.

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

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

Cassel, J.

I. INTRODUCTION

Following a traffic stop leading to a driver's arrest, officers searched the vehicle before impounding it and discovered methamphetamine. Contrary to policy, a completed inventory sheet did not list the methamphetamine, and the officers apparently failed to separately list it. The driver unsuccessfully sought to suppress the evidence. Because we conclude that the search was reasonable and that the procedural defects did not raise an inference the search was conducted to discover evidence, we affirm the judgment below.

II. BACKGROUND

1. Arrest and Overview of Search

In August 2016, Mark P. Nunez was stopped by Sgt. Jacob Hoffman of the Washington County sheriff's office for speeding. Nunez' 7-year-old son was the only passenger. After Hoffman approached Nunez' vehicle, Nunez informed Hoffman that he thought his driver's license had been suspended for failure to pay child support. Hoffman then returned to his patrol

car and confirmed with dispatch that Nunez' driver's license was indeed suspended and found that it was suspended in both Nebraska and Iowa. Hoffman also discovered that there was an active warrant for Nunez' arrest. Hoffman then returned to the vehicle to arrest Nunez. Hoffman handcuffed Nunez and placed him in the patrol car. The child was transported by another officer to one of Nunez' friends or family. The vehicle was impounded.

Before the vehicle was impounded, Hoffman and another officer searched the vehicle for the keys. While looking for the keys, Hoffman discovered a pipe. After the keys were located, the officers continued to search the vehicle and discovered a black container holding a substance that tested positive for methamphetamine. Nunez was charged with one count of possession of a controlled substance, along with one count of driving under a suspended license.

2. Motion to Suppress

Prior to the bench trial, Nunez moved to suppress all evidence obtained as a result of the search of his vehicle, alleging that the warrantless search violated his constitutional rights. The State took the position that the search fell within the inventory exception to the warrant requirement.

At a hearing on the motion to suppress, the State called Hoffman to testify and entered into evidence a document outlining the Washington County sheriff's office's policy and procedures for impounded vehicles ("written policy"), as well as a video from Hoffman's body camera.

(a) Policy on Impounded Vehicles

The written policy states, in relevant part:

> Any vehicle seized and impounded shall be inventoried. The sheriff's office impound/inventory report form shall be completed with all identified items listed on the impound/inventory sheet. All unlocked containers are to be searched and inventoried. If the vehicle has a trunk

> release or if we are in custody of the keys, the trunk shall be inventoried, including any unlocked containers.
>
> . . . .
>
> . . . If any evidence or contraband is seized as the result of a vehicle impound[,] the item shall be listed on the impound/inventory report form with the word "evidence" listed next to the item. The property/evidence report form shall be completed on the item seized, tracking the item from the impound/inventory sheet to the property/evidence sheet. The property/evidence tag number and where item was secured shall be listed on the property/evidence report form.

Hoffman also testified about the Washington County sheriff's office's policy regarding impounded vehicles. He testified that according to the office's policy, officers are to "go through the vehicle and mark up anything that's of value and . . . check all unlocked containers in the vehicle, and if there's keys . . . check the trunk."

(b) Search for Keys

Footage from Hoffman's body camera depicted the stop, Nunez' arrest, and events thereafter. The video shows that after Nunez was arrested, Hoffman informed Nunez that his vehicle would be towed. Nunez then asked Hoffman if he had the keys or if the other officer had the keys. Hoffman responded that Nunez had the keys. Since Nunez was handcuffed, Hoffman told Nunez that he would get them for him. Hoffman then patted Nunez' pockets, apparently not locating the keys. He then instructed an officer standing nearby to check the vehicle, stating that he did not think Nunez had the keys. The video shows the other officer searching the back seat of the vehicle.

After Nunez was secured in the back of the patrol car, Hoffman went to help the other officer locate the keys. After they were unable to locate the keys in the passenger compartment of the vehicle, they questioned Nunez about

whether he had "chuck[ed] [th]em." Nunez denied getting rid of the keys, and Hoffman checked Nunez' pockets again. The officers then returned to the vehicle to search for the keys again. At that time, Hoffman located a pipe in the vehicle's center console underneath the steering column next to the gas pedal. A few minutes later, the other officer located Nunez' keys.

After finding the keys, the officers continued to search the vehicle. They then located the black container. Hoffman conducted a field test on the substance in the black container, and it tested positive for methamphetamine. The officers continued to search the passenger compartment and back of the vehicle.

Hoffman testified that when a person is placed under arrest and the arrestee's vehicle is being towed, he looks for the keys to the vehicle. When asked why he did so, he stated, "If the tow company has the keys they can put it in drive, which will allow the vehicle not to possibly have damage to it when they try to load it up or do whatever they need to do." He added, "[W]e try to keep at least the ignition key in there so it's more movable for the tow company." He testified that he looked for Nunez' keys for the same reason.

(c) Inventory Sheet

On cross-examination, Hoffman admitted that the inventory sheet was not completed during the time that the officers were searching for the keys. He testified that an inventory sheet was completed by another officer in accordance with the written policy. According to Hoffman, the inventory sheet was completed sometime before the vehicle was towed, but he could not remember if it was done before he left to transport Nunez to jail.

The inventory sheet was not offered into evidence at the hearing on the motion to suppress, but was received into evidence for the bench trial. The pipe and black container were not listed on the inventory sheet.

(d) Evidence Report

Although the written policy contemplates that a "property/evidence report form shall be completed" on any evidence seized as the result of a vehicle impound, no such form was offered into evidence at the suppression hearing or the bench trial, and there was no evidence that one was ever completed.

3. Conviction and Appeal

After the hearing, Nunez' motion to suppress was overruled, and following a bench trial during which he preserved his objection to the evidence, Nunez was convicted of possession of a controlled substance. The district court acquitted Nunez of the charge of driving under a suspended license. Nunez was sentenced to a 2-year term of probation.

Nunez filed a timely appeal.

III. ASSIGNMENT OF ERROR

Nunez assigns that the district court erred in overruling his motion to suppress.

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]

V. ANALYSIS

The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures.[2] It is well recognized that

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[1] *State v. Hidalgo*, 296 Neb. 912, 896 N.W.2d 148 (2017).

[2] See *id.*

inventory searches conducted according to established policy are reasonable.[3]

[2] Inventory searches are considered reasonable because they serve at least three needs unrelated to criminal investigation: (1) to protect the owner's property while it remains in police custody, (2) to protect police against claims that they lost or stole the property, and (3) to protect police from potential danger.[4] These purposes impact our analysis of the procedures used in the case before us.

[3,4] The propriety of an inventory search is judged by a standard of reasonableness, and such a search must be conducted in accordance with standard operating procedures.[5] The reason for requiring standardized criteria or an established routine to regulate inventory searches is as follows:

> "[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime . . . .'"[6]

Here, Nunez argues that the search in this case was not a reasonable inventory search because the search was not conducted in accordance with the policy of the Washington County sheriff's office. Nunez suggests that there are three ways in which the search did not comply with established policy:

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[3] See, *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987); *Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983); *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976).

[4] *Id.*

[5] *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996).

[6] *State v. Filkin*, 242 Neb. 276, 282, 494 N.W.2d 544, 549 (1993) (quoting *Florida v. Wells*, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990)).

(1) The officers were searching for keys, which Nunez claims is not a part of the established policy; (2) the officer who completed the inventory sheet did not list the pipe and the black container on it in accordance with established policy; and (3) the officers did not fill out an evidence report in accordance with established policy.

1. Search for Keys

First, Nunez argues that the written policy shows that searching for keys prior to impounding a vehicle is not an established part of the Washington County sheriff's office's policy. The State responds that searching for keys need not be part of the written policy in order to be established policy and that Hoffman's testimony established it as such. The State also argues that even if the officers had not searched for the keys, the pipe and black container would still be admitted as evidence because they would have been inevitably discovered pursuant to a valid inventory search. Assuming without deciding that we do not accept Hoffman's testimony as sufficient to supplement the written policy, we nonetheless agree with the State's alternative argument.

[5] Under the inevitable discovery doctrine, challenged evidence is 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.[7] Here, even if the police had not searched for the keys, as pointed out by the State, they would have discovered the pipe and black container pursuant to the inventory search.

2. Inventory Sheet and Evidence Report

Nunez also argues that certain deficiencies with the inventory sheet and evidence report show that the established policy

[7] See *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

was not followed, thereby rendering the inventory search unconstitutional. We disagree.

[6,7] A failure to strictly follow established policy does not render an inventory search unconstitutional per se.[8] "'Compliance with procedures merely tends to ensure the intrusion is limited to carrying out the government's caretaking function.'"[9] Whether a search is permissible under the Fourth Amendment depends on whether it is reasonable, and "'"[t]he test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts."'"[10]

In support of his argument that the officers' failure to follow established policy invalidates the inventory search, Nunez cites *State v. Newman*.[11] In *Newman*, Lincoln police notified Nevada authorities that they were looking for a criminal suspect who was traveling by train to Nevada. The Nevada authorities arrested the defendant at a train station. At the time, he was carrying three suitcases. The authorities transported the defendant and his luggage to a detention center. They did not immediately search the suitcases, but inventoried them as bulk property.

It was not until after the Nevada authorities were told that certain items were needed as evidence that two police officers went to the detention center's property room and searched the suitcases, locating the needed evidence. Although it was the policy of the detention center to conduct an inventory search of the suitcases before placing them in the property room, we found that policy was not followed in *Newman*. Thus, we

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[8] See *U.S. v. Rowland*, 341 F.3d 774, 780 (8th Cir. 2003) (stating "[e]ven when law enforcement fails to conduct a search according to standardized procedures, this does not mandate the suppression of the evidence discovered as a result of the search").

[9] *Id*. (quoting *U.S. v. Mayfield*, 161 F.3d 1143 (8th Cir. 1998)).

[10] *South Dakota v. Opperman, supra* note 3, 428 U.S. at 373 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)).

[11] *State v. Newman, supra* note 5.

concluded that the search of the suitcases did not fall within the boundaries of the inventory exception.

Although the failure to follow established policy in *Newman* led to a suppression of evidence, *Newman* is clearly distinguishable from the case at hand. As noted above, the purpose of requiring searches to be conducted according to established policy is to ensure that inventory searches are "'not . . . a ruse for a general rummaging in order to discover incriminating evidence.'"[12] In *Newman*, the timing of the search and the facts surrounding it raised an inference that the search was not designed to produce inventory, but to discover incriminating evidence. Here, the alleged technical errors on the inventory sheet and the lack of an evidence report do not raise the same inference.

Certainly, the fact that the evidence seized was omitted from the inventory sheet does not suggest that the search was conducted solely to obtain evidence; if anything, it suggests the opposite.[13] And the fact that there was no evidence report is not suggestive, either.

After reviewing the facts and circumstances presented, we conclude that the failure to list the seized evidence on the inventory sheet and the failure to complete an evidence report for the seized evidence do not raise an inference that the search was conducted solely to discover evidence. Because the officers otherwise complied with the established policy, the inventory search was reasonable and Nunez' assignment of error is without merit.

VI. CONCLUSION

For the reasons set forth above, we affirm Nunez' conviction.

Affirmed.

Wright and Kelch, JJ., not participating.

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[12] *State v. Filkin, supra* note 6, 242 Neb. at 282, 494 N.W.2d at 549.

[13] Compare *U.S. v. Rowland, supra* note 8 (suppressing evidence where officer listed only evidence seized and not other items in vehicle searched).

Nebraska Supreme Court
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In re Interest of Nicholas K., a child under 18 years of age. State of Nebraska, appellee, v. Nicholas K., appellant.

908 N.W.2d 78

Filed March 16, 2018. No. S-17-531.

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. **Minors: Proof.** The exhaustion requirement of Neb. Rev. Stat. § 43-251.01(7)(a) (Reissue 2016) demands evidence establishing that no other community-based resources have a reasonable possibility for success or that all options for community-based services have been thoroughly considered and none are feasible.

Appeal from the Separate Juvenile Court of Douglas County: Elizabeth Crnkovich, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Lauren J. Micek for appellant.

No appearance for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Nicholas K. appeals from a disposition by the separate juvenile court of Douglas County which ordered him placed in a residential group home. The appeal presents the question

of whether the out-of-home placement order complied with Neb. Rev. Stat. § 43-251.01(7) (Reissue 2016), which requires that a juvenile not be placed out of his or her home as a dispositional order unless "(a) [a]ll available community-based resources" have been exhausted and "(b) [there is] a significant risk of harm to the juvenile or community" by "[m]aintaining the juvenile in the home." We conclude the out-of-home placement complied with both requirements. Therefore, we affirm.

STATEMENT OF FACTS

Nicholas was adjudicated pursuant to Neb. Rev. Stat. § 43-247(3)(B)(ii) (Reissue 2016) based on his admission to deportment, a status offense. The petition had alleged that (1) Nicholas was observed abusing alcohol or a controlled substance and (2) Nicholas had admitted to abusing alcohol or a controlled substance. This was Nicholas' first adjudicated law violation.

At his arraignment on March 13, 2017, Nicholas stated he was currently attending individual therapy and had previously participated in, but did not complete, intensive outpatient substance abuse treatment at Journeys in August 2016. The court ordered an updated chemical dependency evaluation.

At the disposition hearing commenced on April 24, 2017, the court considered evidence, including a predisposition investigation authored by Nicholas' probation officer, two letters from Nicholas' substance abuse therapist, and a chemical dependency evaluation.

The probation officer recommended that Nicholas be placed on probation for a period of 6 months and that he participate in level-one dual diagnosis outpatient treatment, attend school without unexcused absences, participate in intensive family support services as arranged by probation, and obtain part-time employment. The State agreed with the recommendations of the probation officer at this time. Counsel for Nicholas agreed with the recommendations, but requested that Nicholas

finish the school year, continue any outpatient treatment with his current therapist, and be ordered to attend meetings of Narcotics Anonymous or Alcoholics Anonymous if group therapy is not available from his current therapist.

The court disagreed with the probation recommendation and the request by Nicholas and, based on all the evidence including questioning of Nicholas' parents about his homelife, observed that the sessions with Nicholas' therapist were not working. The court stated to Nicholas, "[I]t is clear from this letter [from Nicholas' substance abuse therapist] that you do not take your drug use seriously, and you certainly do not take your treatment seriously." The court determined that continued therapy would not work because, in the previous year, Nicholas had dropped out of intensive outpatient substance abuse treatment at Journeys and was continuing to use controlled substances.

Following the receipt of evidence, the court stated that "residential treatment at Boys Town would be great" for Nicholas and ordered that application be made to the Boys Town group home. The court made clear that a 30-day order would not produce the long-term changes needed. The court asked a youth care worker from Boys Town who was present at the hearing whether there was space at Boys Town group home and confirmed that there was one bed open. Having directed that application for Boys Town be made, the court stated that it would check on the group home application in a week or so.

At the continued disposition on May 9, 2017, the court inquired about the status of the application to Boys Town group home. Nicholas' probation officer stated that Nicholas was accepted into the family home program, but recommended that Nicholas receive family support and continue outpatient treatment. However, the State indicated that it had reviewed the chemical dependency evaluation and asked the court to order Nicholas to Boys Town group home. The State asserted that Nicholas' several months at the Journeys program while

continuing to use controlled substances demonstrated that he had exhausted community-based services. Nicholas objected to an out-of-home placement. The court reiterated its concerns about his unsuccessful treatment, lack of motivation in therapy, and failure to question his drug use.

In its May 9, 2017, written disposition order, the court ordered Nicholas placed at Boys Town group home. The court made specific written findings that reasonable efforts were made to prevent removal from the home, including a risk assessment, shelter placement, evaluation, predisposition investigation, probation terms and conditions, and probation supervision, but that the efforts failed to eliminate the need for removal from the home. The order stated that it would be contrary to the health, safety, and welfare of Nicholas to reside at the family home. The order stated that it would be in the best interests of Nicholas to be placed temporarily outside of the parental home and ordered that Nicholas be placed at Boys Town group home until further order of the court.

Nicholas appeals his out-of-home placement at Boys Town group home. On October 12, 2017, the State waived filing a brief and participating in oral arguments on this case.

ASSIGNMENTS OF ERROR

Nicholas claims, consolidated and restated, that the juvenile court erred when it committed Nicholas to a group home when less restrictive placement alternatives existed, determined that available community-based resources had been exhausted, and determined that residing in the parental home presented a significant risk to him or to the community.

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 Lilly S. & Vincent S.*, 298 Neb. 306, 903 N.W.2d 651 (2017).

ANALYSIS

Nicholas claims that the juvenile court erred when it placed him in a residential group home. He argues that the relevant statutory requirements were not met, because there was insufficient evidence all community-based resources had been exhausted, and that the evidence failed to show residing in his family home presented a significant risk of harm to him or the community. After a review of the statute and the record, we reject Nicholas' assignments of error.

According to the juvenile court and Nicholas, the controlling statute applicable to this case is § 43-251.01(7), which provides as follows:

> A juvenile alleged to be a juvenile as described in subdivision (1), (2), (3)(b), or (4) of section 43-247 shall not be placed out of his or her home as a dispositional order of the court unless:
>
> (a) All available community-based resources have been exhausted to assist the juvenile and his or her family; and
>
> (b) Maintaining the juvenile in the home presents a significant risk of harm to the juvenile or community.

As an initial matter, we note that application of § 43-251.01 requires a dispositional order. We have reviewed the record of the April 24 and May 9, 2017, hearings and the orders associated with each hearing. Although conducted over 2 separate days, we conclude that the juvenile court's ruling which resulted from these hearings and ordered that Nicholas be placed out of home at Boys Town group home is a disposition order for purposes of § 43-251.01. Accordingly, we apply this statute to the facts of this case.

[2] We have recently interpreted the exhaustion requirement of § 43-251.01(7)(a) in *In re Interest of Dana H., ante* p. 197, 907 N.W.2d 730 (2018). We concluded that the exhaustion requirement of § 43-251.01(7)(a) demands evidence establishing that no other community-based resources have a reasonable possibility for success or that all options for community-based services have been thoroughly considered and none are

feasible. In reaching our interpretation of § 43-251.01(7)(a), we adopted the reasoning with respect to a similar statute interpreted in *In re Interest of Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014), wherein we stated that the comparable exhaustion requirement did not imply that a juvenile court must ensure that every conceivable community-based resource has been tried and failed. *In re Interest of Dana H., supra*. With the foregoing understanding in mind, we have reviewed the evidence, and we determine that contrary to Nicholas' contention, the evidence satisfied the exhaustion requirement of § 43-251.01(7)(a).

The evidence regarding community-based options is described in the "Statement of Facts" section of this opinion and will not be repeated here. In sum, the exhaustion evidence showed, inter alia, that Nicholas had not improved with intensive outpatient substance abuse treatment including services provided by the Journeys program and that he continued to use controlled substances notwithstanding therapy.

With respect to the risk analysis required under § 43-251.01(7)(b), there is evidence, including evaluations, which indicates that Nicholas' sale of drugs to others has negatively impacted his daily functioning, including school performance—all to his detriment. See *In re Interest of Dana H., supra*. In particular, Nicholas' sale of drugs to others showed a risk to the community.

Before ordering out-of-home placement, the juvenile court made the correct statutory findings. The juvenile court's findings were supported by the evidence. Upon our de novo review, we find no merit to Nicholas' assertions to the contrary.

CONCLUSION

For the reasons set forth above, the orders of the juvenile court are affirmed.

Affirmed.

Wright and Kelch, JJ., not participating.

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

In re Interest of Keyanna R., a child under 18 years of age. State of Nebraska, appellee, v. Keyanna R., appellant.

908 N.W.2d 82

Filed March 16, 2018. No. S-17-659.

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. **Minors: Proof.** The exhaustion requirement of Neb. Rev. Stat. § 43-251.01(7)(a) (Reissue 2016) demands evidence establishing that no other community-based resources have a reasonable possibility for success or that all options for community-based services have been thoroughly considered and none are feasible.

Appeal from the Separate Juvenile Court of Lancaster County: Toni G. Thorson, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and James G. Sieben for appellant.

Joe Kelly, Lancaster County Attorney, Tara Parpart, and Margaret R. Jackson, Senior Certified Law Student, for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Keyanna R. appeals from a disposition by the separate juvenile court of Lancaster County which ordered her placed

in a residential group home. The appeal presents the question of whether the out-of-home placement order complied with Neb. Rev. Stat. § 43-251.01(7) (Reissue 2016), which requires that a juvenile not be placed out of his or her home as a dispositional order unless "(a) [a]ll available community-based resources" have been exhausted and "(b) [there is] a significant risk of harm to the juvenile or community" by "[m]aintaining the juvenile in the home." We conclude the out-of-home placement complied with both requirements. Therefore, we affirm.

STATEMENT OF FACTS

Keyanna was adjudicated pursuant to Neb. Rev. Stat. § 43-247(1) (Reissue 2016) based on a plea of no contest to unauthorized use of a propelled vehicle, a Class III misdemeanor. Neb. Rev. Stat. § 28-516 (Reissue 2016). The charges stemmed from an incident in which Keyanna, with a group of friends, took the vehicle of another juvenile's parent without permission and drove it to Texas. The vehicle was recovered in Ellsworth, Kansas.

After Keyanna entered her no contest plea, the court placed her on a conditional release to Boys Town Psychiatric Residential Treatment Facility (PRTF) in Omaha, Nebraska, where she began treatment in February 2017. Keyanna did not object to this order. The court stated that its conditional release was based on an evaluation which identified troubling behavior at home and at school. These behaviors had included threatening to commit suicide or to run away, being expelled from two high schools because of physical altercations with peers, and refusing to attend two support programs.

Certain issues arose while Keyanna was in the PRTF program. On one occasion, Keyanna was found to be too unsafe to be transported to Lincoln for a court hearing. There were safety concerns while Keyanna was at PRTF, including Keyanna's evident risk of self-harming and running away (possibly by taking a staff member's car). On the other hand, Keyanna made progress regarding anger control and self-calming. She

was deemed to have successfully completed the program in June 2017.

A dispositional hearing was conducted on June 12, 2017. Following the hearing, the court entered a dispositional order and an "Agreement and Order of Probation," which placed Keyanna on probation for 2 years and ordered her to reside at a Boys Town group home. The court ordered a review after 6 months.

At the June 12, 2017, disposition hearing, Keyanna's probation officer testified about the treatment available at the Boys Town residential group home. The probation officer testified that the treatment plan at that residential group home would include family therapy and weekly outpatient therapy to work on mood stabilization. The probation officer testified that outpatient therapy and family therapy services were available in Lincoln, but that the treatment team and Keyanna's mother believed it was in Keyanna's best interests to participate in the group home level of care. The probation officer stated that the duration of the residential group home program was generally 6 months to a year. Keyanna's therapist believed the group home would permit Keyanna to practice her skills in an environment that was less restrictive than PRTF.

In making its determination, the court advised Keyanna that the testimony at the hearing showed that the Boys Town residential group home rather than home placement could prevent backsliding from the therapy she had received on conditional release at PRTF and help her follow through. The court noted that because the evidence showed that the group home program was integrative, Keyanna would have access to the Boys Town doctors she had been seeing, rather than starting over with new providers in Lincoln. The testimony universally characterized the Boys Town group home as a "step down" from intensive treatment designed to facilitate Keyanna's return to the family home.

In its June 12, 2017, order styled "Reasonable Effort Determination," the court found that reasonable efforts and all available community resources had been exhausted and that it

would be contrary to Keyanna's welfare to reside in the family home due to her need for additional structure and supervision. The court named efforts considered and attempted, including counseling, evaluation, and probation supervision. The order stated that residing "in the home presents a significant risk of harm to [Keyanna] and [the] community." The June 12 "Agreement and Order of Probation" was consistent with this order.

Keyanna appeals the June 12, 2017, disposition placing her in the group home.

ASSIGNMENTS OF ERROR

Keyanna assigns, restated, that the juvenile court erred when it ordered her to reside at a Boys Town group home, because there was insufficient evidence that all community-based resources had been exhausted and the evidence failed to show that residing in the family home presented a significant risk of harm to her or the community. Keyanna also contends that the court applied a best interests analysis and ignored the controlling statute, § 43-251.01(7).

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 Lilly S. & Vincent S.*, 298 Neb. 306, 903 N.W.2d 651 (2017).

ANALYSIS

Keyanna claims that the juvenile court erred when it placed her in a residential group home. She argues that the relevant statutory requirements were not met, because there was insufficient evidence all community-based resources had been exhausted, and that the evidence failed to show residing in her family home presented a significant risk of harm to her or the community. She also contends that the juvenile court wrongly applied a best interests analysis at the expense of adhering to the applicable statute. After a review of the statute and the record, we reject Keyanna's assignments of error.

The parties agree that the controlling statute applicable to this case is § 43-251.01(7), which provides as follows:

> A juvenile alleged to be a juvenile as described in subdivision (1), (2), (3)(b), or (4) of section 43-247 shall not be placed out of his or her home as a dispositional order of the court unless:
>
> (a) All available community-based resources have been exhausted to assist the juvenile and his or her family; and
>
> (b) Maintaining the juvenile in the home presents a significant risk of harm to the juvenile or community.

As an initial matter, we note that application of § 43-251.01 requires a dispositional order. We have reviewed the record of the June 12, 2017, hearing and the associated orders. We conclude that the juvenile court's rulings which resulted from the hearing and ordered that Keyanna be placed out-of-home at Boys Town group home are a dispositional order for purposes of § 43-251.01. Accordingly, we apply this statute to the facts of this case.

[2] We have recently interpreted the exhaustion requirement of § 43-251.01(7)(a) in *In re Interest of Dana H., ante* p. 197, 907 N.W.2d 730 (2018). We concluded that the exhaustion requirement of § 43-251.01(7)(a) demands evidence establishing that no other community-based resources have a reasonable possibility for success or that all options for community-based services have been thoroughly considered and none are feasible. In reaching our interpretation of § 43-251.01(7)(a), we adopted the reasoning with respect to a similar statute interpreted in *In re Interest of Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014), wherein we stated that the comparable exhaustion requirement did not imply that a juvenile court must ensure that every conceivable community-based resource has been tried and failed. *In re Interest of Dana H., supra.* With the foregoing understanding in mind, we have reviewed the evidence, and we determine that contrary to Keyanna's contention, the evidence satisfied the exhaustion requirement of § 43-251.01(7)(a).

The evidence regarding the options available to the juvenile court including community-based options is described in the "Statement of Facts" section of this opinion and will not be repeated here. In sum, the exhaustion evidence showed that the "step down" treatment at the Boys Town group home was uniquely suited for Keyanna so she could solidify the progress she had made during her placement at RPTF. According to the evidence, compared to community-based resources, the group home was the best approach for Keyanna to facilitate her transition back to the family home.

With respect to the risk analysis required under § 43-251.01(7)(b), there is evidence which indicates that given Keyanna's history of self-harming and running away, structure was still required to minimize these risks to Keyanna and the community.

Having performed our de novo review, we determine that before ordering out-of-home placement, the juvenile court made the correct statutory findings. The juvenile court did not ignore the statute; nor did it rely strictly on a best interests analysis. The juvenile court's findings were supported by the evidence. Thus, upon our de novo review, we find no merit to Keyanna's assertions to the contrary.

CONCLUSION

For the reasons set forth above, the orders of the juvenile court are affirmed.

Affirmed.

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, appellant, v. Chad T. Kennedy, appellee.

908 N.W.2d 69

Filed March 16, 2018. No. S-17-703.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
2. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
3. **Statutes.** It is a general principle of statutory construction that to the extent there is a conflict between two statutes, the specific statute controls over the general statute.
4. **Statutes: Intent: Appeal and Error.** When interpreting a statute, effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. An appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
5. **Probation and Parole.** Neb. Rev. Stat. § 29-2268(2) (Reissue 2016) does not authorize a probationer to be "unsatisfactorily" discharged or terminated from post-release supervision early as the result of a violation.
6. **Courts: Probation and Parole.** Once a district court finds a violation of post-release supervision, it is authorized by Neb. Rev. Stat. § 29-2268 (Reissue 2016) to take one of two paths: It can either revoke post-release supervision and impose a term of imprisonment up to the remaining period of post-release supervision under subsection (2), or it can find that revocation is not appropriate and order one or more of the dispositions authorized by subsection (3).

7. **Sentences.** Pursuant to Neb. Rev. Stat. § 29-2323(1) (Reissue 2016), if an appellate court determines a sentence is excessively lenient, it may set aside the sentence and either (a) remand the case for imposition of a greater sentence, (b) remand the case for further sentencing proceedings, or (c) impose a greater sentence.
8. **Due Process: Sentences: Probation and Parole.** The same hearing procedures and due process protections that apply when a court considers a motion to revoke probation apply when a court considers a motion to revoke post-release supervision.

Appeal from the District Court for Sarpy County: George A. Thompson, Judge. Vacated and remanded for further proceedings.

Lee Polikov, Sarpy County Attorney, and Nicole R. Hutter for appellant.

Liam K. Meehan, of Schirber & Wagner, L.L.P., for appellee.

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

Stacy, J.

After finding Chad T. Kennedy had violated his post-release supervision, the district court terminated it "unsatisfactorily." The State appeals, claiming this resulted in an excessively lenient sentence that was not authorized by law. We vacate the district court's order and remand the cause for further proceedings consistent with this opinion.

FACTS

Kennedy was charged in the Sarpy County District Court with one count of operating a motor vehicle to avoid arrest (Class IV felony)[1] and one count of willful reckless driving (Class III misdemeanor). On February 9, 2017, he pled guilty to an amended information charging him with only the felony offense. Kennedy requested immediate sentencing and waived

[1] Neb. Rev. Stat. § 28-905(3)(a)(iii) (Reissue 2016).

his right to a presentence investigation. He asked not to be placed on probation. The court imposed a sentence of 240 days in jail and 9 months of post-release supervision. He was given credit for 150 days already served, and it appears he was released from jail the same day he was sentenced.[2]

In April 2017, the State filed what it captioned a "Motion for Revocation of Probation." It is clear from the record the intent was to seek revocation of Kennedy's post-release supervision. The motion to revoke stated that Kennedy was "in violation of his probation order dated February 9, 2017" in that he had "failed to show for his scheduled probation appoint[ment]s and has failed to provide probation with a valid address or contact information."

At the hearing on the motion to revoke, Kennedy admitted he had violated the conditions of his post-release supervision and explained he had done so because he was incarcerated in Douglas County on an unrelated matter. He told the court he had been in custody in Douglas County for 40 days and expected to be released "in another 32" and given 6 months' probation in a "rehab and halfway house." The court accepted Kennedy's admission and found he had violated the terms and conditions of his post-release supervision.

The court then asked counsel how they wished to proceed. Defense counsel advised "the cleanest thing would just be to terminate him unsuccessfully from supervision" and "they'll take that into consideration in sentencing in Douglas County." The State disagreed. It argued the court lacked statutory authority to unsuccessfully terminate post-release supervision and suggested instead that "a sentencing order consistent with his [remaining] post release supervision term would be appropriate."

The court stated:

> I'm going to note for the record a couple things: . . . Kennedy is under the jurisdiction and custody of

[2] See Neb. Rev. Stat. §§ 47-502 and 47-503 (Reissue 2010).

> the fourth judicial district at this point in time and pending charges there. Certainly we did the transport order to get him here. And the point and purpose of post release supervision is to provide guidance and/or track for defendants to be able to follow that is being currently set up with Douglas County. And as a result of that he can't comply with our post release supervision because he's in custody in Douglas County. So, based upon the admission, the court is going to find . . . Kennedy has violated the terms and conditions of his post release supervision.
>
> The court is going to terminate probation [as being] unsatisfactory. And that will be the judgment and order [of] the court. [Kennedy is] remanded to the custody of the sheriff.

The court's minute entry specifically noted that the court was not "revok[ing]" Kennedy's probation. The following day, on June 20, 2017, the court entered what it styled a "Judgment and Sentence" that provided in relevant part:

> [Kennedy] was personally advised of his conviction for the crime of Count 1: Operating a motor vehicle to avoid arrest, felony offense, a class IV felony, pursuant to his plea of guilty and judgment of conviction entered on February 9, 2017, and [Kennedy's] admission to the Motion to Revoke Probation entered on June 19, 2017 and offered no good or sufficient reason why a sentence should not be imposed for such crime. The Court terminated the Post Release Supervision.
>
> IT IS THEREFORE ORDERED that the Post Release Supervision is hereby terminated as unsatisfactorily.

The Sarpy County Attorney, with the consent of the Attorney General (State), timely appealed, alleging the sentence imposed was excessively lenient.[3] We moved the case to our docket on our own motion and set it for oral argument.

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[3] See Neb. Rev. Stat. §§ 29-2320 and 29-2321 (Reissue 2016).

ASSIGNMENTS OF ERROR

The State assigns, restated, that the district court (1) abused its discretion in imposing an excessively lenient sentence not authorized by Neb. Rev. Stat. § 29-2268 (Reissue 2016) and (2) committed plain error by imposing a sentence outside the statutory limits.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[4]

[2] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.[5]

ANALYSIS

Post-release supervision is a relatively new concept in Nebraska sentencing law.[6] Last year, in *State v. Phillips*,[7] this court had its first opportunity to address the procedure for imposing a term of post-release supervision under § 29-2204.02. The issues presented in the instant appeal provide our first opportunity to address the procedure when moving to revoke such a term.

As a threshold matter, we observe that the Legislature has defined "[p]robationer" to mean "a person sentenced to probation or post-release supervision."[8] Similarly, it has

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[4] *State v. Carman*, 292 Neb. 207, 872 N.W.2d 559 (2015); *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

[5] *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008).

[6] See Neb. Rev. Stat. §§ 28-105 (Supp. 2017) and 29-2204.02 (Reissue 2016).

[7] *State v. Phillips*, 297 Neb. 469, 900 N.W.2d 522 (2017).

[8] Neb. Rev. Stat. § 29-2246(5) (Reissue 2016).

defined "[p]robation" to "include[] post-release supervision."[9] "Post-release supervision" is defined to mean "the portion of a split sentence following a period of incarceration under which a person found guilty of a crime upon verdict or plea is released by a court subject to conditions imposed by the court and subject to supervision by the [Office of Probation Administration]."[10] The Legislature has instructed that these statutory definitions apply for purposes of the Nebraska Probation Administration Act[11] "unless the context otherwise requires."[12]

As such, the Nebraska Probation Administration Act sometimes refers to probation and post-release supervision interchangeably,[13] and other times, separately.[14] This may explain why, in the present case, the State filed a motion to revoke "probation" even though Kennedy had been sentenced to a term of incarceration followed by a term of post-release supervision. The trial court used the same vernacular in its June 20, 2017, sentencing order. Particularly because the available disposition differs slightly based on whether a probationer is alleged to have violated the terms of his or her probation or post-release supervision,[15] we encourage courts, and officers of the courts, to be precise when taking up motions to revoke.

§ 29-2268

Violations of probation and post-release supervision are governed by § 29-2268, which provides:

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[9] § 29-2246(4).

[10] § 29-2246(13).

[11] Neb. Rev. Stat. §§ 29-2246 to 29-2269 (Reissue 2016).

[12] § 29-2246.

[13] See, e.g., §§ 29-2250, 29-2251, 29-2258, 29-2262, and 29-2267.

[14] See, e.g., §§ 29-2263(2) and (3) and 29-2268(1) and (2).

[15] See § 29-2268(1) and (2).

(1) If the court finds that the probationer, other than a probationer serving a term of post-release supervision, did violate a condition of his or her probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he or she was convicted.

(2) If the court finds that a probationer serving a term of post-release supervision did violate a condition of his or her post-release supervision, it may revoke the post-release supervision and impose on the offender a term of imprisonment up to the remaining period of post-release supervision. The term shall be served in an institution under the jurisdiction of the Department of Correctional Services or in county jail subject to subsection (2) of section 28-105.

(3) If the court finds that the probationer did violate a condition of his or her probation, but is of the opinion that revocation is not appropriate, the court may order that:

(a) The probationer receive a reprimand and warning;

(b) Probation supervision and reporting be intensified;

(c) The probationer be required to conform to one or more additional conditions of probation which may be imposed in accordance with the Nebraska Probation Administration Act;

(d) A custodial sanction be imposed on a probationer convicted of a felony, subject to the provisions of section 29-2266.03; and

(e) The probationer's term of probation be extended, subject to the provisions of section 29-2263.

Section 29-2268(1) is not applicable to Kennedy because it expressly excludes those on post-release supervision from the definition of probationer. Thus, the question presented here is whether the district court had authority, pursuant to either § 29-2268(2) or (3), to terminate post-release supervision "unsatisfactorily" after finding a violation.

The State argues that upon finding a violation of post-release supervision, the district court had only two options under § 29-2268: It could either revoke post-release supervision pursuant to § 29-2268(2) and impose a term of incarceration up to the remainder of the post-release supervision term or it could find that revocation is not appropriate and enter an order pursuant to § 29-2268(3)(a) through (e).

Kennedy argues the district court had a third option: It could discharge him from post-release supervision altogether under § 29-2263. We address this argument first, and find it has no merit.

§ 29-2263 Does Not Authorize Unsatisfactory Discharge

Section 29-2263 addresses both probation[16] and post-release supervision,[17] and provides in pertinent part:

> When a court has sentenced an offender to post-release supervision, the court shall specify the term of such post-release supervision as provided in section 28-105. The court, on application of a probation officer or of the probationer or on its own motion, may discharge a probationer at any time.[18]

Kennedy argues the second sentence of § 29-2263(2) gave the district court authority to enter an order terminating his post-release supervision "unsatisfactorily" once it found a violation.[19] He urges us to interpret § 29-2263(2) to apply in circumstances where a violation of post-release supervision has been found and asks that we equate "discharge" under § 29-2263(2) with being "terminated unsatisfactorily."[20] We decline to do either.

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[16] § 29-2263(1) and (3) through (5).

[17] § 29-2263(2) through (5).

[18] § 29-2263(2).

[19] Brief for appellee at 6.

[20] *Id.*

[3] Section 29-2263 generally governs a court's power to impose, modify, and discharge a person from probation and post-release supervision. In contrast, § 29-2268 specifically governs violations of probation and post-release supervision and thus is the more specific statute. It is a general principle of statutory construction that to the extent there is a conflict between two statutes, the specific statute controls over the general statute.[21]

More importantly, the early discharge permitted by § 29-2263(2) is incompatible with "unsatisfactory" termination. Section 29-2263(4) explains that "[u]pon completion of the term of probation, or the earlier discharge of the probationer, the probationer shall be relieved of any obligations imposed by the order of the court and shall have satisfied the sentence for his or her crime."

[4] When interpreting a statute, effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.[22] An appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.[23]

[5] Because an early discharge under § 29-2263(2) results in satisfying the sentence imposed, it cannot be reconciled with "unsatisfactorily" completing the sentence. We thus hold that once the State invoked the revocation process under § 29-2268 and the district court found a violation of post-release supervision, the court was not empowered,

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[21] See *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012).

[22] See, *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003); *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995).

[23] See, *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010); *TracFone Wireless v. Nebraska Pub. Serv. Comm.*, 279 Neb. 426, 778 N.W.2d 452 (2010).

at that point, to invoke the early discharge provisions of § 29-2263(2).[24]

Only Dispositions for Violations of Post-Release Supervision Are Those Enumerated in § 29-2268(2) and (3)

[6] We agree with the State that once the district court found a violation of post-release supervision, it was authorized by § 29-2268 to take one of two paths: It could either revoke post-release supervision and impose a term of imprisonment up to the remaining period of post-release supervision under subsection (2), or it could find that revocation was not appropriate and order one or more of the dispositions authorized by subsection (3). Stated differently, once a violation of post-release supervision is found, a district court may proceed under either subsection (2) or subsection (3) of § 29-2268, but the statutory language does not authorize any disposition not therein enumerated.

Before considering whether the district court was proceeding under subsection (2) or subsection (3) of § 29-2268, we pause to address a jurisdictional question raised by Kennedy.

Jurisdiction Over This Appeal

Kennedy, relying on *State v. Caniglia*,[25] argues this court lacks jurisdiction over the instant appeal, because no sentence was imposed that the State may challenge as excessively lenient. We disagree.

In *Caniglia*, the defendant was convicted in Sarpy County District Court of driving under the influence in August 2003. At the time, she was on intensive supervision probation in Douglas County for another conviction of driving under the

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[24] Accord *State v. Caniglia*, 272 Neb. 662, 668, 724 N.W.2d 316, 320 (2006) (in probation revocation proceeding, § 29-2268 does not authorize district court to order probation "terminated as unsuccessful").

[25] *Caniglia, supra* note 24.

influence. The Sarpy County court sentenced her to probation, to be served concurrently with the Douglas County probation. Both probation orders required that she refrain from using alcohol.

In December 2004, the State moved to revoke the Sarpy County probation, alleging the defendant was using alcohol, which the defendant admitted. At the hearing on the motion to revoke, the evidence showed the defendant already had been terminated from her Douglas County probation for using alcohol. The revocation in Douglas County resulted in her serving 15 days in jail and having her driver's license revoked for 15 years. After noting what had occurred in Douglas County, the Sarpy County court found a probation violation, and then, without ruling on the motion to revoke, terminated the defendant's probation as "'unsuccessful.'"[26]

The State appealed the district court's order pursuant to a statute authorizing the State to appeal "the sentence imposed" if it reasonably believes the sentence is excessively lenient.[27] We held the district court had not imposed a sentence at all, thus, this statute did not authorize the State's appeal. In doing so, we analyzed the version of § 29-2268 in effect at the time (which is substantially similar to the current version, minus the specific inclusion of post-release supervision). We noted that pursuant to the terms of the statute, once the district court found a violation of probation it

> was authorized to revoke probation and impose a sentence, to reprimand and warn the probationer, to intensify supervision, to impose additional terms of probation, or to extend the term of probation. The district court did none of the above. Instead, the district court ordered the probation "terminated as unsuccessful." This was neither an authorized order nor a sentence.[28]

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[26] *Id.* at 665, 724 N.W.2d at 318.

[27] See § 29-2320.

[28] *Caniglia, supra* note 24, 272 Neb. at 667-68, 724 N.W.2d at 320.

Based on this rationale, we found there was no appellate jurisdiction, because no "sentence" had been imposed that could be challenged as excessively lenient pursuant to § 29-2320.

Here, the State also seeks to challenge the sentence as excessively lenient and relies on the same statute at issue in *Caniglia*, which requires a challenge from "the sentence imposed."[29] But unlike in *Caniglia*, the district court here ruled on the motion to revoke by determining revocation was not appropriate, and then proceeded to enter a sentencing order which purported to modify the sentence of post-release supervision by terminating it unsatisfactorily. As such, the jurisdictional concerns present in *Caniglia* are not present here. We conclude that the district court's order of June 20, 2017, is a sentencing order from which the prosecuting attorney may appeal under § 29-2320. We proceed to consider the merits of the State's contention that the sentencing order was excessively lenient.

Court Was Not Proceeding Under § 29-2268(2)

In the present case, after finding Kennedy had violated his post-release supervision, the district court made clear it was not revoking that supervision as authorized by § 29-2268(2). However, Kennedy suggests the court's sentencing order should be construed to have had the practical effect of revoking probation and imposing a term of "zero months" of imprisonment.[30]

We rejected a similar argument in *Caniglia.* In that case, we refused to infer a term of imprisonment when one was not expressly stated, reasoning that when imposing a sentence, a court must state with care the precise terms of the sentence and that imposition of a sentence in a revocation of probation

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[29] See § 29-2320.

[30] Brief for appellee at 9.

context is deserving of the same clarity expected when the initial sentence is imposed.[31]

We apply the same reasoning here and conclude the district court's order cannot reasonably be interpreted to have revoked probation and imposed a term of "zero months" of imprisonment, when the court expressly held it was not revoking supervision and expressed no precise term of sentence. The district court was not proceeding under § 29-2268(2) when it opted not to revoke Kennedy's post-release supervision, but, rather, to terminate it unsatisfactorily.

Court Attempted to Proceed Under § 29-2268(3), But Erred

Subsection (3) of § 29-2268 allows a court, after finding a violation of probation or post-release supervision, to decide that revocation is not appropriate, and instead order:

> (a) The probationer receive a reprimand and warning;
>
> (b) Probation supervision and reporting be intensified;
>
> (c) The probationer be required to conform to one or more additional conditions of probation which may be imposed in accordance with the Nebraska Probation Administration Act;
>
> (d) A custodial sanction be imposed on a probationer convicted of a felony, subject to the provisions of section 29-2266.03; and
>
> (e) The probationer's term of probation be extended, subject to the provisions of section 29-2263.

Here, after finding a violation, the court made clear it was not revoking Kennedy's post-release supervision. We find that portion of the district court's decision was authorized by § 29-2268(3). But having elected not to revoke post-release supervision, the court was limited to the dispositions enumerated in § 29-2268(3). Because the sentencing order did not impose any disposition authorized by subsection (3), that

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[31] *Caniglia, supra* note 24.

portion of the court's order was erroneous and resulted in an excessively lenient sentence.

Vacate With Directions

[7] For all of these reasons, the portion of the sentencing order which purported to terminate unsatisfactorily Kennedy's post-release supervision as a result of a violation was not authorized by statute, was erroneous, and resulted in an excessively lenient sentence.[32] Pursuant to Neb. Rev. Stat. § 29-2323(1) (Reissue 2016), if an appellate court determines a sentence is excessively lenient, it may set aside the sentence and either (a) remand the case for imposition of a greater sentence, (b) remand the case for further sentencing proceedings, or (c) impose a greater sentence. We conclude it is appropriate to remand the cause for further sentencing proceedings consistent with the applicable statutes[33] and Kennedy's due process rights.[34]

[8] For the sake of completeness, we remind the parties and the court that the Legislature has established the procedure to be followed when a motion to revoke probation is filed,[35] and this court has identified the minimum due process protections required at probation revocation hearings.[36] We now expressly hold these same hearing procedures and due process protections apply when the court is considering a motion to revoke a term of post-release supervision. On remand, these procedures should be followed.

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[32] See, *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Bensing*, 249 Neb. 900, 547 N.W.2d 464 (1996); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995).

[33] §§ 29-2267 and 29-2268.

[34] See, e.g., *State v. Johnson*, 287 Neb. 190, 842 N.W.2d 63 (2014); *State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884 (2011).

[35] See § 29-2267(1) and (2).

[36] See, e.g., *Johnson, supra* note 34; *Shambley, supra* note 34.

CONCLUSION

Once the district court found a violation of post-release supervision and decided it was not appropriate to revoke supervision, it was authorized by § 29-2268(3) to either (a) order a reprimand or warning, (b) intensify supervision or reporting, (c) impose additional conditions of probation, (d) impose custodial sanctions, or (e) extend the term of probation. Because it did none of these and instead erroneously terminated post-release supervision altogether, we vacate the sentencing order of June 20, 2017, as excessively lenient, and remand the cause for further proceedings not inconsistent with this opinion.

Vacated and remanded for
further proceedings.

Kelch, J., not participating in the decision.

Wright, J., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Tyler A. Davis, relator, v. John A. Gale, in his official capacity as Secretary of State of the State of Nebraska, respondent, and Robert J. Krist, intervenor.

908 N.W.2d 618

Filed March 19, 2018. No. S-18-218.

Special proceeding before Michael G. Heavican, Chief Justice of the Nebraska Supreme Court. Judgment entered.

Joseph A. Wilkins, of Mattson Ricketts Law Firm, for relator.

Douglas J. Peterson, Attorney General, L. Jay Bartel, Ryan S. Post, and Lynn A. Melson for respondent.

David A. Domina, of Domina Law Group, P.C., L.L.O., for intervenor.

Heavican, C.J.

Tyler A. Davis objected to the inclusion of Robert J. Krist as a Democratic candidate for Nebraska governor on the primary election ballot. Nebraska Secretary of State John A. Gale denied the objection. Davis filed a verified petition for special proceeding before a judge of the Nebraska Supreme Court pursuant to Neb. Rev. Stat. § 32-624 (Reissue 2016). The issue is whether non-partisan is a "political party affiliation" for the purpose of interpreting Neb. Rev. Stat. § 32-612 (Reissue 2016). I conclude non-partisan is not a "political party affiliation," but rather is the lack of a political party affiliation. Krist's name shall be included on the primary ballot.

FACTS

The relevant facts are undisputed. Prior to September 13, 2017, Krist was affiliated with the Republican party. On that date, he filed a Nebraska voter registration application with the Douglas County election commissioner, registering as "Nonpartisan." On February 12, 2018, Krist filed a Nebraska voter registration application with the Douglas County election commissioner, registering as a Democrat.

On February 13, Krist filed with the Nebraska Secretary of State a "Governor Candidate Filing Form," declaring he was a Democratic candidate for the office of Nebraska governor, and requesting that his name be shown on the ballot as "Bob Krist" for the primary election to be held on May 15, 2018.

On February 20, 2018, Davis filed an objection with the Secretary of State to Krist's candidate filing form.[1] Davis alleged that Krist's February 13, 2018, candidate filing form was not effective because Krist made a "change of political party affiliation" after the first Friday in December prior to the date of the May 15, 2018, primary, and thus violated § 32-612. The first Friday in December prior to the date of the May 15, 2018, primary election was December 1, 2017.

Gale denied the objection on February 27, 2018. Gale determined that on December 1, 2017, Krist was a nonpartisan registered voter with no political party affiliation. Gale reasoned that because Krist was registered as nonpartisan prior to February 12, 2018, his Nebraska voter registration application filed that day declaring his "Party Affiliation" as a Democrat was a *declaration* of a political party affiliation, not a *change* of political party affiliation.

JURISDICTION

On March 6, 2018, Davis filed an application for "leave to commence an original action in the nature of a petition for

[1] See § 32-624.

a special proceeding relating to elections." The application referred to § 32-624 and to the Nebraska Supreme Court's original jurisdiction under Neb. Const. art. V, § 2 as set forth in Neb. Rev. Stat. § 24-204 (Reissue 2016).

In his responsive brief, Krist contends original jurisdiction does not lie for this action because it does not involve an election contest in that no election has occurred. Whether the court has original jurisdiction need not be determined because § 32-624 provides jurisdiction for this special proceeding. Pursuant to that statute, Gale's decision shall be final

> unless an order is made in the matter by a judge of the county court, district court, Court of Appeals, or Supreme Court on or before the fifty-fifth day preceding the election. Such order may be made summarily upon application of any political party committee or other interested party and upon such notice as the court or judge may require. The decision of the Secretary of State or the order of the judge shall be binding on all filing officers.

Davis' filing invoked § 32-624, and thus a judge of this court may issue an order summarily. The decision here is not an opinion of the Nebraska Supreme Court.[2] Rather, it is a decision of a single justice of the Nebraska Supreme Court.

ANALYSIS

At issue in this special proceeding is the application and interpretation of Neb. Rev. Stat. §§ 32-610 (Supp. 2017) and 32-612. Section 32-610 provides in relevant part:

> [N]o person shall be allowed to file a candidate filing form as a partisan candidate or to have his or her name placed upon a primary election ballot of a political party unless (1) he or she is a registered voter of the political party if required pursuant to [a party rule] . . . .

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[2] See, *State ex rel. Chambers v. Beermann*, 229 Neb. 696, 428 N.W.2d 883 (1988); *State ex rel. Strom v. Marsh*, 162 Neb. 593, 77 N.W.2d 163 (1956).

And § 32-612(1) provides in relevant part:

> A change of political party affiliation by a registered voter so as to affiliate with the political party named in the candidate filing form . . . after the first Friday in December prior to the statewide primary election shall not be effective to meet the requirements of section 32-610 . . . , except that any person may change his or her political party affiliation after the first Friday in December prior to the statewide primary election to become a candidate of a new political party which has successfully completed the petition process required by section 32-716.

The first Friday in December prior to the May 15, 2018, statewide primary election was December 1, 2017. On that date, Krist was a registered voter and his registration reflected he was "Nonpartisan."

The heart of the issue is the meaning of the statutory phrase "a change of political party affiliation" as used in § 32-612. Gale, relying in part on a 1998 memorandum issued by a former Secretary of State,[3] reasoned that a voter registered as "Nonpartisan" is not affiliated with any party so that when Krist registered in February 2018 as a Democrat, he was at that time merely declaring an affiliation with a political party, not effecting a change of political party affiliation.

Standard of Review and Propositions of Law

The issue is one of statutory interpretation, which presents a question of law.[4] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of words which

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[3] See Neb. Rev. Stat. § 32-201 (Reissue 2016) (providing Secretary of State decisions on election law have force of law until changed by courts).

[4] *Twin Towers Condo Assn. v. Bel Fury Invest. Group*, 290 Neb. 329, 860 N.W.2d 147 (2015).

are plain, direct, and unambiguous.[5] In discerning the meaning of a statute, a court determines and gives effect to the purpose and intent of the Legislature as ascertained from the entire language considered in its plain, ordinary, and popular sense.[6]

A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[7] The whole and every part of the statute must be considered in fixing the meaning of any of its parts.[8] In construing a statute, a court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.[9]

Over one hundred years ago, we stated that "it is the duty of the courts, in construing statutes providing for printing the names of candidates of both old and new political organizations upon the ballot," to do so in light of the constitutional principle that "all elections shall be free; and there shall be no hindrance or impediment to the right of the qualified voter to exercise the elective franchise."[10] Other jurisdictions have similarly concluded that statutes relating to election law must be liberally construed. In Louisiana, laws governing the conduct of elections are liberally interpreted "so as to promote

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[5] *Farmers Co-op v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017).

[6] *Id.*

[7] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015); *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

[8] *Board of Trustees v. City of Omaha*, 289 Neb. 993, 858 N.W.2d 186 (2015); *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

[9] *Fisher v. PayFlex Systems USA, supra* note 8.

[10] *Morrissey v. Wait*, 92 Neb. 271, 138 N.W. 186, 188 (1912); Neb. Const. art. I, § 22.

rather than defeat candidacy," and the person objecting to the candidacy bears the burden of proving the candidate is disqualified.[11] New Jersey liberally construes election laws so as to "effectuate their purpose," being mindful that statutes designed to establish an orderly system and procedure in the electoral process should not be "so narrowly construed as to prevent, obstruct, discourage or otherwise frustrate" the right of persons constitutionally qualified for public office from offering themselves as candidates.[12] Ohio liberally construes election laws "in favor of candidates for public office."[13] And Pennsylvania liberally construes its election laws "so as not to deprive a candidate of the right to run for office or the voters of their right to elect a candidate of their choice."[14] I agree with the reasoning of these authorities and conclude §§ 32-610 and § 32-612 should be liberally construed so as to promote, rather than defeat, candidacy for the primary election.

Statutory Language

Davis argues that Gale erred by interpreting § 32-612 in isolation rather than in conjunction with § 32-610. He contends that read together, § 32-610 "required . . . Krist to be a registered voter of the Democratic party if he wished to be included in the 2018 primary election and § 32-612 required him to do it before December 1, 2017."[15] Davis asserts this is so because Krist had to "change" his voter registration in order to become affiliated with the Democratic party, and he failed to do so prior to the deadline imposed by § 32-612.

I reject this argument because it conflates the concept of voter registration contained in § 32-610 with the separate

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[11] *Russell v. Goldsby*, 780 So. 2d 1048, 1051 (La. 2000).

[12] *Alston v. Mays*, 152 N.J. Super. 509, 517 (1977).

[13] *State ex rel. Livingston v. Miami Cty. Bd. of Elections*, 963 N.E.2d 187, 192 (Ohio App. 2011).

[14] *Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993).

[15] Brief for relator at 8.

concept of party affiliation in § 32-612. As the instant case aptly demonstrates, one can be registered to vote without having a party affiliation. The objectives of §§ 32-610 and 32-612 differ and they use different terminology. As such, it is incorrect to read them in the manner urged by Davis.

The record is clear that Krist was a registered voter of the Democratic party before he filed his candidate form. Krist therefore met the statutory requirement of § 32-610 and his filing was effective unless, under § 32-612, he made a "[c]hange of political party affiliation" after December 1, 2017.

Section 32-612 does not define "political party affiliation" or what constitutes a change thereof. The dictionary definition of "change" is "[t]o substitute one thing for (another); to replace (something) with something else, esp. something which is newer or better; to give up (something) in order to replace it with something else."[16] A different and related statute offers guidance on the definition of "political party affiliation." Neb. Rev. Stat. § 32-312 (Supp. 2017) sets forth what must be contained in a Nebraska voter registration application. As to "Party Affiliation," § 32-312 requires the application to

> show the party affiliation of the applicant as Democrat, Republican, or Other . . . . . or show *no party affiliation as Nonpartisan*. (Note: If you wish to vote in both partisan and nonpartisan primary elections for state and local offices, you must indicate a political party affiliation on the registration application. If you *register without a political party affiliation (nonpartisan)*, you will receive only the nonpartisan ballots for state and local offices at primary elections. If you register without a political party affiliation, you may vote in partisan primary elections for congressional offices).[17]

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[16] "Change," Oxford English Dictionary Online, http://www.oed.com/view/Entry/30468 (last visited March 15, 2018).

[17] § 32-312 (Emphasis added.)

Similarly, Neb. Rev. Stat. §§ 32-308 and 32-312.02(5) (Reissue 2016) require that a voter registration application include the "party affiliation of the applicant or indication that the applicant is not affiliated with any political party." Thus, a voter registered as non-partisan is an individual not affiliated with a political party.

Sections 32-308, 32-312, 32-312.02, 32-610, and 32-612 are all part of the Election Act.[18] A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.[19] The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.[20]

It is apparent from the foregoing that the phrase "political party affiliation" is a term of art used by the Legislature to specifically reference an existing relationship with one of the established Nebraska political parties: Republican, Democrat, or Libertarian.[21] And terms of art with legal significance used in statutes are to be construed and understood according to their appropriate meaning.[22] One who is registered as "Nonpartisan," as Krist was prior to February 12, 2018, has no relationship with any of these three established political parties and thus has no "political party affiliation" as that phrase is used by the Nebraska Legislature in the Election Act.

One who has no "political party affiliation" cannot change his or her "political party affiliation." This is so because, as noted above, change requires substitution of one thing for

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[18] See Neb. Rev. Stat. § 32-101 (Reissue 2006).

[19] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

[20] *Id.*

[21] See § 32-312.

[22] See Neb. Rev. Stat. § 49-802(5) (Reissue 2010).

another or replacement of one thing with something else.[23] One cannot "substitute" one thing for another or "replace" a thing with something else if one has no thing to begin with. For example, when one first registers to vote, he or she may choose to affiliate with a political party. But in doing so, he or she does not undertake a "change of political party affiliation," because there was no affiliation to substitute or replace. The same logic applies when a voter who is registered as a nonpartisan, and therefore has "no political party affiliation,"[24] seeks to become affiliated with a political party. There is no "change of political party affiliation." Rather, there is simply a declaration of a political party affiliation. A change from no political party affiliation to a political party affiliation is not a "change of political party affiliation" for purposes of § 32-612.

In his order denying Davis' objection to Krist's filing form, Secretary of State Gale noted that former Secretary of State Scott Moore issued a written memorandum in February 1998, interpreting § 32-612. In that memorandum, Secretary of State Moore concluded: "It is my position that someone who amends their registration from nonpartisan to affiliate with a political party has not affected 'a change in political party affiliation . . .' but has instead chosen to declare an affiliation." Secretary of State Moore thus found that one registered as a nonpartisan could affiliate with a political party after the December deadline and run for partisan office in the primary election.

The Legislature has provided by statute that the Secretary of State shall decide disputed points of election law, and that such "decisions shall have the force of law until changed by the courts."[25] In light of this legislative provision, I presume the Legislature was aware of former Secretary of State Moore's 1998 interpretation of § 32-612. Despite such knowledge, the

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[23] "Change," Oxford English Dictionary Online, http://www.oed.com/view/Entry/30468 (last visited March 15, 2018).

[24] See § 32-312.

[25] § 32-201.

Legislature made no attempt to amend the "change of political party affiliation" language as interpreted by the Secretary of State; thus, an acquiescence with the interpretation thereof is indicated.[26]

Because the phrase "change of political party affiliation" as used in § 32-612 necessitates the existence of a political party with which to be affiliated, Krist did not violate § 32-612 when he registered as a Democrat in February 2018. To the contrary, Krist merely declared an affiliation. Neither § 32-610 nor § 32-612 render Krist's candidate form ineffective. Gale correctly denied Davis' objection thereto.

Purpose and History of § 32-612

This interpretation of the plain language "a change in political party affiliation" is consistent with the purpose and history of § 32-612. As encompassed in that statute, the time limitations imposed on candidates seeking to join a political party prior to the primary election originated in 1925, and were codified by the Legislature first at Neb. Rev. Stat. § 32-1124 and later at Neb. Rev. Stat. § 32-515. The language used with respect to those limitations has varied substantially over time. At times the language was dependent upon a candidate's registration, and at times the language was dependent upon a candidate's affiliation with a political party. I find these variations significant in that they demonstrate the Legislature was capable of using precise language to draft the limitation it wished to impose.

When originally enacted, the statute required a nominee to file, at least 25 days before the primary, a statement verifying under oath that he or she "affiliates" with the political party nominating him or her.[27] The direct precursor to the current

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[26] See, generally, *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012) (holding when appellate court judicially construes statute and construction does not evoke amendment, it is presumed Legislature acquiesced in court's determination of Legislature's intent).

[27] Laws 1925, c. 108, § 1, p. 297.

language appears to have been a 1939 amendment which provided that

> [a]ny elector of one political party within the meaning of this article who desires to affiliate with a different political party for the purpose of becoming a candidate of said different political party shall, at least ninety days prior to filing his application for nomination or acceptance of a nomination by petition, publicly declare his intention to change his party affiliation by filing a written statement thereof duly signed and sworn . . . .[28]

In 1953, a provision was added after the above language, stating:

> *Provided*, that where the elector resides in an area requiring registration as a prerequisite to voting that a change of registration prior to the most recent election and at least ninety days prior to filing his application for nomination for any political office shall be deemed to be a substantial compliance herewith.[29]

In 1969, the language added in 1939 was removed and § 32-515 stated only that "a change of registration at least ninety days prior to filing his application for nomination for any political office shall be deemed to be a substantial compliance herewith."[30] Finally, in 1975 this language was changed again to provide "a change of registration to the political party named in the application less than ninety days prior to filing his application for nomination for any political office shall be deemed to be a lack of compliance with this section."[31] That language remained in § 32-515 until the election statutes were re-codified in 1994 and the current language of § 32-612 was adopted.

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[28] Laws 1939, c. 34, § 9, p. 180.

[29] Laws 1953, c. 106, § 23, p. 332.

[30] Laws 1969, c. 259, § 41, p. 980.

[31] Laws 1975, L.B. 494, § 2.

The legislative history does not indicate why the language used in § 32-612 differs from that used as of the 1975 amendments in § 32-515. It is apparent, however, that the language is significantly different. As noted, § 32-515 prohibited "a change of registration to the political party named in the application" within a certain number of days prior to the primary election. If that were the relevant statutory language today, Davis' argument would be more compelling. Notably, however, the language specifically chosen by the Legislature in § 32-612 and applicable in this case does not broadly prohibit a candidate from changing his or her registration to the political party named in the application. Instead, it prohibits only a "change of political party affiliation" after the first Friday in December of the preceding year. As noted, "political party affiliation" is a term of art used by the Legislature in election-related statutes and is consistently applied by that body only as to affiliation with one of the existing political parties—not to a nonpartisan voter.[32] In fact, a "Nonpartisan" or "Independent" political party cannot exist under Nebraska law.[33]

To the extent it is useful, I note that additional authorities support this interpretation of the Legislature's chosen language. The U.S. Supreme Court has recognized, in a related context, that an "independent candidate" has no "political party affiliations."[34] Similarly, the Nebraska Supreme Court has recognized that one must be "affiliated" with a party in order to vote in a primary election, and that affiliation means "open declaration of allegiance to a party."[35] Further, a Nebraska Attorney General's opinion addressed a related issue in 1998. The opinion addressed the application of § 32-612 to "a person

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[32] See §§ 32-212 and 32-212.02.

[33] Neb. Rev. Stat. § 32-716 (Reissue 2016).

[34] *Storer v. Brown*, 415 U.S. 724, 733, 84 S. Ct. 1274, 39 L. Ed. 2d 714 (1974).

[35] *State v. Drexel*, 74 Neb. 775, 105 N.W. 174 (1905).

who was registered in one county as a member of a particular party," and then registered "as a member of a different party in a different county."[36] That opinion concluded § 32-612 applied, noting in part that "party affiliation" and "voter registration" are not synonymous.

The sum of these parts is that the phrase "political party affiliation," and the concept of affiliating with a political party, has been recognized in a distinct context by the legislative, executive, and judicial branches of Nebraska government. That context is in relation to an existing political party and an allegiance thereto. As such, the Legislature's use of the precise phrase "change of political party affiliation" in § 32-612 must be viewed in light of this distinct context, and particularly because under the relevant jurisprudence I am to liberally construe the statute to promote rather than defeat candidacy, limited to its precise terms. This is especially so because earlier codifications of the statute used substantially different language, which indicates the Legislature knew how to define the limitation to precise terms and intended to do so.

In light of the precise language used in § 32-612, I conclude that only a "change of political party affiliation" so as to "affiliate" with the political party named in the candidate filing form is prevented after the first Friday in December of the preceding calendar year. Because in February 2018 Krist was unaffiliated with a political party as that term of art has repeatedly been used in Nebraska law, he made no change to his political party affiliation in order to become affiliated with the Democratic party; thus Gale correctly denied the objection to Krist's candidate filing form.

Other Arguments Lack Merit

I briefly dispose of Davis' other arguments. First, Davis argues in his brief that Gale's interpretation of § 32-612 violates

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[36] Att'y Gen. Op. No. 98024 (Apr. 9, 1998).

the Equal Protection Clause of the Nebraska Constitution.[37] Davis contends that Gale's interpretation draws "an arbitrary distinction between two classes of people (affiliated and unaffiliated) and enforces the law differently depending upon which class of people the applicant falls into."[38] Such an argument is not properly presented in this limited special proceeding and I therefore decline to address it.

Second, Davis' original objection to Krist's candidate form was based in part on Krist's action related to a proposed "United Nebraska" political party. The record is clear, however, that no such political party exists and that the only official partisan political parties recognized in Nebraska are the Republican, Democrat, and Libertarian parties. Because the record shows "United Nebraska" is not and never has been a recognized political party in Nebraska, any argument that Krist "changed [his] political party affiliation" from "United Nebraska" to "Democrat" in February 2018 is without merit.

CONCLUSION

The "change of political party affiliation" language in § 32-612 effectively allows a candidate registered without a political party affiliation to "game" the primary system, in that he or she may wait as late as March 1[39] before affiliating with a party and filing a candidate form. In contrast, a candidate affiliated with a political party may file a candidate form with a different political party only if he or she has registered with that different political party prior to the first Friday in December preceding the primary election. A non-affiliated candidate can

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[37] Neb. Const. art. I, § 3. Davis does not assert a violation of equal protection under the U.S. Constitution.

[38] Brief for relator at 13.

[39] See Neb. Rev. Stat. § 32-606 (Reissue 2016) (an incumbent of any elective office shall file between December 1 and February 15 prior to the date of the primary election, all other candidates shall file between December 1 and March 1 prior to the date of the primary election).

thus adopt a "wait and see" approach and weigh the relative strengths and weaknesses of the candidates for both political parties prior to choosing a party affiliation. Whether this loophole in the statute was contemplated by the Legislature when enacting § 32-612, it had every opportunity to draft the language precisely and specifically and it chose the language at issue even after utilizing substantially different language in prior versions of the statute. Furthermore, for approximately 20 years the Nebraska Secretary of State's office has interpreted the language in § 32-612 to not apply to one registered as nonpartisan, and the Legislature has taken no action to change the language. I can do no more than interpret the language in the statute.

For the foregoing reasons, I conclude that Gale properly denied Davis' objection. Krist's name should be placed on the May 15, 2018, primary ballot as a Democratic candidate for governor.

Judgment entered.

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

State of Nebraska, appellee, v. Charles S. Trotter, appellant.

908 N.W.2d 656

Filed March 23, 2018. No. S-16-1146.

1. **Rules of Evidence: Appeal and Error.** An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on relevance, whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, and the sufficiency of a party's foundation for admitting evidence.
2. **Constitutional Law: Sentences.** Whether a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment presents a question of law.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.

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

James Martin Davis, of Davis Law Office, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Riedmann and Arterburn, Judges.

Heavican, C.J.

INTRODUCTION

Charles S. Trotter was convicted of two counts of first degree murder and two counts of use of a deadly weapon to commit a felony. He was sentenced to a term of 40 to 60

years' imprisonment for each murder conviction and 5 to 10 years' imprisonment for each use conviction, to be served consecutively.

On direct appeal, Trotter, who was 16 years of age at the time of the events for which he was convicted, alleges that the district court erred in not admitting photographs he claims support his defense that another individual committed the murders and that his collective sentence of 90 to 140 years' imprisonment was the functional equivalent of a sentence of life imprisonment. We affirm.

BACKGROUND

Trotter was charged in the January 3, 2015, shooting deaths of Marcel Lovejoy and Dexter Joseph. Lovejoy and Joseph were shot while attending a party at an apartment complex in Omaha, Nebraska. At trial, three eyewitnesses testified that Trotter was the shooter.

Trotter's defense was mistaken identity: He claimed that the witnesses who identified him mistook him for DeAndre Hines. He attempted to introduce into evidence photographs of Hines, which were found on Hines' cell phone during a consensual search of that phone by law enforcement. The photographs were taken on two different days toward the end of December 2014 and depicted Hines holding a silver and black handgun.

Anticipating an objection to these photographs, Trotter's counsel sought a sidebar prior to the offering of the photographs:

> [Counsel for Trotter]: Okay. Here is the screenshot. It's dated December 29th of 2014, which is a couple of days beforehand, and that's — although you may not be able to tell, that clearly is . . . Hines with a gun that is similar to the one described by the witnesses as silver and black.
>
> Show them the next picture. For your information, the next one is taken on — okay. There it is. Similar gun, . . .

Hines on New Year's Eve. He doesn't have — doesn't have the time on there. It's 7:56 p.m., it looks like, and once again, I believe that he's in possession of a gun that is similar to the one described by the witness, silver and black.

And so I would — my intention would be to ask him if he got them from — captured them from the phone, and put them into evidence, and I want to do this beforehand, so it's not —

THE COURT: I appreciate that you are playing fair.

[The State]: The State would object, first off, on relevance. I don't know if that is, in fact, a gun or a BB gun. It looks like a real gun. I can't tell from looking at the photo what caliber of weapon it is. I can't tell if it's a 9 millimeter or a .40 caliber or a .22. In terms of — so we have a relevance objection.

I would also object on 403 and also on 404, because I think what [Trotter's counsel] is trying to show is propensity evidence of the fact that this person possessed a gun a week or four days before this crime so that he must have been the person possessing the gun on the day of.

THE COURT: All right. My — my recollection — I don't recall a witness saying anything about the gun was black and silver, maybe there was someone that said silver, but I only recall black — a description as black, but regardless of that, I would agree that the relevance is overweighed by the potential prejudice, and I would not allow you to put those in.

[Counsel for Trotter]: May I just respond briefly? This is not 404 evidence. This is evidence that he had possession of the weapon or a similar weapon on the day of, so I wasn't trying to show any propensity there. I understand the Court's ruling. It was more in line with 403 and relevance.

THE COURT: That's right. And the other problem that I have with that, there is clear gang signs in the second

photo, so I wouldn't let it in because of the motion in limine.

I don't remember the first one. Go back to the first one.

[Counsel for Trotter]: There is none on that one.

THE COURT: Yeah, and, again, that appears to be a silver weapon when the only witness description I have is black, and, again, I think the small amount of relevance is overweighed by the — by 403 on this.

[Counsel for Trotter]: I will — I do have pictures that I will ask to be marked during a break. I can make an offer of proof that way. Okay?

THE COURT: Absolutely. We will reserve the opportunity to make an offer of proof until the next break, which will probably be over the noon hour.

[Counsel for Trotter]: Okay.

THE COURT: All right.

[Counsel for Trotter]: Okay. Thanks.

ASSIGNMENTS OF ERROR

Trotter assigns that the district court erred in (1) not admitting exhibits 292 and 293, which were photographs of an individual Trotter argued was the actual perpetrator, wearing clothes matching the description of the shooter and holding a gun, and (2) sentencing him to a functional life sentence, in violation of the Eighth Amendment to the U.S. Constitution.

STANDARD OF REVIEW

[1] An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on relevance, whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, and the sufficiency of a party's foundation for admitting evidence.[1]

[2,3] Whether a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment presents

[1] *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

a question of law.[2] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[3]

ANALYSIS

Admissibility of Photographs.

Trotter first asserts that the district court erred in not admitting exhibits 292 and 293, which were photographs of Hines. The district court refused to admit these photographs, contending that "the small amount of relevance is overweighed by [evidence rule] 403 on this."

Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2016), provides that "relevant evidence is admissible [and] [e]vidence which is not relevant is not admissible." Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), qualifies that admissibility: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Exhibit 292 is a photograph taken on December 29, 2014, of Hines wearing a gray button-up hooded sweatshirt and holding a black and silver handgun. Exhibit 293 is a photograph taken on December 31 of Hines and another individual. In this latter photograph, Hines is apparently wearing the same gray hooded sweatshirt, now unbuttoned, and is pointing a gun at the camera. The other individual in the photograph is displaying a gang sign. Both photographs are out of focus.

Trotter argues that these photographs are relevant, because in them, Hines is wearing a sweatshirt similar to the one which witnesses describe the shooter as wearing and is carrying a gun similar to the one described by those witnesses. There is no merit to Trotter's assertions.

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[2] *State v. Jones*, 297 Neb. 557, 900 N.W.2d 757 (2017).

[3] *Id.*

We first observe that Trotter did not argue at trial that these exhibits were relevant because they showed Hines wearing a gray hooded sweatshirt similar to the one worn by the shooter. Thus, Trotter has not preserved that argument for purposes of this appeal. We note, however, that exhibit 235, which was received, is also a photograph of Hines wearing the same sweatshirt. To the extent exhibits 292 and 293 might have been admissible for that purpose, those exhibits would have been cumulative evidence and, on these facts, any error would have been harmless.

Nor was the district court's failure to admit these exhibits because of the depiction of the handgun reversible error. Assuming without deciding that these photographs were relevant, any relevance is minimal.

Trotter argued at trial that the photographs were admissible, because the gun depicted was "similar" to the one described by the witnesses. But as the district court noted, the gun in these exhibits was silver and black, while the only testimony at trial about the color of the weapon used by the shooter was that it was black. Nor was there any evidence presented that this handgun was the caliber of weapon used in the shooting or that the gun was even a real gun. The gun used in the shootings was never recovered by law enforcement. Other evidence at trial showed that a bullet matching the caliber of the bullets used in the shootings was found in a couch near Trotter's possessions in the home where he was living.

The uncontroverted testimony at trial was that the shooter was carrying a black handgun. Exhibit 292 depicts a predominantly silver handgun with some black accents. It is not possible to identify the characteristics of the gun shown in exhibit 293. Given these contradictions, the risk of juror confusion is present. Admitting photographs showing a gun that does not match the description offered by any testifying witnesses could confuse the issues presented at trial and have a tendency to mislead the jury. The members of the jury may place more emphasis on exhibits, including a photograph of any handgun,

particularly given that the gun used in these shootings was never recovered and therefore was not offered as evidence at trial. Given this risk, we cannot conclude that the district court abused its discretion in excluding the exhibits by reasoning that "the small amount of relevance [was] overweighed by [evidence rule] 403 on this."

There is no merit to Trotter's first assignment of error.

Sentences.

Trotter also argues that the district court's sentences of a combined 90 to 140 years' imprisonment was the functional equivalent of a life sentence, which is a violation of the Eighth Amendment as interpreted by *Miller v. Alabama*.[4] This argument is without merit.

We recently decided *State v. Castaneda*.[5] At issue in *Castaneda* was whether the defendant's combined sentence of 105 to 125 years' imprisonment was an effective life sentence because it did not provide a "'meaningful opportunity to obtain release.'"[6] We rejected that contention in *Castaneda*, reasoning in that case:

> [T]he court held a full evidentiary hearing concerning [the defendant's] resentencing. Before issuing the sentences, the court discussed the individualized factors it was required to consider and how they impacted its decision. Even assuming, without deciding, that a court was required to find a juvenile "irreparably corrupt" before issuing him or her a life imprisonment without parole sentence, [an argument the defendant made on appeal,] the court here gave [the defendant] no such sentence; instead, it sentenced [him] on the low end of the statutory range for each of his eight convictions. Accordingly, [the

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[4] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

[5] *State v. Castaneda*, 295 Neb. 547, 889 N.W.2d 87 (2017).

[6] *Id.* at 559, 889 N.W.2d at 96.

> defendant] received the protections required by *Miller* for a juvenile convicted of a homicide offense.[7]

Trotter was convicted of two counts of first degree murder and two counts of use of a deadly weapon to commit a felony. The district court noted at sentencing that it was "clear . . . that [Trotter's] type of antisocial behavior [was] significantly attached due to the fact of his age as opposed to being predetermined type of behaviors that the doctor would predict would last through adulthood." Nevertheless, the district court observed that it became "an unworkable situation," because a sentence with a reduced upper sentence limit "wouldn't take into account the fact that there [were] two separate victims." The court then imposed the minimum sentence for each of the convictions against Trotter and ordered those sentences to run consecutively.[8]

As we found in *Castaneda*, Trotter received the protections required by *Miller* for a juvenile convicted of a homicide offense. We conclude that Trotter's second assignment of error is without merit.

CONCLUSION

The judgment and sentences of the district court are affirmed.

Affirmed.

Wright and Kelch, JJ., not participating.

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[7] *Id.* at 560, 889 N.W.2d at 97.

[8] See Neb. Rev. Stat. §§ 28-105 (Cum. Supp. 2014) and 28-105.02 and 28-1205 (Reissue 2016).

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

Marc A. Lombardo, appellant and cross-appellee, v. Michael J. Sedlacek, M.D., appellee and cross-appellant.

908 N.W.2d 630

Filed March 23, 2018. No. S-17-146.

1. **Evidence: Appeal and Error.** Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.
2. **Appeal and Error.** Appellate review of a district court's use of inherent power is for an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Judgments: Motions for Continuance: Appeal and Error.** A court's grant or denial of a continuance and other judicial action authorized by Neb. Rev. Stat. § 25-1335 (Reissue 2016) are within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
5. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
6. **Judgments: Pleadings: Appeal and Error.** A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
7. **Statutes: Jurisdiction.** Jurisdictional statutes must be strictly construed.
8. **Statutes: Jurisdiction: Legislature: Courts: Appeal and Error.** To say that jurisdiction may be lodged in the Nebraska Supreme Court in any other manner than that provided by the plain words of the statute amounts to judicial legislation.

9. **Legislature: Intent.** The intent of the Legislature is generally expressed by omission as well as by inclusion.
10. **Statutes: Appeal and Error.** An appellate court is not at liberty to add language to the plain terms of a statute to restrict its meaning.
11. **Pleadings: Notice.** The statutory description of the motion to alter or amend does not include any requirement that the motion be accompanied simultaneously by a notice of hearing before the district court.
12. **Summary Judgment: Motions for Continuance: Affidavits.** The purpose of Neb. Rev. Stat. § 25-1335 (Reissue 2016) is to provide a safeguard against an improvident or premature grant of summary judgment.
13. ____: ____: ____. The affidavit in support of relief under Neb. Rev. Stat. § 25-1335 (Reissue 2016) need not contain evidence going to the merits of the case, but it must contain a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment.
14. **Summary Judgment: Malpractice: Physicians and Surgeons: Affidavits: Proof.** At the summary judgment stage, it is well settled that a physician's self-supporting affidavit suffices to make a prima facie case that the physician did not commit medical malpractice.
15. **Malpractice: Physicians and Surgeons: Expert Witnesses: Presumptions.** There are only very limited exceptions to the requirement of expert testimony to rebut a prima facie case by a physician stating that he or she met the standard of care, where the alleged negligence and the causal link to the plaintiff's injuries are presumed to be within the comprehension of laymen.
16. **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.

Appeal from the District Court for Douglas County: Horacio J. Wheelock, Judge. Affirmed.

Christian T. Williams, of Domina Law Group, P.C., L.L.O., for appellant.

Marc A. Lombardo, pro se.

Mary M. Schott and Thomas J. Shomaker, of Sodoro, Daly, Shomaker & Selde, P.C., L.L.O., for appellee.

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

Heavican, C.J.

I. NATURE OF CASE

A former patient sued a psychiatrist for medical malpractice. The psychiatrist moved for summary judgment. The psychiatrist averred that he had met the applicable standard of care and that he had given to the patient all materials in his possession pertaining to the patient's care. The court granted the patient a 90-day continuance of the summary judgment hearing, in order to find an expert witness. The court stayed all discovery and pending motions until the summary judgment hearing or an expert witness indicated the need for more discovery. The patient failed to designate an expert within 90 days, and the court granted summary judgment in favor of the psychiatrist. The patient appeals, arguing that the court abused its discretion in staying discovery contingent upon his designation of an expert witness, in refusing to admit into evidence at the summary judgment hearing his first set of requests for admission and the psychiatrist's responses, and in erroneously relying on the psychiatrist's affidavit that allegedly was not in evidence.

II. BACKGROUND

1. Complaint

Marc A. Lombardo, pro se, sued his former psychiatrist, Michael J. Sedlacek, for medical malpractice. Lombardo alleged that Sedlacek was negligent in failing to properly diagnose and treat Lombardo and that as a proximate result, Lombardo suffered permanent personal injuries and damages, including but not limited to, loss of income, medical expenses, impairment of earning capacity, and mental pain and suffering. In Sedlacek's answer to the amended complaint, he admitted that he provided medical care to Lombardo, but denied the remaining allegations. Sedlacek moved for summary judgment.

2. Protective Orders

The motion for summary judgment was originally set for hearing on June 1, 2016. At a hearing held on April 28, the court heard several motions.

The court overruled Lombardo's motion to strike Sedlacek's answer on the ground that it was too general.

The court also overruled a motion by Lombardo for a temporary protective order from Sedlacek's discovery requests, pursuant to the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). The motion had requested "the entry of a Protective Order for the purpose of preventing the disclosure and use of Confidential Information by any party or non-party other than as allowed by the order."

The court granted a motion by Sedlacek for a protective order requiring Lombardo to communicate with Sedlacek's attorney, and not with Sedlacek directly.

The court granted Lombardo a 1-month continuance for Lombardo to respond to Sedlacek's discovery requests.

On May 28, 2016, Lombardo sent Sedlacek his first set of requests for admission.

3. Continuance of Summary Judgment Hearing, Stay of Motions and Discovery, and Sedlacek's Affidavits

On June 6, 2016, Lombardo filed a motion to compel Sedlacek to produce certain documents responsive to Lombardo's first set of requests for production, which had been served on April 7. In the motion, Lombardo alleged that Sedlacek had not produced all the documents in his possession and that he had obscured or cropped portions of the documents provided. On June 9, Lombardo filed a motion to continue the hearing on the motion for summary judgment, pursuant to Neb. Rev. Stat. § 25-1335 (Reissue 2016).

The court conducted a hearing on June 13, 2016. The court introduced the hearing as a hearing on summary judgment. At that point, Lombardo interjected that he had filed a motion to

continue the summary judgment hearing. Sedlacek responded that he had objected to the continuance.

Lombardo offered into evidence exhibit 23 in support of his motion to continue. The court entered exhibit 23 into evidence without limitation. Exhibit 23 consists of Lombardo's affidavit and several attachments.

In his affidavit, Lombardo averred that he did not have all the medical records that Sedlacek was supposed to produce, that certain records appeared to contain misrepresentations or fabrications of facts, and that portions of the records were illegible. Lombardo further stated in the affidavit that he needed to depose Sedlacek "in order to understand more about why the records contain the false information." Lombardo requested a continuance of the summary judgment hearing for at least 9 months, after all records were produced, in order for Lombardo to name an expert.

Also contained within exhibit 23 is an affidavit by Sedlacek, dated May 2, 2016. In the May 2 affidavit, Sedlacek averred that he had met or exceeded the applicable standard of care required of him under the circumstances in his treatment of Lombardo.

Lombardo's affidavit, to which Sedlacek's affidavit was attached, did not call into question the authenticity of Sedlacek's May 2, 2016, affidavit. Instead, Lombardo "responded" to Sedlacek's affidavit, stating that he could not opine on the accuracy of Sedlacek's averments and that he disagreed Sedlacek had met the applicable standard of care.

In response to Lombardo's affidavit claiming he had not received all his medical records, Sedlacek entered into evidence exhibit 22. Exhibit 22 is Sedlacek's affidavit, dated June 9, 2016, averring that he had provided all "materials pertaining to . . . Lombardo that I believe are my [sic] possession or the possession of my office staff to my attorneys" and that "[i]t is my understanding that all of the records that I provided to my attorneys were produced to . . . Lombardo in response to his Requests for Production of Documents."

Lombardo confirmed at the hearing that on May 11, he had received 484 pages of documents from the offices of Sedlacek's attorneys.

Given the fairly recent receipt of his medical records, the court ultimately granted Lombardo a 90-day continuance of the summary judgment hearing, in order to find an expert. The court told Lombardo that he would not be allowed to designate an expert after September 13, 2016. The summary judgment hearing was continued to September 15.

The court did not rule upon Lombardo's motion to compel, but instead continued the hearing on any pending motions until September 15, 2016. The court specifically stated that Lombardo was not allowed to depose Sedlacek "until and after such time [Lombardo] has identified his expert or experts, and said expert or experts' opinions." The court explained that Lombardo needed to designate an expert "before we do anything else."

4. Denial of Motion to Alter or Amend and Stay of Motions and Discovery

The orders from the April 28 and June 13, 2016, hearings were file stamped on June 13, 2016. And, on June 23, Lombardo filed a "Motion to Alter or Amend" the June 13 order relating to the continuance of pending motions and the requirement that Lombardo designate an expert witness.

Despite the court's order staying discovery, Lombardo sent Sedlacek a second set of requests for admission on July 14, 2016. In response, on July 19, Sedlacek also moved for a stay of all discovery until September 15, unless Lombardo could show that the discovery was requested by a potential expert. Sedlacek also moved for a stay of all hearings on all motions filed by Lombardo that did not relate to his ability or duty to designate an expert until September 15.

At a hearing on July 25, 2016, Lombardo again argued that Sedlacek had not provided all records in his possession.

Lombardo claimed he had proof in the form of a letter he received from Sedlacek, a copy of which was not in the records disclosed. Counsel for Sedlacek responded that they had scanned approximately 500 pages of records and had sent them to Lombardo and that those were all the pertinent records in Sedlacek's possession.

The court made a specific finding that all discovery had been complied with up to the date of the hearing.

The court again stayed all discovery until Lombardo designated an expert. The court stated that if Lombardo timely found an expert, and such expert indicated more discovery was necessary, the court would reopen discovery. The court explained that Sedlacek's averment that he had met the standard of care created a prima facie case for summary judgment and that the burden had shifted to Lombardo to present expert testimony showing a material issue of fact.

The court denied Lombardo's motion to alter or amend. The court's order was file stamped on July 26, 2016.

5. Lombardo's Objection and Interlocutory Appeal

On August 5, 2016, Lombardo served upon Sedlacek a third set of requests for admission. And on August 8, Lombardo filed an "Objection and Motion." Lombardo stated in the August 8 motion that he objected to the court's order of July 26, because he had not received timely notice of Sedlacek's July 19 motion for a stay of discovery. Lombardo stated, further, that Sedlacek had omitted 38 of 52 requests for admission, which were served on Sedlacek on May 28, 2016, before any stay of discovery. Lombardo asked the court to set aside its order on Sedlacek's July 19 motion or to amend the order so as to remove the stay on discovery.

On August 11, 2016, Lombardo filed a notice of appeal from the court's orders of June 13 and July 26. In an order on August 22, the district court stated that it was retaining jurisdiction while the appeal was pending, on the ground that

Lombardo had appealed from nonfinal orders. On September 19, 2016, in case No. A-16-776, the August 11 appeal was summarily dismissed for lack of jurisdiction by the Nebraska Court of Appeals.

6. Hearing and Order Regarding Summary Judgment

On September 12, 2016, Lombardo filed a motion to stay the summary judgment hearing, as well as a jury demand. In the motion to stay, Lombardo asserted that his August 11 notice of appeal deprived the court of jurisdiction.

At a hearing on September 15, 2016, the court denied the motion to stay and proceeded with the motion for summary judgment. Lombardo conceded at the hearing that he had not designated an expert. Lombardo explained that he had spoken with a medical doctor, but had not hired the doctor or obtained an affidavit from the doctor expressing any opinion.

Lombardo entered into evidence exhibit 34, entitled "Objection." In the objection, Lombardo asserted, among other things, that Sedlacek's May 2, 2016, affidavit was inadmissible, because Sedlacek made statements that were not based on personal knowledge and because Sedlacek relied on hearsay statements in the medical records. However, Lombardo did not object to the use of the May 2 affidavit on the grounds that it had allegedly been admitted for a limited purpose, that it had been admitted into evidence at a prior hearing, that Lombardo lacked notice it would be relied on in determining the motion for summary judgment, or that the affidavit was submitted by Lombardo rather than by Sedlacek.

Lombardo also offered into evidence exhibit 35, containing Lombardo's first set of requests for admission and Sedlacek's responses. In an affidavit within exhibit 35, Lombardo averred that he mailed a copy of the requests to Sedlacek's attorney on May 28, 2016, and mailed a notice of service on June 1. He further stated that he believed requests Nos. 3, 5 to 11, 13, 14, 16 to 18, 20, 21, 25, 27, and 31 to 52 should be deemed

admitted pursuant to Neb. Ct. R. Disc. § 6-336, because they were not responded to.

A comparison of the requests and the responses found in Lombardo's offer of proof indicates that, with the exception of request No. 38, the requests specified by Lombardo were not individually responded to. However, Sedlacek's response to the first set of requests for admission stated with regard to these unanswered requests that they were "vague, unclear as to time and place, [sought] conclusions of law, [sought] conclusions as to the impressions of others, [were] unintelligible, and/or contain[ed] compound questions."

Sedlacek's attorney objected to the admission of exhibit 35. She asserted that a general denial to a number of requests does not waive or permit those requests to be deemed admitted. The court sustained counsel's objection and refused to enter exhibit 35 into evidence for purposes of the summary judgment hearing.

Lombardo also offered into evidence exhibits 36 and 37, which consisted of Lombardo's second and third sets of requests for admission, along with Lombardo's affidavits stating their dates of service and that Sedlacek had not responded to the requests. The court sustained Sedlacek's objections to the exhibits on the ground that they were subject to the court's stay of discovery.

On September 20, 2016, the court granted summary judgment to Sedlacek. The court ruled that all other pending motions were denied as moot and explicitly stated that the court did not retain any motions for future disposition.

7. Motion to Alter or Amend

On September 26, 2016, Lombardo filed a motion to alter or amend, asking the court to vacate its order of summary judgment. The motion was served upon Sedlacek, but did not contain a notice of hearing at the time of its filing. A notice of hearing was later filed on December 14, setting the hearing on the motion to alter or amend for December 30. The hearing

was rescheduled for January 13, 2017. Prior to the hearing, Lombardo filed an "Amended Motion to Alter or Amend Judgment," as well as a motion to stay the hearing on his motion to alter or amend.

At the hearing on January 13, 2017, Sedlacek objected to Lombardo's motion to alter or amend on the ground that the district court lacked "jurisdiction" to hear the motion, because Lombardo had failed to comply with Rules of Dist. Ct. of Fourth Jud. Dist. 4-2(B)(1) (rev. 2005). That rule states in relevant part:

> Unless otherwise ordered by the court, all pretrial and posttrial motions or similar filings such as special appearances which require a hearing shall be filed in the case prior to the scheduled hearing. *At the time of making said filing, the party shall obtain a date for hearing thereon from the judge in charge of the case or, in the absence of the judge or at the judge's direction, from a member of the judge's office staff.*

(Emphasis supplied.)

Sedlacek acknowledged receipt of notice of the hearing, but argued that Lombardo should have obtained the notice of hearing before the motion was filed. The court overruled Sedlacek's jurisdictional objection and considered the merits of Lombardo's motion to alter or amend.

During the hearing on Lombardo's motion to alter or amend, one of the attorneys from the firm representing Sedlacek stated that as far as she could tell, Sedlacek's affidavit stating he met the applicable standard of care had not been offered into evidence. The court disagreed. The judge stated that he recalled seeing the affidavit and that it had been "attached to something that was submitted."

In an order dated January 17, 2017, the court denied Lombardo's motion to stay, his motion to alter or amend, and his amended motion to alter or amend. The court denied all other pending motions.

On February 6, 2017, Lombardo filed his notice of appeal and deposited his docket fee in the office of the clerk of the district court. That is the appeal presently before us.

III. ASSIGNMENTS OF ERROR

Lombardo assigns that the district court erred when it (1) granted summary judgment without an affidavit in support of the motion before it, (2) did not hear and did not grant Lombardo's motion to compel discovery, (3) did not grant Lombardo's motion for additional time in discovery, (4) did not hear and did not grant Lombardo's motions for protection from discovery, (5) determined that Sedlacek had made a prima facie case on the basis of facts not in evidence, (6) relied on facts not in evidence, and (7) denied Lombardo's offer of evidence in opposition to summary judgment.

On cross-appeal, Sedlacek assigns that the district court should have sustained his objection to Lombardo's motion to alter or amend and "acknowledged the case stood dismissed when no appeal was taken within 30 days of the Order granting Summary Judgment."

IV. STANDARD OF REVIEW

[1,2] Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.[1] Similarly, appellate review of a district court's use of inherent power is for an abuse of discretion.[2]

[3] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[3]

[4] A court's grant or denial of a continuance and other judicial action authorized by § 25-1335 are within the discretion

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[1] *Putnam v. Scherbring*, 297 Neb. 868, 902 N.W.2d 140 (2017).

[2] *Id.*

[3] *Id.*

of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.[4]

[5] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[5]

[6] A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.[6]

V. ANALYSIS

1. Jurisdiction

We first address Sedlacek's cross-appeal. Sedlacek asserts that we lack jurisdiction because Lombardo's motion to alter or amend was defective and thus failed to toll the 30-day statutory period for perfecting his appeal to this court. Sedlacek contends that Lombardo's motion was fatally defective because Lombardo failed to comply with local district court rule 4-2(B)(1), which requires parties to obtain a date for hearing simultaneously to the filing of any motion.

[7-10] An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction.[7] Jurisdictional statutes must be strictly construed.[8] To say that jurisdiction may be lodged in our appellate court in any other manner than that provided by the plain words of the statute amounts to judicial legislation.[9] The intent of the

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[4] See, *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014); *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988).

[5] *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008).

[6] *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014).

[7] *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

[8] *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

[9] See *id.*

Legislature is generally expressed by omission as well as by inclusion.[10] We are not at liberty to add language to the plain terms of a statute to restrict its meaning.[11]

Neb. Rev. Stat. § 25-1912(1) (Reissue 2016) provides that an appeal is perfected and the appellate court has jurisdiction when a notice of appeal is properly filed within 30 days of the entry of the judgment, decree, or final order. Subsection (4) of § 25-1912 states:

> Except as otherwise provided in subsection (3) of this section . . . an appeal shall be deemed perfected and the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court, and after being perfected no appeal shall be dismissed without notice, *and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional*.

(Emphasis supplied.)

Section 25-1912(3) provides for termination of the 30-day period through a timely motion to alter or amend. It states in this regard:

> The running of the time for filing a notice of appeal shall be terminated as to all parties . . . (b) *by a timely motion to alter or amend a judgment under section 25-1329*, . . . and the full time for appeal fixed in subsection (1) of this section *commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a), (b), or (c) of this subsection*.

(Emphasis supplied.) Thus, under § 25-1912(3), the time to appeal to this court begins anew after the motion to alter or amend is disposed of.[12]

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[10] *State v. Frederick*, 291 Neb. 243, 864 N.W.2d 681 (2015).

[11] *Id.*

[12] See, *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017); *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 746 N.W.2d 707 (2008).

The only express limitation to this exception within our statutes governing appellate jurisdiction is that the motion to alter or amend be as described by Neb. Rev. Stat. § 25-1329 (Reissue 2016). Section 25-1329 states in full:

> A motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment. A motion to alter or amend a judgment filed after the announcement of a verdict or decision but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof.

[11] This statutory description of the motion to alter or amend does not include any requirement that the motion be accompanied simultaneously by a notice of hearing before the district court. Under the plain language of our jurisdictional statutes, to terminate the 30-day period for filing a notice of appeal, the motion to alter or amend needs to be filed within 10 days after the entry of the judgment. In this case, it was.

And the district court accepted Lombardo's motion to alter or amend as filed—despite Lombardo's failure to timely set a hearing date under local district court rule 4-2(B)(1). The court specifically rejected Sedlacek's contention that the motion was fatally defective and should not be recognized as filed, for the reason that Lombardo had not simultaneously obtained a date for its hearing.

We find no error in the court's ruling. Indeed, local district court rule 4-2(B)(1) does not by its plain language purport to set forth the requirements of a motion itself. Rather, the rule requires that the party filing a motion obtain a date for hearing on the motion when the motion is filed. It states in relevant part that "[a]t the time of making said filing, the party shall obtain a date for hearing thereon . . . ."

Sedlacek points to no rule stating the consequences of failing to abide by local district court rule 4-2(B)(1). Moreover, district courts have discretion to excuse procedural court

rules.[13] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[14] We find no reason to conclude that the district court abused its discretion in accepting Lombardo's motion to alter or amend as properly filed and under the court's consideration until its ruling on January 17, 2017.

Sedlacek's reliance on Neb. Rev. Stat. § 25-910 (Reissue 2016) does not alter our analysis. Section 25-910 merely outlines the required written content of a notice of a motion "[w]here notice of a motion is required . . . ." It does not state that the motion must be filed simultaneously with a notice of hearing. Moreover, § 25-910 is not cross-referenced by our statutes governing appellate jurisdiction.

The 30-day period for filing a notice of appeal was terminated until Lombardo's motion to alter or amend (filed with the district court within 10 days of the judgment as required by § 25-1329) was disposed of. Then, a new 30-day period began. Lombardo filed his notice of appeal within 30 days of the January 17, 2017, order denying his motion to alter or amend. Therefore, the current appeal is timely and we have jurisdiction to consider the merits of Lombardo's assignments of error.

2. Summary Judgment

While Lombardo's pro se brief touches upon many topics, we consider only arguments that were both specifically assigned and specifically argued in the appellate brief.[15] Broadly, Lombardo presents three assertions of error that were both assigned and argued. First, he asserts that the district court erroneously relied on an affidavit not in evidence in its various rulings, including granting summary judgment

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[13] See *Houser v. American Paving Asphalt, ante* p. 1, 907 N.W.2d 16 (2018).

[14] *Putnam v. Scherbring, supra* note 1.

[15] See *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

in Sedlacek's favor. Second, Lombardo argues that he was unfairly hampered in the amount of discovery permitted before the court ruled on the summary judgment motion, by limiting its continuance to finding an expert and refusing to grant Lombardo's motion to compel discovery. Third, Lombardo asserts that he was prejudiced at the summary judgment hearing by the district court's allegedly erroneous ruling on his offer of exhibit 35, and its failure to grant his motion for a protective order under HIPAA.

(a) Affidavit "Not in Evidence"

We find no merit to Lombardo's contention that Sedlacek's affidavit, stating he met the applicable standard of care, was not in evidence. It is true, as Lombardo points out, that unless the affidavit is marked, offered, and accepted, it does not become part of the record and cannot be considered by the trial court as evidence.[16] But, fortunately for Sedlacek, the May 2, 2016, affidavit, in which Sedlacek averred he met the applicable standard of care, was offered into evidence by Lombardo as part of exhibit 23. Lombardo's affidavit did not purport to attach Sedlacek's affidavit for a limited purpose. And the district court admitted exhibit 23 into evidence without any restriction on its use. Lombardo's "Objection," at exhibit 34, to the affidavit, on the ground that it was vague and relied on hearsay, was untimely.

Accordingly, Sedlacek's May 2, 2016, affidavit was part of the record and was properly considered by the district court as evidence. Most importantly, the court properly relied upon Sedlacek's affidavit, which was submitted during the June 13 summary judgment hearing, in granting summary judgment in favor of Sedlacek.

(b) Limited Continuance

We equally find no merit to Lombardo's claim that the court erred in deciding Sedlacek's motion for summary judgment

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[16] *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002).

without allowing Lombardo adequate time for discovery to rebut Sedlacek's prima facie case.

[12] Lombardo asserts that pursuant to § 25-1335, the court should have refused Sedlacek's motion for summary judgment or granted Lombardo a continuance on the hearing of the motion, in order to permit affidavits to be obtained, depositions to be taken, or discovery to be had. The purpose of § 25-1335 is to provide a safeguard against an improvident or premature grant of summary judgment.[17] Section 25-1335 provides:

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

[13] We have said that the affidavit in support of relief under § 25-1335 need not contain evidence going to the merits of the case,[18] but it must contain a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment.[19] We have cited with approval case law holding that the affidavit must show how additional time will enable the party to rebut a summary judgment movant's allegation that no genuine issue of material fact exists for disposition by trial.[20] The affidavit should specifically identify the relevant information that will be obtained with additional

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[17] *Gaytan v. Wal-Mart, supra* note 4; *Wachtel v. Beer, supra* note 4.

[18] See, *Gaytan v. Wal-Mart, supra* note 4; *Dresser v. Union Pacific RR. Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011); *Wachtel v. Beer, supra* note 4.

[19] *Id.*

[20] See *Wachtel v. Beer, supra* note 4, citing *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260 (10th Cir. 1984).

time and indicate some basis for the conclusion that the sought information actually exists.[21]

Generally, the control of discovery is a matter for judicial discretion.[22] A court's grant or denial of a continuance and other judicial action authorized by § 25-1335 is likewise within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.[23]

We first note that the court did, in fact, grant Lombardo relief under § 25-1335 in the form of a 90-day continuance for Lombardo to find an expert witness. Nevertheless, Lombardo argues that the court abused its discretion in so limiting the relief and in not allowing Lombardo more time for discovery without a designated expert. In particular, Lombardo argues he should have been allowed more time in order to depose Sedlacek.

In his affidavit in support of relief under § 25-1335, Lombardo claimed he did not have all the medical records, certain records appeared to contain misrepresentations or fabrications of facts, and portions of the records were illegible. He averred that he needed to depose Sedlacek "in order to understand more about why the records contain the false information."

But none of the allegations in Lombardo's affidavit presented a likelihood that additional time for discovery, without designating an expert, would allow Lombardo to rebut Sedlacek's prima facie case for summary judgment. As the district court repeatedly explained, Lombardo needed an expert witness in order to do that.

[14] At the summary judgment stage, it is well settled that a physician's self-supporting affidavit suffices to make

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[21] See *id.*, citing *VISA Intern. Service v. Bankcard Holders*, 784 F.2d 1472 (9th Cir. 1986).

[22] See, *Putnam v. Scherbring, supra* note 1; *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

[23] See, *Gaytan v. Wal-Mart, supra* note 4; *Wachtel v. Beer, supra* note 4.

a prima facie case that the physician did not commit medical malpractice.[24] Sedlacek's affidavit thus shifted the burden to Lombardo to produce admissible contradictory evidence raising a genuine issue of material fact.[25]

And, in medical malpractice cases, expert testimony by a medical professional is normally required to establish the standard of care and causation under the circumstances.[26] Therefore, once the defendant physician in a malpractice case states that he or she has met the standard of care, the plaintiff must normally present expert testimony to show that a material issue of fact exists preventing summary judgment.[27]

[15] There are only very limited exceptions to the requirement of expert testimony to rebut a prima facie case by a physician stating that he or she met the standard of care, where the alleged negligence and the causal link to the plaintiff's injuries are presumed to be within the comprehension of laymen.[28] Lombardo does not argue, however, that any such exception to the need for expert testimony applies to the facts of his case.

Lombardo's argument instead is that Sedlacek's own statements might have created a material issue of fact, had Lombardo been given additional time to depose him. While a defendant physician's own statements can be used to create a material issue of fact in a medical malpractice case,[29] speculation that such statements might be obtained is a poor indication that the sought information actually exists. Furthermore,

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[24] See *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

[25] See *id.*

[26] *Simon v. Drake*, 285 Neb. 784, 829 N.W.2d 686 (2013).

[27] See *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005). See, also, e.g., *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995).

[28] See *Thone v. Regional West Med. Ctr., supra* note 24.

[29] See, *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994).

Lombardo's affidavit failed to present good cause as to why he had not deposed Sedlacek before the June 13, 2016, hearing, at which discovery was stayed.

The district court did not abuse its discretion in granting only limited relief under § 25-1335, in the form of a 90-day continuance of the summary judgment hearing in order for Lombardo to obtain an expert witness.

Relatedly, the district court did not err in refusing to entertain Lombardo's motion to compel discovery until the summary judgment hearing, unless Lombardo designated an expert witness stating the need for further discovery.

Nor did the court err in ultimately denying Lombardo's motion to compel when Lombardo failed to designate an expert witness by September 13, 2016.

(c) Evidence Not Admitted at Summary Judgment Hearing

Lastly, Lombardo argues that he was prejudiced in his ability to present a material issue of fact at the summary judgment hearing by virtue of the court's refusal to enter exhibit 35 into evidence and its denial of Lombardo's motion for a protective order.

Lombardo argues that exhibit 35, containing Sedlacek's responses to Lombardo's first set of requests for admission, would have created a material issue of fact if the court had admitted it into evidence. Specifically, he asserts that the court should have recognized as admitted, under § 6-336, several "unanswered" requests for admission. These allegedly admitted allegations would, according to Lombardo, have established that Sedlacek breached his "duty as physician to establish a thorough and accurate medical history."[30]

Section 6-336 states in relevant part, "The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow,

[30] Brief for appellant at 31.

the party to whom the request is directed serves upon the party requesting the admission a written answer *or objection* addressed to the matter . . . .” (Emphasis supplied.) Matters admitted pursuant to § 6-336 are a proper basis for a summary judgment.[31]

Section 6-336 is self-enforcing but not self-executing.[32] It requires that a party, claiming another party’s admission by 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 subsequently offer the request for admission as evidence.[33] If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, the trial court is obligated to give effect to the provisions of § 6-336.[34]

While Lombardo’s affidavit in exhibit 35 proved service, he did not demonstrate Sedlacek’s failure to object to the request. Exhibit 35 demonstrated that Sedlacek had objected to the unanswered requests as vague, unclear as to time and place, sought conclusions of law, sought conclusions as to the impressions of others, were unintelligible, and/or contained compound questions. Lombardo did not take issue below with the fact that the objections referred to several requests simultaneously, nor did he take issue with the form of the objections in his appellate brief.

[16] 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.[35] We conclude that even

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[31] *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993).

[32] See, *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012); *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011); *Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988).

[33] *Id.*

[34] *U.S. Bank Nat. Assn. v. Peterson, supra* note 32; *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

[35] *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

had the court admitted exhibit 35 into evidence, there would not have been matters admitted under § 6-336. Moreover, Lombardo fails to explain how the requests for admission, which were largely in hypothetical form, would have created a material issue of fact even if deemed admitted. We find no prejudicial error in the court's ruling on exhibit 35.

Lombardo also claims that he was prejudiced by the court's refusal to grant his motion for a protective order under HIPAA. He claims that he could not offer his medical records as evidence at the summary judgment hearing, because they were not properly protected.

Lombardo fails to point to what provision of HIPAA requires such a protective order or to any case law supporting his right to a protective order. And even if Lombardo had entered his medical records into evidence, they would not have created a material issue of fact. We agree with the district court that in order to create a material issue of fact, Lombardo needed to submit an expert's opinion that Sedlacek had breached the applicable standard of care. Thus, again, we find no prejudicial error in the court's order denying Lombardo's motion for a protective order.

VI. CONCLUSION

The district court did not err in continuing the summary judgment hearing for only the limited purpose of giving Lombardo more time to hire an expert witness. The court did not err in relying on Sedlacek's affidavit in which he averred that he had met the applicable standard of care. And Lombardo was not prejudiced by the court's refusal to enter exhibit 35 into evidence at the summary judgment hearing or by its denial of Lombardo's motion for a protective order under HIPAA.

Affirmed.

Wright and Kelch, JJ., not participating.

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

Butler County Landfill, Inc., appellee, v. Butler County Board of Supervisors, appellant.

908 N.W.2d 661

Filed March 23, 2018. No. S-17-276.

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. **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. ____: ____. Where a lower court lacks subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
4. **Political Subdivisions: Final Orders: Appeal and Error.** A district court order setting aside, annulling, vacating, or reversing a siting approval decision in a review pursuant to Neb. Rev. Stat. § 13-1712 (Reissue 2012) is a final order.
5. **Jurisdiction: Appeal and Error.** An appellate court and the tribunal appealed from do not have jurisdiction over the same case at the same time.
6. **Political Subdivisions: Jurisdiction: Time: Appeal and Error.** A failure to comply with the requirement under Neb. Rev. Stat. § 13-1712 (Reissue 2012) to petition for a hearing before the district court within 60 days after notice of the siting body's decision deprives the district court of jurisdiction to review a siting approval decision.

Appeal from the District Court for Butler County: Mary C. Gilbride, Judge. Appeal dismissed.

Kristopher J. Covi and Steven P. Case, of McGrath, North, Mullin & Kratz, P.C., L.L.O., and Julie L. Reiter, Butler County Attorney, for appellant.

Robert H. Epstein and Ryan C. Hardy, of Spencer Fane, L.L.P., and Stephen D. Mossman, of Mattson Ricketts Law Firm, for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

The Butler County Board of Supervisors (the Board) appeals from the order of the district court for Butler County which reversed the Board's decision to deny an application by Butler County Landfill, Inc. (BCL), to expand its solid waste disposal landfill area located in Butler County, Nebraska. We conclude that the district court lacked jurisdiction to enter the February 7, 2017, order from which this appeal is taken and that, consequently, we lack jurisdiction over this appeal. We therefore vacate the district court's order and dismiss this appeal.

STATEMENT OF FACTS

BCL, a wholly owned subsidiary of Waste Connections of Nebraska, Inc., operates a solid waste landfill located in Butler County near David City, Nebraska. The landfill has been in existence since 1986, and an expansion of the landfill was approved in 1992 which allowed it to accept solid waste from other counties. The record indicates that by 2015, BCL was accepting solid waste from 15 to 20 counties in eastern Nebraska and some additional counties outside Nebraska.

BCL determined that it needed to expand the solid waste landfill area in Butler County. Neb. Rev. Stat. §§ 13-1701 to 13-1714 (Reissue 2012) are the statutes that govern siting approval procedures for solid waste disposal areas and

solid waste processing facilities. These statutes indicate that if denied, an applicant for siting approval can reapply after the passage of 2 years. See § 13-1711.

As required by § 13-1702, BCL filed a request for siting approval with the Board on July 6, 2015. In its request, BCL asserted, inter alia, that as the scope of the area it served has expanded, the amount of solid waste it accepted had increased. BCL asserted that in the mid-1990's, it had accepted approximately 100,000 tons of solid waste per year; that by 2015, it accepted approximately 550,000 tons of solid waste per year; and that it projected that by 2020, it would receive 800,000 tons of solid waste per year. The size of the expanded landfill approved in 1992 was 144.79 acres. In the July 6 request, BCL sought approval to further expand into a 160-acre parcel of land it had purchased that was contiguous to the south side of its existing landfill.

As required by § 13-1706, the Board, on October 28, 2015, held a public hearing on BCL's request. Part of the purpose of a public hearing under § 13-1706 is to "develop a record sufficient to form the basis of an appeal of the decision." At the public hearing, the Board heard testimony by representatives of BCL and by members of the public, including those who favored and those who opposed BCL's request.

Following the public hearing and a written comment period which served to supplement the record of the public hearing, the Board met on December 14, 2015, to deliberate BCL's request. At that meeting, the Board considered, inter alia, the statutory criteria for siting approval set forth in § 13-1703, which provides that "[s]iting approval shall be granted only if the proposed area or facility meets all of" six specified criteria. The record of the deliberations shows that the Board considered in turn whether each criterion had been shown. At the end of the Board's discussion of each criterion, a poll was taken of the seven supervisors as to whether each supervisor thought that specific criterion had been met. Based on the polling of supervisors during the meeting, all supervisors

agreed that three of the six criteria had been met, and all supervisors agreed that one criterion had not been met. With respect to the two remaining criteria, the votes were split, with a majority voting in each case that the criteria had not been met.

At the end of the discussion, based on the polling as to each criterion, a supervisor moved to deny the application, another supervisor seconded the motion, and the Board unanimously voted to deny the application. The supervisors thereafter signed a document titled "Decision Regarding Siting Approval," which set forth the procedures that had been followed with regard to BCL's application and which concluded that "[b]ased upon the finding that [BCL] has failed to meet all criteria required to be met under [§] 13-1703 it was moved . . . and seconded . . . that the [BCL application] be denied. Upon roll call vote, the motion was unanimously passed." This December 14, 2015, written decision did not specify which criteria were not met and did not further set forth reasons for the decision.

On February 10, 2016, BCL filed a petition in the district court for Butler County seeking judicial review, pursuant to § 13-1712, of the Board's denial of its siting application. At a hearing on the petition held on March 21, the district court received into evidence a transcript of the public hearing held October 28, 2015; the exhibits received at the public hearing; a transcript of the Board's December 14, 2015, meeting; and the Board's decision dated December 14, 2015.

After an additional hearing, the district court on June 17, 2016, filed a journal entry in which it referred to § 13-1712, which requires that "the district court shall consider the written decision and reasons for the decision of the . . . county board and the transcribed record of the hearing held pursuant to [§] 13-1706." The court concluded that in addition to a written decision and a transcript of the public hearing, the statute required the Board to "make a written statement of the reasons for its decision." The court stated that in this case, the

Board "simply found that [BCL] had failed to demonstrate the statutory requirements but did not specify any of its reasons for reaching that conclusion." Although the district court's jurisdiction was conferred under § 13-1712, rather than under the Administrative Procedure Act, the court cited cases under the Administrative Procedure Act regarding a failure "to make findings of fact and conclusions of law." The court concluded its June 17 journal entry with the following paragraph, which was titled "Remand":

> The failure of the [B]oard to make specific fact findings as required by statute, necessitates that the order entered December 14, 2015 be set aside and the matter remanded to the . . . Board . . . with directions to make findings of fact supporting the order which they shall issue within thirty days of this remand.

For completeness, we note that because we lack jurisdiction over this appeal, we make no comment regarding the correctness of the district court's reading of the requirements of § 13-1712.

On July 14, 2016, the Board filed in the district court a "Notice of Compliance" stating that it had complied with the court's order. The Board attached to the filing a certified copy of a resolution passed by the Board on July 13 in which it stated that it had denied BCL's application by a unanimous vote and that it was adopting findings of fact "in further support of its denial" of BCL's application. In a document attached to the resolution, the Board stated that the supervisors unanimously determined that BCL satisfied three criteria, that the supervisors unanimously determined that BCL failed to satisfy one criterion, and that a majority of the supervisors determined that BCL failed to satisfy the two remaining criteria. The Board set forth its reasons for each of these determinations.

After the Board adopted the resolution on July 13, 2016, BCL did not file a new petition for judicial review pursuant to § 13-1712. Nevertheless, after the Board filed its notice of

compliance, the district court held a hearing on October 25 and received briefing. At the conclusion of the hearing, the court stated that it was taking the matter under advisement.

On February 7, 2017, the district court filed an order in which it reversed the Board's decision to deny the application and remanded the matter to the Board with directions for the Board to approve BCL's application. In the February 7 order, the court specifically addressed each of the three criteria that the Board or a majority of the Board had determined BCL had not met. The court cited evidence from the record and determined as to each criterion that the Board's finding that the criterion was not met was in error. The court concluded that the Board's denial of BCL's application "was not based on competent evidence in the record, was contrary to law and was arbitrary and capricious." The court further concluded that based on the application, the record, and the relevant evidence, the Board should have approved BCL's application. The court therefore reversed the Board's order denying BCL's application and remanded the matter to the Board with directions to approve the application.

The Board appeals the February 7, 2017, order.

ASSIGNMENT OF ERROR

The Board claims that the district court erred when it determined that the Board acted arbitrarily and capriciously when it denied BCL's application.

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. *Campbell v. Hansen*, 298 Neb. 669, 905 N.W.2d 519 (2018).

ANALYSIS

[2,3] 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. *Rafert v. Meyer*, 298 Neb. 461, 905 N.W.2d 30 (2017). Where a lower court lacks subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017).

Prior to our moving this case to our docket, the Nebraska Court of Appeals conducted a jurisdictional review. Following that review, the Court of Appeals issued an order to show cause in which it stated that a question existed "as to how BCL came back before the District Court following the court's June 17[, 2016,] order vacating the December 14, 2015 decision and remand back to the Board." The Court of Appeals stated that there was no indication in the record on appeal that BCL had filed a new petition in the district court after the Board issued its findings of fact and restated its decision to deny BCL's application. The Court of Appeals further stated that there was a question whether a second petition was necessary given the nature of the district court's remand. In its response to the order to show cause, BCL conceded that no second petition had been filed, but BCL asserted that a second petition was not necessary. Based on BCL's response, the Court of Appeals directed the parties "to include and address in their briefs the issue of whether a second petition was required following the District Court's order requiring the Board to make findings of facts and the Board's subsequent compliance with the Court's order."

The parties briefed the jurisdictional issue, and we granted BCL's petition to bypass the Court of Appeals. We now consider the jurisdictional issue. As explained below, we conclude that we do not have jurisdiction over this appeal, because the district court did not have jurisdiction when it entered the February 7, 2017, order, from which the Board appeals. The district court's June 17, 2016, order returned jurisdiction to the Board, and the district court was divested of jurisdiction.

After the Board acted on the district court's order, BCL took no action to again vest jurisdiction in the district court, and as a consequence, the district court's rulings after its June 17 remand were issued without authority.

As noted above, BCL filed a timely petition under § 13-1712 for the district court to review the Board's December 14, 2015, order denying BCL's application. The district court took action on that petition on June 17, 2016, when it determined that the Board had failed to make specific written findings of fact which the court believed were required by statute. The court thereby effectively concluded that the Board's order did not conform to the law. The court therefore ordered the Board's December 14, 2015, order to be "set aside and the matter remanded to the . . . Board . . . with directions to make findings of fact supporting the order which they shall issue within thirty days of this remand." In the order, the district court "set aside" the Board's order and remanded the matter to the Board for further action, but the district court did not explicitly purport to reserve jurisdiction in itself.

After the Board complied with the order and filed its notice of compliance in the district court, the parties and the district court proceeded upon the apparent assumption that the district court had acquired jurisdiction at the time BCL had filed its petition for review of the December 14, 2015, order and that the district court continued to exercise jurisdiction. Given certain inferences in the language of the June 17, 2016, order, this assumption might have seemed reasonable; on remand, the Board acted within the timeframe set forth by the court in the June 17 order, and the court promptly continued with proceedings in the case after the Board gave notice of its compliance. However, the assumption does not comport with the facts or applicable law, and we must therefore determine in this case which body—the district court or the Board—had jurisdiction at what time.

[4] We note first that the court in the June 17, 2016, order stated that the Board's failure to make findings of fact

"necessitate[d] that the order entered December 14, 2015 be set aside and the matter remanded" to the Board. Black's Law Dictionary 1580 (10th ed. 2014) defines "set aside" as "to annul or vacate (a judgment, order, etc.)." It has been stated that in an appeal to the district court by petition in error pursuant to Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 2016), a judgment of the district court reversing an inferior tribunal is a final order. See *County of Douglas v. Burts*, 2 Neb. App. 90, 507 N.W.2d 310 (1993) (citing *Tootle, Hosea & Co. v. Jones*, 19 Neb. 588, 27 N.W. 635 (1886)). We similarly conclude that a district court order setting aside, annulling, vacating, or reversing a siting approval decision in a review pursuant to § 13-1712 is a final order. In *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995), we held that in conformity with Neb. Rev. Stat. § 25-1911 (Reissue 2016), in an appeal of a siting approval case under §§ 13-1701 to 13-1714, a judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Applying the foregoing principles of law, the district court's June 17, 2016, order, which vacated the Board's decision, was a judgment under § 13-1712, and when it was not timely appealed, it became final.

In further support of our jurisdictional analysis, we note that the district court remanded the matter to the Board, and when the Board entered an order in compliance with the order of remand, the district court lost its power to further modify its order and, by extension, lost its power to act on this case. We have said:

> The jurisdiction of the supreme court over its own judgments and orders is, in general, the same as that of any other court of record, and hence it may alter or modify such judgments or orders and correct its mandates accordingly at any time during the term at which they are rendered, unless its mandate has been filed and acted upon in the lower court prior to the end of the term.

Horton v. State, 63 Neb. 34, 38, 88 N.W. 146, 147 (1901). Likewise, when the district court remands a matter and the body to which the matter was remanded acts on that order, the district court's power to modify its order ceases. See *County of Douglas v. Burts, supra*.

[5] Finally, we observe that it would be inconsistent with our jurisprudence for the Board and the district court to have jurisdiction over the matter at the same time. As a general proposition, an appellate court and the tribunal appealed from do not have jurisdiction over the same case at the same time. *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996). See *State Bank of Beaver Crossing v. Mackley*, 118 Neb. 734, 735, 226 N.W. 318, 318 (1929) ("[i]t is not conceivable that both the supreme court and the district court could at the same time have jurisdiction of this cause"). See, also, *County of Douglas v. Burts, supra*. We find this concept to be applicable as between the tribunal that tries a matter and the court that reviews or hears appeals from that tribunal's decisions. In this case, the Board acted like a tribunal with regard to the siting approval decision under §§ 13-1701 to 13-1714.

[6] Returning to the facts in this case, the Board filed its decision to deny BCL's application on December 14, 2015, and BCL vested jurisdiction in the district court when it filed its petition for review pursuant to § 13-1712. The district court lost jurisdiction when it set aside the Board's order and remanded the matter to the Board on June 17, 2016. The Board necessarily had jurisdiction on July 13, when it adopted the resolution of that date. The record shows, and BCL concedes, that after the Board adopted the resolution on July 13, BCL did not within 60 days after notice of the decision file a new petition for a hearing before the district court, as required under § 13-1712. We hold that a failure to comply with the requirement under § 13-1712 to petition for a hearing before the district court within 60 days after notice of the siting body's decision deprives the district court of

jurisdiction to review a siting approval decision. See, similarly, *Schaffer v. Cass County*, 290 Neb. 892, 863 N.W.2d 143 (2015) (determining that failure to file appeal within 30 days of judgment or final order as required for review on petition in error under § 25-1901 deprives district court of jurisdiction to hear appeal). We note that § 13-1712 specifically requires "the applicant" to file a petition; hence, the Board's act of filing its notice of compliance in the district court on July 14 could not satisfy the requirement under § 13-1712 that "the applicant . . . petition for a hearing." We reject any suggestion that the Board's filing of its notice of compliance in the district court caused the district court to reacquire jurisdiction after it had remanded the matter to the Board.

As noted above, in *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995), we held that pursuant to § 25-1911, in an appeal siting approval case under §§ 13-1701 to 13-1714, a judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. In an appeal authorized by § 25-1911, a party must follow the procedural requirements of Neb. Rev. Stat. § 25-1912 (Reissue 2016), including the requirement to file a notice of appeal within 30 days of the district court's decision, in order to vest jurisdiction in the appellate courts. The notice of appeal in this case was filed in the district court on March 3, 2017. Such notice was obviously not timely to give this court jurisdiction to review the June 17, 2016, order. Instead, the notice of appeal purports to appeal from the district court's February 7, 2017, order. However, because the district court did not have jurisdiction to enter that order, we consequently do not have jurisdiction to hear this appeal.

When an appellate court is without jurisdiction to act, the appeal must be dismissed. *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017). However, an appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked

jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions. *Id*. Having determined that we lack jurisdiction over this appeal, we vacate the district court's February 7, 2017, order, which the district court was without jurisdiction to enter, and we remand the cause to the district court with directions to dismiss for lack of jurisdiction.

CONCLUSION

On June 17, 2016, the district court "set aside" the Board's December 14, 2015, decision denying BCL's siting application and remanded the matter to the Board to make findings of fact. As a result of this order, jurisdiction was returned to the Board. After the Board acted on the remand, no petition was filed that would have again vested the district court with jurisdiction. We therefore conclude that the district court lacked jurisdiction to enter the February 7, 2017, order appealed in this case, and consequently, we lack jurisdiction over this appeal. As a result, we vacate the district court's February 7, 2017, order and dismiss this appeal.

Appeal dismissed.

Kelch, J., not participating in the decision.
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. Kaitlyn N. Coble, appellant.

908 N.W.2d 646

Filed March 23, 2018. No. S-17-769.

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.
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. **Courts: Final Orders: Appeal and Error.** Final orders and judgments issued by a county court may be appealed to district court.
4. **Courts: Final Orders: Jurisdiction: Appeal and Error.** A district court order affirming, reversing, or remanding an order or judgment of the county court is itself a final order that an appellate court has jurisdiction to review.
5. **Judgments.** An order affecting a substantial right that is issued upon a summary application in an action after judgment under Neb. Rev. Stat. § 25-1902 (Reissue 2016) is an order ruling on a postjudgment motion in an action.
6. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
7. **Criminal Law: Judgments.** An order regarding the statutory right to remove criminal record history information from the public record pursuant to Neb. Rev. Stat. § 29-3523 (Reissue 2016) affects a substantial right for purposes of Neb. Rev. Stat. § 25-1902 (Reissue 2016).
8. **Jurisdiction: Appeal and Error.** Where a lower court lacks subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
9. ____: ____. When an appellate court is without jurisdiction to act, the appeal must be dismissed. However, an appellate court has the power to

determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.

10. **Pleadings: Words and Phrases.** In a legal action, the function of a motion is not to initiate new litigation, but to bring before the court for ruling some material but incidental matter arising in the progress of the case in which the motion is filed.
11. **Jurisdiction.** Jurisdiction over a motion is dependent upon the court's having jurisdiction over the case in which the motion is filed.
12. ____. A court has jurisdiction to issue orders on motions pertaining to incidental matters within the scope of the action over which the court has jurisdiction.
13. **Actions: Jurisdiction.** A court lacks subject matter jurisdiction to hear motions that seek an order granting relief beyond the scope of the action at hand unless the motion is authorized by statute. A litigant must file a new action when seeking such relief.
14. **Actions: Words and Phrases.** An action is a distinct and separate court proceeding, governed by separate pleadings and requiring a separate process.
15. **Courts: Appeal and Error.** A higher court is not bound by a precedent of an inferior court under the doctrine of stare decisis.
16. ____: ____. The doctrine of stare decisis does not require a court to blindly perpetuate its prior interpretation of the law if it concludes the prior interpretation was clearly incorrect.
17. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.
18. **Statutes: Judicial Construction: Legislature: Intent.** The doctrine of legislative acquiescence applies only when there is a statutory provision to interpret.
19. ____: ____: ____: ____. A court's holding is not protected by the doctrine of legislative acquiescence, if it does not purport to interpret the statutory text.

Appeal from the District Court for Lancaster County, John A. Colborn, Judge, on appeal thereto from the County Court for Lancaster County, Matthew L. Acton, Judge. Vacated and dismissed.

Jennifer Gaughan and Marian G. Heaney, of Legal Aid of Nebraska, for appellant.

Marcee A. Brownlee, Assistant Lincoln City Attorney, for appellee.

Christopher L. Eickholt, of Eickholt Law, L.L.C., and Amy A. Miller, of American Civil Liberties Union Foundation of Nebraska, for amicus curiae American Civil Liberties Union of Nebraska.

Ryan P. Sullivan, for amicus curiae University of Nebraska Civil Clinical Law Program.

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

Funke, J.

I. INTRODUCTION

Kaitlyn N. Coble filed a motion to seal the record of her citation for two misdemeanors which were subsequently dismissed. The county court overruled Coble's motion, and the district court affirmed. We conclude that Coble's motion was not authorized by statute and that thus, the county court lacked jurisdiction to consider the motion. As a result, the district court and this court lack jurisdiction to review the merits of the county court's order. We do not reach the merits of whether Coble would be entitled to have her record sealed were she to use a proper procedure. We vacate the county court and district court orders and dismiss this appeal.

II. BACKGROUND

In 2013, Coble, who was 18 years of age at the time, was issued a uniform complaint and citation for two misdemeanors. After completing a diversion program, the charges were dismissed on the city attorney's motion.

In 2017, Coble filed a motion in the county court for Lancaster County, under the same case number as her criminal case, captioned as "Motion to Seal Records." It requested that the court issue an "[o]rder making all the records

associated with this case 'non-public' pursuant to Neb. Rev. Stat. § 29-3523." The county court issued an order overruling Coble's motion.

In doing so, the county court concluded that the procedure utilized by Coble (filing a motion to seal in the criminal case), in spite of having no basis in Neb. Rev. Stat. § 29-3523 (Reissue 2016), was authorized by the Nebraska Court of Appeals' opinion in *State v. Blair*.[1]

The court then concluded that Coble was seeking retroactive application of a recent statutory amendment to § 29-3523, but the court refused to apply it retroactively because it deemed the amendment to be a substantive change. The court then determined that under the version of the statute in effect at the time of the dismissal of Coble's charges, the statute applied only to a "notation of arrest,"[2] not to records of citations. Thus, the court concluded that Coble was not entitled to the relief she sought.

Coble appealed to the district court, which generally agreed with the county court's analysis and affirmed.

III. ASSIGNMENTS OF ERROR

Coble's two assignments of error, restated and summarized, claim that the district court erred by affirming the county court's order overruling her motion to seal.

IV. 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.[3]

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[1] *State v. Blair*, 17 Neb. App. 611, 767 N.W.2d 143 (2009).

[2] See § 29-3523 (Reissue 2008).

[3] *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017).

V. ANALYSIS

1. Jurisdiction: Final Order

[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.[4]

The State argues that this court lacks appellate jurisdiction because the county court's order was not a final, appealable order. While the county court's order was a final order, we conclude that the county court lacked subject matter jurisdiction to enter the order. Thus, we lack jurisdiction to review the merits of the county court's order.

[3,4] Final orders and judgments issued by a county court may be appealed to district court.[5] A district court order affirming, reversing, or remanding an order or judgment of the county court is itself a final order that an appellate court has jurisdiction to review.[6]

Neb. Rev. Stat. § 25-1902 (Reissue 2016) defines three categories of final orders:

> 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.[7]

[5] An order "affecting a substantial right" that is issued "upon a summary application in an action after judgment" under § 25-1902 is "an order ruling on a postjudgment motion in an action."[8]

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[4] *Id.*

[5] Neb. Rev. Stat. § 25-2728 (Reissue 2016). See, also, *Boyd v. Cook*, 298 Neb. 819, 906 N.W.2d 31 (2018).

[6] *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). See, also, Neb. Rev. Stat. § 25-1911 (Reissue 2016).

[7] See, also, *Boyd v. Cook, supra* note 5.

[8] See *Heathman v. Kenney*, 263 Neb. 966, 969, 644 N.W.2d 558, 561 (2002).

Coble sought to seal the record of her citation by filing a motion in the case in which she had been charged. However, Coble's case had been dismissed years earlier, after she completed a diversion program. Because the case had already been dismissed, the county court's order overruling Coble's motion was an order ruling on a postjudgment motion.[9]

[6,7] And the order affects a substantial right. A substantial right is an essential legal right, not a mere technical right.[10] The right invoked by Coble was the statutory right to remove the record of her citation from the public record, no mere technical right. Thus, the county court's order on Coble's motion was a final order, because it affected a substantial right and was issued upon a summary application in an action after judgment.

2. L.B. 505

Before addressing the dispositive jurisdictional issue in this case, we review the recent amendments to § 29-3523 in 2016 Neb. Laws, L.B. 505. Section 29-3523 generally protects certain criminal history record information and prohibits, subject to exceptions, the dissemination of this information.

In 2016, the Legislature enacted significant amendments to § 29-3523 in L.B. 505. The stated purpose of the enactment was to "strengthen the privacy provisions of Neb. Rev. Stat. §29-3523" in order to "protect[] legally innocent Nebraskans from the stigma of a permanent public criminal record."[11]

While the previous version of the statute applied only to a "notation of arrest,"[12] L.B. 505 amended the statute to provide that "in the case of an arrest, citation in lieu of arrest, or referral for prosecution without citation, all criminal history record information relating to the case shall be removed from

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[9] See *id*.

[10] *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016).

[11] Introducer's Statement of Intent, L.B. 505, 104th Leg., 1st Sess. (Feb. 5, 2015).

[12] § 29-3523 (Reissue 2008).

the public record" as specified by the statute under certain circumstances, such as a dismissal or acquittal of the criminal charges.[13]

L.B. 505 also provides that when criminal charges are filed, but are then dismissed or the defendant is acquitted, the court must then "[o]rder that all records, including any information or other data concerning any proceedings relating to the case . . ."[14] be sealed and provide notice of the order to relevant criminal justice agencies.[15]

3. Jurisdiction: Subject Matter Jurisdiction

In this case, we need not reach the merits of whether Coble is entitled to have the record of her case sealed, because we conclude that the county court lacked subject matter jurisdiction to reach that question. Coble's motion to seal sought relief that went beyond the scope of the original criminal case in which it was filed, and the motion was not authorized by statute.

[8,9] Where a lower court lacks subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.[16] When an appellate court is without jurisdiction to act, the appeal must be dismissed. However, an appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.[17]

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[13] § 29-3523(3) (Reissue 2016).

[14] § 29-3523(4)(a).

[15] See Neb. Rev. Stat. § 29-3509 (Reissue 2016) (defining "[c]riminal justice agency").

[16] *Kozal v. Nebraska Liquor Control Comm., supra* note 3.

[17] *Id.*

Because the county court lacked jurisdiction over Coble's motion, the district court and this court lack jurisdiction to review the merits of the county court's order.

(a) County Court Lacked Subject Matter Jurisdiction

The jurisdictional defect in this case is not, as the State argued, one of finality, but is one of subject matter jurisdiction. The problem stems from the fact that Coble sought relief by filing a motion in a case that had been dismissed years earlier—a procedure that has no basis in statute—rather than utilizing the procedure authorized by statute to enforce the rights created by § 29-3523 and surrounding sections.[18]

[10-13] In a legal action, the function of a motion is not to initiate new litigation, but to bring before the court for ruling some material but incidental matter arising in the progress of the case in which the motion is filed.[19] Jurisdiction over a motion is therefore dependent upon the court's having jurisdiction over the case in which the motion is filed.[20] A court has jurisdiction to issue orders on motions pertaining to incidental matters within the scope of the action over which the court has jurisdiction.[21] But it necessarily follows that a court lacks subject matter jurisdiction to hear motions that seek an order granting relief beyond the scope of the action at hand unless

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[18] See Neb. Rev. Stat. § 29-3528 (Reissue 2016).

[19] See *State v. McNerny*, 239 Neb. 887, 479 N.W.2d 454 (1992). See, also, generally, *D.T. v. W.G.*, 210 So. 3d 1143 (Ala. Civ. App. 2016); *People v. Picklesimer*, 48 Cal. 4th 330, 226 P.3d 348, 106 Cal. Rptr. 3d 239 (2010); *Hickson v. State*, 39 Kan. App. 2d 678, 182 P.3d 1269 (2008).

[20] See, *id.*; *Mtr. of North Shore Hosp. v. McConico*, 39 Misc. 2d 1032, 242 N.Y.S.2d 402 (1963) (cited by this court in *State v. McNerny, supra* note 19).

[21] See, *Morrison v. Patterson*, 221 Iowa 883, 267 N.W. 704 (1936) (cited by this court in *State v. McNerny, supra* note 19); *Caperton v. Winston Co. Fair Ass'n*, 169 Miss. 503, 153 So. 801 (1934) (cited by this court in *State v. McNerny, supra* note 19).

the motion is authorized by statute.[22] A litigant must file a new action when seeking such relief.[23]

Of course, a motion that goes beyond those incidental matters contained within the scope of a case could be authorized by statute.[24] But in this case, § 29-3523 does not authorize the filing of a motion to make criminal history record information nonpublic. And the relief sought by a motion like Coble's is an order directed to criminal justice agencies to seal the criminal history record information. Such relief goes beyond the scope of the original criminal case over which the county court had jurisdiction. The county court thus lacked subject matter jurisdiction to issue an order on Coble's motion to seal.

Not only is there no statutory basis for enforcing the privacy protections of § 29-3523 by filing a motion, but the Security, Privacy, and Dissemination of Criminal History Information Act[25] (of which § 29-3523 is a part) provides a different procedure for its enforcement. Section 29-3528 provides that whenever a state agency or political subdivision, or officer or employee thereof, fails to comply with the requirements of various sections—including § 29-3523—"any person aggrieved may bring an action, including but not limited to an action for mandamus, to compel compliance and such action may be brought in the district court of any district in which the records involved are located or in the district court of Lancaster County."

[14] Importantly, § 29-3528 authorizes an aggrieved individual to "bring an action," not to file a motion in the criminal case the record of which he or she seeks to seal. An "action" is

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[22] See *Caperton v. Winston Co. Fair Ass'n, supra* note 21.

[23] See, *id.*; *Mtr. of North Shore Hosp. v. McConico, supra* note 20.

[24] See, generally, *State v. McNerny, supra* note 19; *Mtr. of North Shore Hosp. v. McConico, supra* note 20; *Morrison v. Patterson, supra* note 21; *Caperton v. Winston Co. Fair Ass'n, supra* note 21.

[25] Neb. Rev. Stat. §§ 29-209, 29-210, 29-3501 to 29-3528, and 81-1423 (Reissue 2016).

a distinct and separate court proceeding, governed by separate pleadings and requiring a separate process.[26] Thus, the proper procedure for Coble to enforce her rights under § 29-3523 (assuming she could establish that her criminal history record information is still in the public record) would be to file a separate action in district court. But here, Coble did not file a new action in district court pursuant to § 29-3528, but, instead, filed a motion in county court in the case that had been earlier dismissed.

Because the relief sought by Coble's motion exceeded the scope of her criminal case and was not an incidental matter therein, and because there was no statutory basis for her motion, the county court lacked jurisdiction to issue an order on the motion.

(b) *State v. Blair*

This conclusion runs headlong into the Court of Appeals' holding in *State v. Blair*,[27] the case on which Coble relies. Coble correctly argues that *Blair* endorsed the procedure she utilized in seeking to vindicate her rights under § 29-3523—filing a motion in the case which she sought to seal. But we conclude that *Blair* wrongly approved of this procedure, and we disapprove of it to the extent it is inconsistent with this opinion.

(i) Overview of Holding in Blair

In *Blair*, the motion under review was labeled a "motion to expunge."[28] After the district court granted the defendant postconviction relief and ordered a new trial, the county attorney declined to retry him and dismissed the charges. The defendant subsequently filed his motion to expunge the record of his arrest and charges pursuant to § 29-3523. The district court overruled the motion, and Blair appealed.

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[26] See *In re Interest of D.I.*, 281 Neb. 917, 799 N.W.2d 664 (2011).

[27] *State v. Blair, supra* note 1.

[28] *Id.*

The State argued that the defendant's appeal of the denial of his motion to expunge should not be addressed by the Court of Appeals, because the procedure used by the defendant was not authorized by § 29-3523. The then-current version of § 29-3523(2)(c)—now codified at § 29-3523(3)(c)—required that a notation of arrest be removed from the public record 3 years after the arrest if charges were filed and then dismissed by the court or prosecutor. The State argued that this statutory language "appears to apply automatically and does not authorize a person to file a petition to expunge."[29]

The Court of Appeals rejected the State's argument. The court acknowledged that the statutory language "appears to be self-executing—specifically, if the conditions fit, a notation of dismissal shall be made on the defendant's record."[30] But it concluded that "even though [the defendant] did not need to file a petition to expunge, the fact that he did so does not mean that [the defendant's] claim cannot be addressed."[31] However, the Court of Appeals concluded that the district court did not err in overruling the defendant's motion, because he had failed to present any evidence that the record of his arrest was still part of the public record.[32]

In this case, the county court and district court were correct insofar as they concluded that the procedure used by Coble was authorized by the Court of Appeals' *Blair* opinion. Like the procedure blessed in *Blair*, Coble filed a motion within the same criminal case as the record she was seeking to seal, rather than filing a separate action. The procedure used by Coble is legally indistinguishable from that in *Blair*. The county and district courts correctly adhered to binding precedent as mandated by the doctrine of vertical stare decisis.[33]

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[29] *Id.* at 614, 767 N.W.2d at 146.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] See *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

[15,16] However, this court is not bound by a precedent of the Court of Appeals under the doctrine of stare decisis.[34] Further, even if a Court of Appeals' decision was afforded the same weight as one of our own precedents, the doctrine of stare decisis does not require us to blindly perpetuate a prior interpretation of the law if we conclude the prior interpretation was clearly incorrect.[35] As we have set forth, the filing of a motion to seal criminal history records under § 29-3523 is not authorized by statute. Therefore, the holding in *Blair* was incorrect.

However, Coble argues that we should adhere to the *Blair* decision under the doctrine of legislative acquiescence.

(ii) Legislative Acquiescence

[17] We have said that "[w]here a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent."[36]

[18,19] But the doctrine of legislative acquiescence applies only when there is a statutory provision to interpret.[37] In *Heckman v. Marchio*,[38] we rejected the argument that we should adhere to our prior decisions creating the collateral order doctrine of appellate jurisdiction, because those decisions "never purported to interpret a statute as allowing for" such appeals. Similarly here, there is simply no statutory provision allowing for the use of a motion to enforce the rights set forth

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[34] See *State v. Barranco*, 278 Neb. 165, 769 N.W.2d 343 (2009).

[35] See *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).

[36] *Heckman v. Marchio*, 296 Neb. 458, 465, 894 N.W.2d 296, 301 (2017).

[37] *Id.* See, generally, *Jones v. Liberty Glass Co*., 332 U.S. 524, 68 S. Ct. 229, 92 L. Ed. 142 (1947); *State v. Spencer Gifts, LLC*, 304 Kan. 755, 374 P.3d 680 (2016); *Wenke v. Gehl Co.*, 274 Wis. 2d 220, 682 N.W.2d 405 (2004); *Hoffman v. ND Workers Compensation Bureau*, 651 N.W.2d 601 (N.D. 2002).

[38] *Heckman v. Marchio, supra* note 36, 296 Neb. at 465, 894 N.W.2d at 301-02.

in § 29-3523 (with the inapplicable exception of subsection (6)). The extent of the Court of Appeals' reasoning in *Blair* on this issue was that "even though [the defendant] did not need to file a petition to expunge, the fact that he did so does not mean that [the defendant's] claim cannot be addressed."[39] This conclusion is not protected by the doctrine of legislative acquiescence, because it does not purport to interpret the statutory text.

VI. CONCLUSION

We need not and do not address the merits of whether Coble was entitled to the relief she sought. Nor do we endorse the county and district courts' conclusion that Coble was seeking a retroactive application[40] of the amendments in L.B. 505 to § 29-3523. Because we conclude that the county court lacked jurisdiction, we lack jurisdiction and the district court lacked jurisdiction to review the merits of the county court's order. We vacate the county court's order and the district court's order and dismiss this appeal.

Vacated and dismissed.

Wright and Kelch, JJ., not participating.

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[39] *State v. Blair, supra* note 1, 17 Neb. App. at 614, 767 N.W.2d at 146.

[40] See, generally, *Millennium Solutions v. Davis*, 258 Neb. 293, 603 N.W.2d 406 (1999); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 263 (2012) (discussing presumption against retroactivity and stating that "retroactivity ought to be judged with regard to the act or event that the statute is meant to regulate").

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

In re Interest of Steven S., a child under 18 years of age. State of Nebraska, appellee, v. Steven S., appellant.

908 N.W.2d 391

Filed March 23, 2018. No. S-17-1155.

1. **Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** An appellate court reviews a juvenile court's decision to transfer a juvenile offender's case to county court or district court de novo on the record for an abuse of discretion.
2. **Juvenile Courts: Appeal and Error.** When the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Courts: Juvenile Courts: Jurisdiction: Proof.** When the prosecution seeks to transfer a juvenile offender's case to criminal court, the juvenile court must retain the matter unless a preponderance of the evidence shows that the proceeding should be transferred to the county court or district court. The prosecution has the burden by a preponderance of the evidence to show why such proceeding should be transferred.
4. **Courts: Juvenile Courts: Jurisdiction.** In determining whether a case should be transferred to criminal court, a juvenile court should consider those factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 2016). In order to transfer the proceedings, the court need not resolve every factor against the juvenile, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.

Appeal from the Separate Juvenile Court of Lancaster County: Reggie L. Ryder, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Sarah J. Safarik for appellant.

Tara A. Parpart, Deputy Lancaster County Attorney, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Colborn and Samson, District Judges.

Cassel, J.

INTRODUCTION

Steven S. appeals an order of the separate juvenile court transferring his case to county court. We begin by settling the standard of review, which is a matter of first impression. Because of the nature of juvenile courts and the statutory provisions governing such transfers, we determine that the appropriate standard of review is de novo on the record for an abuse of discretion. Having considered the evidence, upon our de novo review, we find no abuse of discretion in the transfer. We affirm the order of the juvenile court.

BACKGROUND

Juvenile Petition

In September 2017, Steven and another juvenile were being transported from juvenile detention facilities to the Youth Rehabilitation and Treatment Center (YRTC) in Kearney, Nebraska. While en route, the juveniles discussed not wanting to go to Kearney. Steven freed his hand from a wrist restraint and opened the passenger door, allowing both juveniles to escape from custody. Shortly thereafter, law enforcement took them into custody without incident.

The State filed a petition in the separate juvenile court of Lancaster County charging Steven with escape. This is a Class IV felony offense.[1] The State simultaneously filed

[1] Neb. Rev. Stat. § 28-912(4) (Reissue 2016).

a motion to transfer Steven's case from juvenile court to county court.

Transfer Hearing

The juvenile court conducted a transfer hearing. Evidence showed that Steven's contacts with law enforcement dated back to 2011. He was placed on probation for disturbing the peace committed in 2011 and for criminal mischief committed in April 2012. In February 2013, a court adjudicated Steven on a charge of disturbing the peace and committed him to the Office of Juvenile Services. He received probation for criminal mischief committed in January 2015 and for an assault in April.

Over the course of Steven's involvement with juvenile court, he had multiple out-of-home placements. Lancaster County Youth Services Center (YSC) housed him for approximately 1 month, before he was placed at a group home in Iowa at the end of March 2014. Steven successfully completed the program and returned home in November. But approximately 5 months later, he was detained at YSC for an assault. At that time, Steven was also being uncooperative with his electronic monitor and with services.

In May 2015, Steven was placed at a psychiatric residential treatment facility. He ran away from that program after approximately 3 months and was "on run" for approximately 2 weeks. After being held at YSC for a few weeks, Steven was placed at a group home. After a little over 2 weeks, Steven ran away. Once detained, the State filed a motion to send Steven to the YRTC. Steven remained at the YRTC for about 7 months, until June 2016, and returned to his mother's home in Lincoln, Nebraska, after successfully completing the program.

After being home for approximately 3 months, Steven cut off his electronic monitor. He allegedly took his mother's vehicle to Omaha, Nebraska, and was on run for about 3 days. After being detained, Steven had relatively short stays

at YSC, "Cedars Shelter," and a relative's home. In December 2016, Steven was placed at a different group home in Iowa. After approximately 3 months, he again went on run. After being on run for about 1 day, Steven was located with another youth in a stolen vehicle that was stuck in mud. He was detained for some time in "Sarpy County Detention" and then transferred to YSC.

In April 2017, Steven returned to the YRTC. In August, he absconded with another youth and was on run for almost 3 weeks. He had been in detention since being apprehended, but he remained under a commitment to the YRTC.

Emily Trotter, Steven's intensive supervision probation officer since November 2015, noted that Steven did not turn himself in on any of the times that he was on run. He had an electronic monitor on three occasions and was not compliant on any of those occasions. She could not think of any additional services that could be used to help Steven be successful in his home. She explained, "I think we've offered . . . the family everything that probation has available to us at this time and it doesn't seem like it's working." She testified that the YRTC was the most structured and secure environment that probation could offer.

In September 2016, a co-occurring evaluation was performed to examine mental health and substance abuse symptoms. It stated in part:

> Overall, Steven continues to struggle with impulsivity and low frustration tolerance, which has resulted in a history of oppositional behaviors, which have led to multiple arrests and out of home placements. If Steven is not able to find ways to better regulate his emotions these behaviors are likely to continue and even worsen.

Trotter discussed a couple of matters favorable to Steven. The only time that Steven tested positive on a drug screen was when he was taking prescribed painkillers. Trotter testified that Steven consistently attended high school when he was in

the community, that he obtained good grades, and that teachers liked him. Unfortunately, due to all the times that Steven was on run, he was not on track to graduate.

Trotter also testified regarding a couple of traumatic events in Steven's life. Steven's father passed away during Steven's first commitment at the YRTC. In July 2016, a firework injured Steven's hand, causing a loss of parts of his fingers and a hearing loss.

Even after the instant escape charge, Steven continued to display problematic behavior. On September 9, 2017, he joined in a fight occurring in his housing unit. Four days later, he commented that he would continue the fight if allowed out with the youth. On September 17 and 18, Steven disobeyed staff orders. On the latter day, he received a "Major Rule Violation for Obstruction of Correctional Operations."

In October 2017, Dr. Colleen A. Conoley performed a neuropsychological/psychological evaluation on Steven. Steven's attorney requested the evaluation and sought an expert opinion on whether the case should be transferred to adult court. Trotter testified that if probation had been aware of the evaluation, she would have provided the YRTC's intake and monthly updates, as well as Steven's entire school record.

Conoley opined that Steven was amenable to treatment in the juvenile court. She stated that the correct clinical priority was treatment of Steven's post-traumatic stress disorder. She opined that it would be best to aggressively treat Steven's post-traumatic stress disorder before addressing anger and resentment issues and that "[t]he juvenile justice system has more flexibility and access to resources and medication than available through the adult system." Conoley also stated, "He continues to require resources that are better handled at the juvenile levels, including access to peers, special education, mental health providers specializing in children and adolescents, and access to medication that is unavailable within the state penitentiary system."

Juvenile Court's Order

The juvenile court entered a comprehensive order outlining its considerations of the factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 2016). The court found it "very clear that [Steven] is not willing to cooperate with treatment services and is not currently amenable to treatment." It noted that Steven's "significant and lengthy history in Juvenile Court" weighed strongly in favor of transferring the case to county court. The court recounted that multiple services had been offered to Steven and that he had been placed in multiple out-of-home placements. The court determined that Steven's history of going "on run" posed an ongoing risk to the public. It stated that Steven "seems to do whatever he wants without any regard for the consequences of how it might affect others."

The juvenile court felt that it was running out of time to help Steven and that nothing tried over the last 6 years had been successful. It reasoned:

> It is very clear that [Steven] has not taken advantage of the services provided to him[,] and he has not taken steps that would likely help better regulate his emotions. In reality, quite the opposite is true and, per the evaluation, it is fair to conclude that the juvenile's behaviors have worsened and have continued.
>
> No matter what, the Juvenile Court loses jurisdiction over [Steven] once he turns 19 years of age, which is in approximately 16 months. If he is adjudicated in Juvenile Court on the pending charge, the most restrictive thing this Court could do is re-commit him to the YRTC-Kearney, a place he has been to twice and one that clearly is not working for [Steven]. As there was no evidence presented that indicates the YRTC-Kearney has increased [its] security and structure since he escaped from there, he could very clearly run away again from there if he so chose.

The juvenile court acknowledged factors weighing in favor of maintaining jurisdiction. It recognized Steven's chaotic

upbringing, but stated that Steven had added to the chaos and had not cooperated with services and placements that were designed to help him overcome his chaotic upbringing. And it observed that Conoley recommended Steven be placed in a "treatment-group home or a [psychiatric residential treatment facility]." But in considering Conoley's evaluation, the court was troubled that probation had no involvement: "[N]o collateral information was provided by the juvenile probation office nor was the juvenile probation office even contacted by Dr. Conoley. That in and of itself calls into question the validity of her entire report, especially her recommendations."

The juvenile court queried what it could do for Steven that had not already been done. It found the answer to be clear: "[N]othing. The Juvenile Court is simply out of options." The court concluded that the State had proved by a preponderance of the evidence that the matter should be transferred to county court.

Steven filed a timely appeal from the final order granting transfer of the case,[2] and we moved the case to our docket.[3]

ASSIGNMENT OF ERROR

Steven assigns that the juvenile court erred in finding sufficient evidence to transfer his case to county court.

STANDARD OF REVIEW

The standard of review for transfer orders from juvenile court to county court or district court is an issue of first impression. The parties advance different standards.

Before considering the suggested alternatives, we make two observations. First, transfers from juvenile to "adult" court are a recent development. Prior to legislation enacted in 2014,[4] proceedings began in the county or district court. The juvenile

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[2] See Neb. Rev. Stat. § 43-274(5) (Supp. 2017).

[3] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

[4] 2014 Neb. Laws, L.B. 464.

could file a motion asking that the case be transferred to juvenile court. In 2014, the legislation dictated that the county attorney or city attorney file the petition in the court with jurisdiction as outlined in what became codified as Neb. Rev. Stat. § 43-246.01 (Reissue 2016).[5] Second, the 2014 legislation did not provide for an interlocutory appeal.[6] Thus, we held that an order denying a transfer was not a final, appealable order.[7] Later, the Legislature amended the law to provide for an interlocutory appeal.[8] In so doing, the Legislature emphasized that these interlocutory appeals are to be expedited.[9] This is our first opportunity to review a juvenile court order granting a transfer to county court, where the matter has not proceeded to the substance of the allegations. We now turn to the parties' proposals.

The State contends that our review should be for an abuse of discretion. We have used an abuse of discretion standard when reviewing a denial of a transfer from juvenile court to tribal court under the Indian Child Welfare Act.[10] And we review a motion to transfer a pending criminal proceeding to the juvenile court for an abuse of discretion.[11] The State correctly observes that in such a situation, the court considers the same criteria under § 43-276(1).[12]

Although the considerations for transfer between adult court and juvenile court are the same, the respective prerequisites are not. When a case is filed in adult court, the adult court shall transfer it to juvenile court "unless a sound basis exists

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[5] *Id.*, §§ 9 and 16.

[6] *Id.*, § 4.

[7] *In re Interest of Tyrone K.*, 295 Neb. 193, 887 N.W.2d 489 (2016).

[8] 2017 Neb. Laws, L.B. 11, § 1.

[9] See § 43-274(5).

[10] See *In re Interest of Tavian B.*, 292 Neb. 804, 874 N.W.2d 456 (2016).

[11] See *State v. Bluett*, 295 Neb. 369, 889 N.W.2d 83 (2016).

[12] See Neb. Rev. Stat. § 29-1816(3)(a) (Supp. 2017).

for retaining the case."[13] On the other hand, when the matter is initially filed in juvenile court, the juvenile court shall retain it "unless the court determines that a preponderance of the evidence shows that the proceeding should be transferred to the county court or district court."[14] Due to this difference, it does not naturally follow that we should employ the pure abuse of discretion standard used in reviewing a request to transfer *from* adult court.

On the other hand, Steven urges that a de novo standard of review is appropriate. He highlights that in juvenile cases, an appellate court's review is typically de novo on the record and that the appellate court reaches its conclusions independently of the juvenile court's findings.[15] We have long held that the object of the juvenile code is corrective, to the end that the child's reformation be brought about.[16] And we have observed that a juvenile proceeding is not a prosecution for a crime but a special proceeding that serves as an ameliorative alternative to a criminal prosecution and that the purpose of our statutes relating to youthful offenders is the education, treatment, and rehabilitation of the child.[17] Moreover, the juvenile code expounds upon these purposes at length[18] and the codification of recent changes allocating jurisdiction between juvenile and adult courts[19] illustrates the Legislature's goal of favoring juvenile courts as forums for criminal offenses committed by minor children. But this does not mean that no deference should be accorded to the juvenile court's decision on a motion to transfer.

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[13] *Id.*

[14] § 43-274(5).

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

[16] See *Laurie v. State*, 108 Neb. 239, 188 N.W. 110 (1922).

[17] See *In re Interest of Laurance S.*, 274 Neb. 620, 742 N.W.2d 484 (2007).

[18] See Neb. Rev. Stat. § 43-246 (Reissue 2016).

[19] See § 43-246.01.

In some juvenile cases, we have conducted a review de novo on the record for an abuse of discretion. We have used such a standard in reviewing a juvenile court's determination regarding (1) whether a juvenile has been denied his or her statutory right to a prompt adjudication[20]; (2) whether a juvenile's waiver of counsel was voluntary, knowing, and intelligent[21]; and (3) whether special reasons exist to split the roles of guardian ad litem and counsel for the juvenile.[22] Likewise, the Nebraska Court of Appeals has used that standard for review regarding guardian ad litem fees.[23]

We believe that is the standard of review that should be used here. In our view, it provides the proper balance for accomplishing the purposes and goals of both the juvenile code and the criminal code. At oral argument, Steven urged that transfers from juvenile to adult court be viewed as "suspect." We reject his argument and conclude that our articulation best carries out the Legislature's goal of expedited review. And we emphasize that in many, if not most, instances, oral arguments will not be necessary. Summary dispositions may frequently be appropriate.

[1,2] We therefore hold that an appellate court reviews a juvenile court's decision to transfer a juvenile offender's case to county court or district court de novo on the record for an abuse of discretion. But we also recognize that in doing so, the juvenile court's assessment of credibility may be critical. In such circumstances, we will apply the rule that when the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.[24]

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[20] See *In re Interest of Shaquille H.*, 285 Neb. 512, 827 N.W.2d 501 (2013).

[21] See *In re Interest of Dalton S.*, 273 Neb. 504, 730 N.W.2d 816 (2007).

[22] See *In re Interest of J.K.*, 265 Neb. 253, 656 N.W.2d 253 (2003).

[23] See *In re Interest of Antone C. et al.*, 12 Neb. App. 466, 677 N.W.2d 190 (2004).

[24] See *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016).

ANALYSIS

[3] When the prosecution seeks to transfer a juvenile offender's case to criminal court, the juvenile court must retain the matter unless "a preponderance of the evidence shows that the proceeding should be transferred to the county court or district court."[25] The prosecution "has the burden by a preponderance of the evidence to show why such proceeding should be transferred."[26]

[4] Section 43-276 sets forth 15 factors for a juvenile court to consider in making the determination of whether to transfer a case to county court or district court. As noted above, the same factors are considered when determining whether to transfer a case to juvenile court. And in that context, we have said that the court need not resolve every factor against the juvenile and that there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor.[27] Rather, it is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile. We apply the same reasoning in the context of a motion to transfer from juvenile court.

Factors Weighing in Favor of Transfer

Of the 15 statutory factors to be considered, many weigh in favor of transferring the matter to county court or district court. One consideration is the type of treatment to which Steven would most likely be amenable. The evidence on this point was in dispute. Conoley, who performed the psychological evaluation on Steven, opined that Steven was amenable to treatment in the juvenile court and that "[t]he juvenile justice system has more flexibility and access to resources and medication

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[25] § 43-274(5).

[26] *Id.*

[27] See *State v. Stevens*, 290 Neb. 460, 860 N.W.2d 717 (2015).

than available through the adult system." But Trotter, Steven's intensive supervision probation officer, felt that probation had offered Steven everything it could and that such services had not worked. This consideration dovetails with another factor weighing heavily in favor of transferring the case: Steven's previous history. His first contact with law enforcement was in 2011. Since that time, Steven has continued to engage in unlawful activity, despite his ongoing involvement with juvenile court and the multitude of services offered to him. Based on Steven's poor track record over a number of years in juvenile court, we agree with the juvenile court that Steven is not amenable to treatment in that court.

Other factors weigh in favor of transferring the case. Steven's motivation in committing the escape was to avoid returning to the YRTC. He was being returned to the YRTC after escaping from there. Ironically, the YRTC is the most secure environment that probation can offer. At the time of the escape, Steven was 17½ years old. He helped a juvenile who was 7 months younger escape with him. Consideration of public safety weighs in favor of transferring the case. Steven has gone on run a number of times and has escaped from even the most secure juvenile placement. Further, he does not appear to appreciate the nature and seriousness of his conduct. His claim to be a member of a criminal street gang is troublesome.

Whether Steven's best interests and the security of the public may require that Steven continue in secure detention or under supervision for a period extending beyond his minority also point to transferring his case. Once again, we note his 6-year involvement with juvenile court and the multiple placements and services that have not led to a positive change in Steven's behavior. If Steven remained in juvenile court, he would likely be sent to the YRTC for a third time and the juvenile court would lose jurisdiction over him when he turned 19 years old. If Steven's case were transferred to adult court, he could be placed on adult probation or he could

be incarcerated, if necessary. The evidence shows that even though Steven has successfully completed some programs, he has not reformed his behavior.

Factors Weighing Against Transfer

A few factors weigh against transfer. The escape offense did not include violence. Steven's best interests would likely be aided by remaining in juvenile court and thereby avoiding a possible felony conviction. He has not been convicted of or acknowledged use or possession of a firearm. And we are cognizant of research related to the development of the adolescent brain.

Neutral Factors

Some of the factors do not tip the scales in favor of juvenile court or adult court. Whether the victim agrees to participate in mediation has no application here. Whether there is a juvenile pretrial diversion program also appears largely irrelevant: Lancaster County has such a program, but nothing in the evidence leads to the conclusion that Steven would be eligible for the program. There was no evidence that a juvenile court order had been issued for Steven under Neb. Rev. Stat. § 43-2,106.03 (Reissue 2016).

Resolution

Upon our de novo review of the record, we find no abuse of discretion by the juvenile court in transferring Steven's case to county court. Steven is now 18 years old, and the juvenile court's jurisdiction ends when he turns 19. No service offered to Steven thus far has led him to reform his behavior.

To the extent that Steven's mental health and trauma issues may be better handled at the juvenile level, we observe that a transfer to adult court does not eliminate a disposition under the juvenile code. As we recently noted, "the possibility of disposition under the juvenile code remains available

to juveniles even if their case is transferred from juvenile to criminal court."[28] A statute specifically provides:

> If the defendant was under eighteen years of age at the time he or she committed the crime for which he or she was convicted, the court may, in its discretion, instead of imposing the penalty provided for the crime, make such disposition of the defendant as the court deems proper under the Nebraska Juvenile Code.[29]

Further, individuals in adult court can be placed on probation with conditions related to rehabilitation of the offender.[30] And adult probation can work with an offender for up to 5 years.[31]

CONCLUSION

Upon our de novo review of the record, we conclude that the juvenile court did not abuse its discretion in ordering that Steven's case be transferred to county court. The juvenile court's transfer order is affirmed.

Affirmed.

Wright, J., not participating.

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[28] *In re Interest of Tyrone K., supra* note 7, 295 Neb. at 211, 887 N.W.2d at 501.

[29] Neb. Rev. Stat. § 29-2204.02(6) (Reissue 2016).

[30] Neb. Rev. Stat. § 29-2262(2) (Reissue 2016).

[31] Neb. Rev. Stat. § 29-2263(1) (Reissue 2016).

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. John D. Feller, respondent.

908 N.W.2d 628

Filed March 23, 2018. No. S-17-1291.

Original action. Judgment of disbarment.

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

Per Curiam.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, John D. Feller, on December 11, 2017. The court accepts respondent's voluntary surrender of his license and enters a judgment of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on July 2, 1976. On December 11, 2017, respondent filed a voluntary surrender of license to practice law, in which he stated that, on August 22, 2017, a grievance was filed against him with the Counsel for Discipline alleging that he misappropriated client funds. Respondent stated that he knowingly chooses not to contest the truth of the allegations made against him in the grievance letter. He also stated that he freely and voluntarily waives his right to notice, appearance, or hearing prior to the entry of an order of

disbarment, and consents to the entry of an immediate order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the suggested allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is

directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

Wright, J., not participating.

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

Douglas L. Hemsley, Special Administrator of the Estate of Paul H. Hemsley, deceased, appellant, v. Thomas J. Langdon, M.D., et al., appellees.

909 N.W.2d 59

Filed March 30, 2018. No. S-16-1123.

1. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function under *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
2. ____: ____: ____. When the trial court has not abdicated its gatekeeping function under *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), an appellate court reviews the trial court's decision to admit or exclude the evidence for an abuse of discretion.
3. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
6. **Judgments: Verdicts.** 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.
7. ____: ____. To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.

8. **Trial: Pretrial Procedure: Evidence: Appeal and Error.** When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.
9. **Malpractice: Expert Witnesses: Proof.** As a general matter, expert testimony is required to identify the applicable standard of care.
10. **Courts: Expert Witnesses.** Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), framework, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.
11. **Expert Witnesses.** The standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion.
12. **Trial: Expert Witnesses: Intent.** The purpose of the gatekeeping function is to ensure that the courtroom door remains closed to "junk science" that might unduly influence the jury, while admitting reliable expert testimony that will assist the trier of fact.
13. **Trial: Expert Witnesses.** In evaluating the validity of scientific testimony, a trial court considers a number of factors. These include (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and (4) the "general acceptance" of the theory or technique.
14. **Trial: Rules of Evidence: Expert Witnesses.** In making the preliminary assessment of validity and applicability regarding the admissibility of expert opinion evidence, the trial judge has the discretion both to avoid unnecessary Neb. Rev. Stat. § 27-104 (Reissue 2016) hearings, where the reliability of an expert's methods is stipulated to or properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases, where cause for questioning the expert's reliability arises.
15. **Trial: Expert Witnesses: Records: Appeal and Error.** A trial court adequately demonstrates that it has performed its gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion

is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination.

16. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Affirmed.

Greg Garland, of Greg Garland Law, Kathy Pate Knickrehm, Tara DeCamp, of DeCamp Law, P.C., L.L.O., and Todd E. Frazier, of Frazier Law Offices, P.C., for appellant.

David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, and David D. Ernst, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellees.

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

Per Curiam.

I. INTRODUCTION

The special administrator of the estate of Paul H. Hemsley, deceased (the Estate), brought a medical negligence action against Thomas J. Langdon, M.D.; John T. Batter, M.D.; and Omaha Thoracic and Cardiovascular Surgery, P.C. (collectively the doctors), claiming they were negligent in the rendering of medical care and treatment to Hemsley. Prior to trial, the court overruled the Estate's motion to exclude and motion in limine regarding the testimony of the doctors' expert witnesses. At a jury trial, the district court admitted, over the Estate's objections, testimony by several expert witnesses that Langdon and Batter met the standard of care. The jury found for the doctors. The Estate appeals. We affirm.

II. BACKGROUND

On September 22, 2011, Langdon performed a coronary artery bypass on Hemsley, a 67-year-old male. During the

procedure, Langdon placed a chest tube into Hemsley's anterior mediastinum to monitor any postoperative internal bleeding and to drain blood and serum from under the breastbone. Langdon concluded the procedure, and Hemsley remained at the hospital to recover.

On September 25, 2011, a nurse notified Batter, the physician on duty, that fecal material was "oozing" from Hemsley's chest incision and that he was feverish. Hemsley was transferred to the intensive care unit with a temperature of 104.9 degrees. Batter called in another surgeon and "the heart team" to operate on Hemsley.

During the second operation, it became apparent that Hemsley had sustained a transverse colon injury. The physicians repaired the colon and irrigated the abdomen to remove the stool present. Batter saw stool in the abdomen, but "not a lot." Batter and the team "observed that there was no evidence that any stool had gotten up from where the hole [in the colon] was underneath the rib cage or into any tract that was there." As a result, Batter decided not to open Hemsley's mediastinum to irrigate that area for possible stool.

On September 30, 2011, Hemsley was transferred out of the intensive care unit. The next day, he became restless, confused, hypotensive, hypoxemic, and unresponsive and later died as a result of acute respiratory failure due to or as a consequence of peritonitis and of sepsis due to or as a consequence of coronary artery disease.

On September 19, 2013, the Estate filed a complaint against the doctors. In its complaint, the Estate asserted a medical malpractice claim under the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 2010). The Estate argued that due to Langdon's and Batter's professional negligence, the Estate was entitled to predeath damages, wrongful death damages, and funeral expenses.

The Estate subsequently filed a motion in limine and a motion to exclude the testimony of the doctors' expert witnesses. At the pretrial hearing, the Estate argued that "the

Court has . . . no information before it on what methodologies [the doctors' expert witnesses] used nor how they applied them nor how did they arrive at a logical conclusion." The Estate further argued that the expert witnesses testified "about education, training, and experience," but that under federal and state case law (*Daubert*/*Schafersman*),[1] "[t]hey still must disclose the methodologies and . . . the reasoning that they used."

The district court filed an order reserving ruling on the Estate's motion in limine and overruling the Estate's motion to exclude testimony, stating that the expert opinions were not of the kind that would be subject to a *Daubert*/*Schafersman* test. The court eventually overruled the Estate's motion in limine regarding the doctors' methodologies, which was essentially a reassertion of the arguments presented in the motion to exclude.

A jury trial was held. At trial, the Estate called as a witness a cardiac surgeon who testified that he found a breach of the standard of care by Langdon. The surgeon stated that "at a 99 percent certainty level, the injury was made by the clamp when it was passed into the chest." He testified that the malpractice by Langdon was "the inciting event that led to [Hemsley's] death." At the conclusion of its case in chief, the Estate renewed its pretrial *Schafersman* motions.

At trial, the defense offered the testimony of Langdon, Batter, and another cardiothoracic surgeon on the standard of care. The Estate objected and renewed its *Schafersman* motions when each witness was questioned on the standard of care. The court overruled the motions.

Langdon, the cardiothoracic surgeon who performed the initial surgery, testified that he met the applicable standard of care and did not pierce Hemsley's colon with the clamp during

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[1] 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).

the surgery. Langdon contended there were three possibilities as to how Hemsley's transverse colon was injured: First, the "transverse colon wall was weakened" from a previous surgery and the "clamp skinned it or nicked it . . . or just the outside of it, enough to give it a weakness." Second, when Langdon opened Hemsley's chest, "there was enough force on that if the colon was scarred to the back of the abdominal wall . . . the serosa of the colon . . . may have partially torn . . . and weakened it." Third, "the tube was immediately adjacent to [the colon] and putting pressure on that part of the colon," which weakened the lining of the colon.

Batter, the cardiothoracic surgeon who performed the second surgery, to irrigate out the contamination, also testified that he met the standard of care. Finally, the other cardiothoracic surgeon testified as an expert witness that Langdon and Batter "very clearly met the standard of care in this case."

A jury found in favor of the doctors. The Estate's posttrial motions for new trial, for judgment notwithstanding the verdict, to strike the opinions of defense's expert witnesses, and to alter or amend the judgment were overruled. The Estate appeals.

III. ASSIGNMENTS OF ERROR

The Estate assigns that the district court erred in (1) failing to properly perform its gatekeeping function under *Daubert*/*Schafersman* by overruling the Estate's motion in limine and motion to exclude the expert testimony regarding medical opinions and methodologies used and applied by the doctors' experts and (2) overruling the Estate's posttrial motions, which were based on the improper admission of the doctors' expert testimony that had been subject to the Estate's motion in limine, motion to exclude, and objection at trial based on the *Daubert*/*Schafersman* requirements.

IV. STANDARD OF REVIEW

[1,2] An appellate court reviews the record de novo to determine whether a trial court has abdicated its *Schafersman*

gatekeeping function.[2] When the trial court has not abdicated its *Schafersman* gatekeeping function, an appellate court reviews the trial court's decision to admit or exclude the evidence for an abuse of discretion.[3]

One issue on appeal asks whether standard of review expert testimony is subject to *Daubert*/*Schafersman*. We review that question de novo. If we conclude that it is, then we review the facts for an abuse of discretion.

[3,4] An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.[4] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[5]

[5] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[6]

[6,7] 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.[7] To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.[8]

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[2] *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004); *Schafersman v. Agland Coop, supra* note 1.

[3] *Zimmerman v. Powell, supra* note 2.

[4] *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

[5] *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015).

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

[7] *Frank v. Lockwood*, 275 Neb. 735, 749 N.W.2d 443 (2008).

[8] *Id.*

V. ANALYSIS

1. Motion in Limine

[8] We note that the Estate's first assignment of error is stated in terms of a motion in limine and motion to exclude evidence. When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.[9] We find that the Estate's error was adequately preserved at trial.

2. *Daubert*/*Schafersman* Analysis and Standard of Care

The Estate argues that the district court erred in concluding that the expert testimony regarding the standard of care did not require a *Daubert*/*Schafersman* analysis. The doctors argue that the trial court appropriately overruled the *Daubert*/*Schafersman* objections in regard to the challenged testimony.

(a) Standard of Care in Medical Malpractice Cases

To establish a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant(s) deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.[10]

The applicable standard of care, in cases such as this arising under the Nebraska Hospital-Medical Liability Act,[11] has been established by the Legislature:

> Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill,

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[9] *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

[10] *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

[11] §§ 44-2801 to 44-2855.

> and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in his or in similar localities. *In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a health care provider in a particular community, the test shall be that which health care providers, in the same community or in similar communities engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances.*[12]

The standard under § 44-2810 includes a locality focus,[13] but otherwise is consistent with the general common-law rule that in a medical malpractice case, the standard of care is found in the customary practices prevailing among reasonable and prudent physicians.[14]

To establish the customary standard of care in a particular case, expert testimony by a qualified medical professional is normally required.[15] Often, such testimony is premised on the expert's personal knowledge of, and familiarity with, the customary practice among medical professionals in the same or similar locality under like circumstances.

(b) *Daubert*/*Schafersman* Framework

[9] Neb. Rev. Stat. § 27-702 (Reissue 2016) governs the admissibility of expert testimony and provides that the witness must be qualified as an expert: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

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[12] § 44-2810 (emphasis supplied).

[13] See *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

[14] *Murray v. UNMC Physicians*, 282 Neb. 260, 806 N.W.2d 118 (2011).

[15] See, e.g., *Simon v. Drake*, 285 Neb. 784, 829 N.W.2d 686 (2013); *Thone v. Regional West Med. Ctr., supra* note 10.

education, may testify thereto in the form of an opinion or otherwise." As a general matter, expert testimony is required to identify the applicable standard of care.[16]

[10-12] In *Schafersman v. Agland Coop*,[17] we adopted the framework set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[18] and its progeny, *Kumho Tire Co. v. Carmichael*[19] and *General Electric Co. v. Joiner*.[20] Under the *Daubert*/*Schafersman* framework, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.[21] This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.[22] The *Daubert*/*Schafersman* standards require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion.[23] The purpose of this gatekeeping function is "'to ensure that the courtroom door remains closed to "junk science" that might unduly influence the jury, while admitting reliable expert testimony that will assist the trier of fact.'"[24]

[13] The Court in *Daubert* also set out a list of considerations that a trial court may use to evaluate the validity of

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[16] *Thone v. Regional West Med. Ctr., supra* note 10. See *Simon v. Drake, supra* note 15.

[17] *Schafersman v. Agland Coop, supra* note 1.

[18] *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 1.

[19] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

[20] *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997).

[21] *Id.*

[22] *Id.*

[23] *Schafersman v. Agland Coop, supra* note 1.

[24] *State v. Herrera*, 289 Neb. 575, 588, 856 N.W.2d 310, 324 (2014).

scientific testimony. These include (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and (4) the "'general acceptance'" of the theory or technique.[25]

[14,15] In making the preliminary assessment, the trial judge has the discretion both to avoid unnecessary Neb. Rev. Stat. § 27-104 (Reissue 2016) hearings, where the reliability of an expert's methods is stipulated to or properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases, where cause for questioning the expert's reliability arises.[26] A trial court adequately demonstrates that it has performed its gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination.[27]

In *Kumho Tire Co.*, the U.S. Supreme Court discussed how *Daubert*[28] applies to the testimony of experts who are not scientists and concluded that the trial judge's general gatekeeping obligation also applies to testimony based on technical and other specialized knowledge.[29] The Court further held that

> a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and

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[25] *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 1, 509 U.S. at 594. Accord *Schafersman v. Agland Coop, supra* note 1.

[26] *Schafersman v. Agland Coop, supra* note 1.

[27] *Id.*

[28] *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 1.

[29] *Kumho Tire Co. v. Carmichael, supra* note 19.

> *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.[30]

Furthermore, the Court stated that

> [o]ur emphasis on the word "may" thus reflects *Daubert*'s description of the [Fed. R. Evid.] 702 inquiry as "a flexible one." . . . *Daubert* makes clear that the factors it mentions do *not* constitute a "definitive checklist or test." . . . And *Daubert* adds that the gatekeeping inquiry must be "'tied to the facts'" of a particular "case."[31]

The Court stated that "'[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.'"[32] The Court further emphasized that the factors should not apply even in every instance in which the reliability of scientific testimony is challenged, but can help to evaluate the reliability even of experience-based testimony.[33]

In *Rankin v. Stetson*,[34] we applied the *Daubert*/*Schafersman* factors to expert testimony that the defendant failed to meet the standard of care in the treatment of the plaintiff's spinal cord injury when the plaintiff did not receive surgery within 72 hours of the injury. We held that it was not an abuse of discretion for the district court to reject the expert's testimony, reasoning that the district court acted as a gatekeeper to ensure that the reasoning or methodology underlying the expert testimony was valid and properly applied. We explained that because the expert witness failed to disclose the underlying facts or data for his opinions, he was not qualified to testify to his opinion under § 27-702.[35]

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[30] *Id.*, 526 U.S. at 141.

[31] *Id.*, 526 U.S. at 150.

[32] *Id.*

[33] *Kumho Tire Co. v. Carmichael, supra* note 19.

[34] *Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d 460 (2008).

[35] *Id.*

In *Zimmerman v. Powell*,[36] we held that the district court abdicated its gatekeeping duty because it failed to explain its reasoning for overruling a *Daubert*/*Schafersman* motion. The plaintiff's expert witness testified, over the defendant's objection, to data that the expert had derived from a computer program. The district court overruled the objection, but did not explain why it had determined that the expert's testimony was admissible under *Daubert*/*Schafersman*. We stated that a trial court, when faced with such an objection, "'must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper'" and in that case had failed to do so.[37] Nevertheless, we found that in that instance, the district court's failure to perform its gatekeeping duties did not result in prejudice to the defendant. We held that the court's failure to conduct its gatekeeping function did not taint the issue of the defendant's damages, and we modified the judgment accordingly.

It is clear that in *Stetson*, a medical malpractice case, we applied *Daubert*/*Schafersman* to standard of care testimony. Furthermore, as "'specialized knowledge,'" expert testimony pertaining to the standard of care is subject to the trial judge's general gatekeeping obligation.[38]

(c) Court Applied *Daubert*/*Schafersman* to Doctors' Expert Testimony

At the pretrial motion hearing, the Estate made a motion to exclude the testimony of the doctors' expert witnesses on the basis that the expert witnesses failed to provide the methodologies used in reaching their expert opinions on the standard of care and failed to explain the application of such methodologies. The court noted on the record that the witnesses were "not testifying as to some novel form of science, medicine,

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[36] *Zimmerman v. Powell, supra* note 2.

[37] *Id.* at 430, 684 N.W.2d at 9.

[38] See *Rankin v. Stetson, supra* note 34, 275 Neb. at 780, 749 N.W.2d at 465.

engineering, anything like that," but that the testimony regarding the standard of care was "straightforward" and was based on the witnesses' personal knowledge:

> [M]y view here is that this is not the type of opinion or science that is subject to a [*Daubert*/*Schafersman*] test. For that reason, your motion will be overruled.
>
> . . . .
>
> My view of [*Daubert*] is it applies to novel or science that is not settled. That is not — in other words, the standard of care is a settled method of science. How a standard of care is arrived at is a settled method. Every expert in the country would give you the same basis for determining what is the standard of care. Just what you said when you were making your argument.
>
> So that is how it's arrived at. All experts do it the same way.
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> . . . .
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> . . . I don't think it's an exception to [*Daubert*]. . . .
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> . . . .
>
> What . . . I see before me based on the evidence you've provided for the purpose of this hearing is a straightforward medical opinion. And that is not, in my opinion, at this point subject to [*Daubert*].

Contrary to the Estate's characterization on appeal, the trial court did not find that expert testimony on the standard of care in medical malpractice cases is exempt from *Daubert*/*Schafersman* analysis. As is evident from the above excerpt from the pretrial motion hearing, the trial judge made several statements regarding whether *Daubert*/*Schafersman* applied. The Estate takes one of those statements out of the broader context of the judge's pretrial hearing statements and ultimate findings to argue that the judge misstated and misapplied our *Daubert*/*Schafersman* jurisprudence. After review, however, we interpret the judge's statements to be consistent with our previous case law and his judicial gatekeeping responsibilities.

The trial court appropriately focused on both the nature of the challenged testimony and the objections raised by the Estate. Here, the witnesses' testimony on the standard of care was not based on clinical practice guidelines, physician surveys, or any other scientific methodology or theory. Rather, it was empirical testimony based on their personal knowledge of the ordinary care, skill, and diligence commonly exercised by cardiac surgeons in Nebraska under similar circumstances and the actual care, skill, and diligence they exercise during operations.

Moreover, we understand the trial court's ruling to have been premised on the Estate's failure to sufficiently call into question the reliability or validity of the testimony being challenged. To raise a *Daubert*/*Schafersman* objection, the initial task falls on the party opposing expert testimony to sufficiently call into question the reliability or validity of some aspect of the anticipated testimony.[39] Only after the factual basis, data, principles, methods, or their application has been sufficiently called into question does the proponent of the expert testimony have the burden of showing that the testimony is reliable.[40]

We find no merit to the Estate's contention that the district court abandoned its gatekeeping function by failing to apply *Daubert*/*Schafersman*; nor do we find merit in the Estate's contention that the district court failed to assess the methodology underlying the testimony and whether the methodology could properly be applied to the facts at issue. The court adequately demonstrated "'by specific findings on the record'" that it performed its duty as gatekeeper.[41]

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[39] *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

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

[41] *Zimmerman v. Powell, supra* note 2, 268 Neb. at 430, 684 N.W.2d at 9.

(d) Doctors' Expert Testimony Met *Daubert*/*Schafersman* Standard

Next, we turn to whether the *Daubert*/*Schafersman* standard was met. The Estate argues that the court failed to note factors bearing on reliability and that while education is relevant under *Daubert*/*Schafersman*, the reasoning and methodology used to form an opinion is also required. Neither party disputes the professional qualifications of the other party's expert witnesses.

The testimony offered by the expert witnesses was certainly relevant to the issue at trial. They testified to their education, training, and experience which formed the basis of their opinions as to the standard of care. Their opinions as to the standard of care were helpful to the jury only if the jury understood each expert's qualifications and experience. Langdon, a cardiothoracic surgeon, testified that he was trained extensively in general surgery and that he completed a board certification in general surgery and thoracic surgery. Langdon stated that he is licensed in Nebraska and Iowa and has performed "six or 7,000 open heart operations." Langdon also testified that he had been consulted by physicians who were seeking advice on the proper treatment of patients. In addition, Langdon's curriculum vitae was submitted into evidence. Langdon then testified, over objection, that he met the standard of care.

Similarly, Batter, a cardiothoracic surgeon, testified to his education, training, and experience. Batter testified that he is board certified and licensed in Nebraska. Batter explained that he has been "doing this since 1995" and that he "probably averaged 250 heart surgeries a year." Batter then testified, over objection, that he met the standard of care. The court stated that the Estate's objection was overruled "for the same reason it was previously overruled prior to trial."

We find no error in the district court's determination that the testimony provided by the witnesses would assist the jury in understanding and determining the facts at issue in

this case. As noted above, the *Daubert*/*Schafersman* inquiry is "'flexible.'"[42] The *Daubert*/*Schafersman* standard is not "'"some magical incantation."'"[43] Depending on the nature of the testimony offered, *Daubert* factors "'may or may not be pertinent in assessing reliability.'"[44] And "whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine."[45] We do not mean that trial courts must always determine the admissibility of standard of care testimony in a medical malpractice case by analyzing all of the *Daubert*/*Schafersman* factors. Instead, depending on the nature of the testimony offered and the objections thereto, *Daubert* factors "'may or may not be pertinent in assessing reliability.'"[46]

We reject the Estate's interpretation of *Zimmerman*,[47] that the district court similarly abdicated its gatekeeping duty in this case by failing to explain its reasoning and methodology. We side with those jurisdictions that have found that *Daubert* factors apply to expert testimony on the standard of care.[48] This should not be misconstrued as signaling some sort of change in our standard of care jurisprudence. We are aware some commentators have suggested that due to scientific and technological advancements in the practice of medicine, a standard of care based on local custom and ordinary practice is

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[42] *Kumho Tire Co. v. Carmichael, supra* note 19, 526 U.S. at 150.

[43] *Zimmerman v. Powell, supra* note 2, 268 Neb. at 430, 684 N.W.2d at 9.

[44] *Kumho Tire Co. v. Carmichael, supra* note 19, 526 U.S. at 150.

[45] *Id.*, 526 U.S. at 153.

[46] *Id.* See *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 1.

[47] *Zimmerman v. Powell, supra* note 2.

[48] *Dickenson v. Cardiac & Thoracic Surgery TN*, 388 F.3d 976 (6th Cir. 2004); *Sullivan v. U.S. Department of Navy*, 365 F.3d 827 (9th Cir. 2004); *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396 (3d Cir. 2003); *Mitchell v. U.S.*, 141 F.3d 8 (1st Cir. 1998); *Seifert v. Balink*, 372 Wis. 2d 525, 888 N.W.2d 816 (2017).

outdated and should be replaced with a *Daubert*-style analysis of scientific evidence.[49] But in Nebraska, where the applicable standard of care testimony is statutory, such a policy debate is properly reserved for the Legislature, not the courts. For that reason, in applying the *Daubert*/*Schafersman* factors to standard of care testimony in a medical malpractice case, trial courts should be mindful not to supplant the customary care standard required by § 44-2810. As this court observed in *Murray v. UNMC Physicians*,[50] the standard of care in medical malpractice cases cannot be altered for public policy reasons: "We cannot depart from the customary standard of care on policy grounds, even if it is subject to criticism, because the standard of care is defined by statute and public policy is declared by the Legislature."

The record shows the trial court considered the applicability of the *Daubert*/*Schafersman* factors, but found they offered little assistance in determining the reliability of the witnesses' personal knowledge of the customary standard of care and their personal knowledge of the actions they performed during the surgeries. And because there was no objection to the qualifications of the witnesses to testify as experts, and the Estate offered nothing else that called into question the reliability of their testimony, the court overruled the Estate's objections and allowed the testimony. Therefore, we find that the district court did not abuse its discretion in admitting the challenged testimony.

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[49] See, e.g., Nicole Hines, *Why Technology Provides Compelling Reasons to Apply a* Daubert *Analysis to the Legal Standard of Care in Medical Malpractice Cases*, 2006 Duke L. & Tech. Rev. 18 (2006); Carter L. Williams, *Evidence-Based Medicine in the Law Beyond Clinical Practice Guidelines: What Effect Will EBM Have on the Standard of Care*?, 61 Wash. & Lee L. Rev. 479 (2004); Michelle M. Mello, *Using Statistical Evidence to Prove the Malpractice Standard of Care: Bridging Legal, Clinical, and Statistical Thinking*, 37 Wake Forest L. Rev. 821 (2002).

[50] *Murray v. UNMC Physicians, supra* note 14, 282 Neb. at 271, 806 N.W.2d at 126.

3. Estate's Posttrial Motions

[16] The Estate argues that the district court abused its discretion in overruling the motion for a new trial, motion for judgment notwithstanding the verdict, and motion to strike the opinions of the doctors' expert witnesses. The doctors contend that the district court properly exercised its discretion with regard to the admission of the standard of care testimony. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.[51] Because we hold that the district court did not err in admitting the testimony, we also hold that the district court did not abuse its discretion in overruling the Estate's posttrial motions.

The Estate's second assignment of error is without merit.

VI. CONCLUSION

We conclude that the district court did not fail to perform its *Daubert*/*Schafersman* gatekeeping function. The district court therefore did not err in overruling the Estate's posttrial motions, and its judgment is affirmed.

Affirmed.

Kelch, J., not participating in decision.

Wright, J., not participating.

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[51] *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996).

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

State of Nebraska, appellee, v.
Patrick R. Russell, appellant.
908 N.W.2d 669

Filed March 30, 2018. No. S-17-197.

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.** 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.
4. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are 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.
5. ____. Where a defendant was under the age of 18 when he or she committed a Class IA felony, Neb. Rev. Stat. § 28-105.02 (Reissue 2016) dictates that the sentencing judge must also consider mitigating factors, such as the defendant's (1) age at the time of the offense, (2) impetuosity, (3) family and community environment, and (4) ability to appreciate risks and consequences of the conduct, as well as (5) the outcome of a comprehensive mental health evaluation of the defendant conducted by an adolescent mental health professional licensed in Nebraska.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Annie O. Hayden for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Pirtle and Bishop, Judges.

Cassel, J.

INTRODUCTION

In 1974, a court sentenced Patrick R. Russell to life imprisonment for a murder he committed at age 17. Following decisions in *Miller v. Alabama*[1] and *State v. Mantich*,[2] Russell sought postconviction relief in the form of a new sentencing hearing. The court granted relief and resentenced Russell to 110 to 126 years' imprisonment, making him eligible for parole at age 72. Because the sentence does not constitute an abuse of discretion, we affirm.

BACKGROUND

Crime and Direct Appeal

The facts and circumstances surrounding Russell's crime are set out in greater detail in our decision resolving his direct appeal.[3] On November 10, 1973, when Russell was 17 years old, he engaged in sexual activities with 8-year-old Joseph Edmonds. After Edmonds allegedly called Russell's grandmother derogatory names, Russell used a pocketknife to cut a length of telephone cord. He told Edmonds to close his eyes, slipped the cord around Edmonds' neck, and pulled it tight. Edmonds died due to the strangulation.

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[1] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

[2] *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014).

[3] *State v. Russell*, 194 Neb. 64, 230 N.W.2d 196 (1975).

Our prior opinion also discussed Russell's mental condition. At age 14, he was hospitalized for psychiatric treatment for approximately 1 month. Russell then resided at the Omaha Home for Boys for approximately 2 years. He returned to live with his mother in July 1973, and he was soon charged with three counts of assault and battery related to sexual attacks on young boys ranging from 4 to 8 years of age.

The district court convicted Russell of murder in the first degree and imposed a sentence of life imprisonment. We affirmed the court's judgment.[4]

Postconviction and Resentencing

Following decisions in *Miller*[5] and *Mantich*,[6] Russell sought postconviction relief. He asked the district court to vacate and set aside his sentence and to hold a new sentencing hearing. The district court granted the requested relief.

The district court received evidence at a mitigation hearing. It received the deposition of an adolescent neuropsychologist who discussed newer revelations in science concerning the development of the adolescent brain. It also received documents regarding Russell's misconduct reports, achievements while incarcerated, and reclassification forms used by the penitentiary to determine placement.

The district court heard live testimony from a witness. Kirk A.B. Newring, Ph.D., a psychologist, testified that studies show the brains of adolescents are not fully formed. He explained that the prefrontal cortex—which allows for deliberation, anticipation of future outcomes, assessment of risk, and impact—seems to be more fully developed around age 25. The lack of prefrontal cortex development is most demonstratively impaired in "hot logic situations where there's emotional arousal." Newring testified that Russell reported a strong

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[4] *Id.*

[5] *Miller v. Alabama, supra* note 1.

[6] *State v. Mantich, supra* note 2.

attachment to his grandmother as the only relative who had a parenting-type relationship toward him. Newring gathered from his talks with Russell that Russell admitted to the crime to appease the parole board but was now saying that he did not do it. Russell explained that his attorney performed inadequately and that Russell was innocent.

Newring testified that with regard to classification, since 2011, Russell had scores that would allow him to be at a community corrections center if he were not serving a life sentence. In other words, Russell "has the institutional behavior and history that would allow him to be placed at work release," but instead, Russell is kept in total confinement due to the nature of his sentence. The presentence report (PSR) shows that during many annual custody reviews from at least 1989 to 2000, no change was recommended in Russell's classification due to his refusal to take part in a psychological evaluation. He submitted to a psychological evaluation in 2002. That evaluation recommended that Russell complete all three levels of both "GOLF" (for mental health) and "SATOP" (for substance abuse) programming prior to being considered for a custody promotion. In 2002 through 2005, his classification was not changed, because the mental health recommendation was not favorable.

Newring assessed Russell at a low risk for future acts of violence. The risk factors were that Russell had a conviction of violence and a personality disorder. Newring assigned Russell a diagnosis of "Other Personality Disorder with Mixed Schizoid and Schizotypal Personality features" to "encapsulate that he's a little bit asocial" and that "his presentation and perceptions are a little bit odd or eccentric." Newring testified that Russell described a feasible and achievable release plan and recognized that he would need to work through the transition process of the Department of Correctional Services. Newring did not believe that Russell had any meaningful family support in the community. Newring explained that Russell was employable, did not have a major mental illness, had a

good work history, handled stress fairly well within the institution, and was cognizant of a need for supportive transition, all of which suggested a low risk for future acts of violence. Russell obtained a low score on a test that is a predictor of future violence.

The record showed steps taken by Russell to improve himself while incarcerated. In 1981, Russell obtained a diploma through the GED program and earned credentials of ministry in the "Church of the God Within." The next year, the church awarded him an honorary doctor of divinity. The record shows that Russell completed other Bible studies. In 1988, he obtained a certificate in welding. Performance reviews show that Russell had an "exceptional" work history in prison. Between 1991 and 2016, Russell had 26 misconduct reports, with the most recent occurring in 2010.

According to the PSR, "Russell remains in a Pre-Contemplative Stage of Change with regard to addressing his criminogenic needs." Testing tools found Russell to be at a very high risk to reoffend. The report stated that Russell appeared to be unwilling to accept he has mental health problems and that his personality disorder would likely impact efforts to address his criminogenic needs.

Although Russell does not see himself as having a mental illness, his history suggests otherwise. On two occasions in 1969, Russell was hospitalized at a psychiatric center after exhibiting violence toward family members. Russell was hospitalized in 1970 with an admission diagnosis of adolescent schizophrenia. After an evaluation, a doctor felt that Russell "represented borderline retardation and adolescent adjustment reaction." Russell acknowledged that as a juvenile, he was seen by a psychiatrist, and that he was diagnosed with schizophrenia in 1972. In a Nebraska Penal and Correctional Complex progress report from March 1975, the author strongly recommended that Russell be placed in a mental institution. In a report the following year, the counselor stated that Russell should be under psychiatric care.

Upon admission to a psychiatric hospital in 1978, Russell indicated that he had no mental disorders. However, staff perceived him as "having a severe mental disorder, and the main feature of which is paranoia." An admission note and mental status examination report from that year stated that Russell, as an adolescent, carried a knife or a section of pipe on his person "for his own protection or in case someone bumped into him or in case he didn't like someone's face." Russell reported that he had "attacked people from behind and struck them with the pipe because he didn't like their looks or because they had accident[al]ly bumped into him on the street." In this report, Russell offered strong racial opinions and indicated that he could get along with African Americans, "provided that they do not talk to him or look at him the wrong way." The report showed a diagnostic impression of "Schizophrenia, Paranoid Type."

The PSR shed light on crimes committed by Russell prior to the murder. In December 1972, a 7-year-old boy reported that Russell inserted a pencil in the victim's rectum, made the victim perform oral sex on Russell, and pulled on the victim's penis and testicles. When interviewed by the police, Russell stated that among other actions against the victim, he "tied a cord around [the victim's] neck, and threatened to hang him over the side of the porch railing from the third floor for messing with the TV." Russell told the officer that the victim harassed him, which made Russell angry, and that Russell was unable to control his temper. When an officer spoke with Russell's mother, she informed him that Russell had been staying at the Omaha Home for Boys because he was "hard to handle," but that he was home on holiday leave. She also said that prior to his admittance to the Omaha Home for Boys, Russell was receiving care from a doctor for "a [m]ental problem." Russell told an officer that if he had been "taking medicine for his condition," he "possibly would not have done what he did" to the victim. In November 1973, Russell was charged with stealing a vehicle.

The PSR stated that Russell appeared to have a deep-seated need for power and control and that interpersonal relationships were problematic for Russell. It further stated that Russell's level of suspicion toward authority figures "does not bode well for his prospects of succeeding in community-based supervision." Russell showed "very little motivation to participate actively and meaningfully in a correctional plan." According to the report, Russell "appears to be dreaming of living under a bridge in a warm climate."

In February 2017, the court resentenced Russell. The court stated that it had spent days "going through everything" in preparation for the sentencing. The court recounted that it had reviewed the entirety of the PSR and opinions from this court as well as *Miller*.[7] The court further stated that it considered Russell's age, mentality, education and experience, social and cultural background, past record of criminal or law-abiding conduct, motivation for the offense, nature of the offense, and amount of violence involved in the commission of the crime. In addition, the court weighed mitigating factors under Neb. Rev. Stat. § 28-105.02(2) (Reissue 2016). The court reviewed this court's opinion in Russell's direct appeal[8] and considered the evidence at the mitigation hearing.

The district court disagreed with Newring that Russell was impulsive. The court observed that on the same page of Newring's report that Newring said Russell was impulsive, Newring wrote that Russell was now contending he did not commit the murder. The court noted that on a number of occasions in the PSR, it was reported that Russell denied and minimized responsibility for his actions and felt he had the right to defend his grandmother's name. The court recalled reading that Russell had also blamed his attorney for not properly representing him.

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[7] *Miller v. Alabama, supra* note 1.

[8] *State v. Russell, supra* note 3.

The district court recognized the importance of considering mitigating factors before sentencing a juvenile offender. It stated:

> [T]he State doesn't challenge the vast body of neuroscientific and developmental science in adolescents that have implications for the treatment of juveniles in the justice system, and ultimately led to *Miller* [*v.*] *Alabama*. Before *Miller* [*v.*] *Alabama*, in 2012, a murder conviction meant a life sentence, regardless of the age of the actor. Since *Miller*, if the actor was under 18, the Court must consider mitigating factors before imposing a life sentence for murder.
>
> . . . We are here today because of a change in the law that applies to cases like this across the country. *Miller* [*v.*] *Alabama* requires the courts to — across the country at the state level to consider mitigating factors before sentencing a person who was under 18 at the time of the murder.
>
> And I've mentioned the change in the law that our legislature made because of *Miller* [*v.*] *Alabama*, [§] 28-105.02, and all of the nonexhaustive list of mitigating factors, which the Court considered.
>
> In attempting to fashion a fair and appropriate sentence — resentence, excuse me, based on the law and the evidence, the Court does so within the context of the facts of this case. All sentences are driven in part by the particular facts unique to them, and I mentioned this earlier. So it's this case, these facts, that the Court considers.
>
> The legislature has set the minimum sentence in these kinds of cases at 40 years. And it has set the maximum sentence at life. And where this case falls in that spectrum is ultimately left to the Court to determine.

The district court recognized that it must "also consider a sentence that will not depreciate the seriousness of the crime and serve to protect society." The court resentenced Russell to 110 to 126 years in prison, with credit for 15,789 days served.

Thus, the court stated that Russell would be eligible for parole after serving 55 years and, if he did not lose any good time, would be discharged after serving 63 years.

Russell timely appeals.

ASSIGNMENT OF ERROR

Russell assigns that the district court abused its discretion by imposing an excessive sentence.

STANDARD 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.[9] 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.[10]

ANALYSIS

We have recently decided a number of appeals involving juvenile offenders convicted of first degree murder who were sentenced to life imprisonment, who were subsequently resentenced in response to *Miller*, and who then appealed that sentence.[11] This is another such appeal. Our prior cases set forth the legal background leading to the resentencing of juvenile offenders, and we do not repeat it here.

Russell argues that his sentence of 110 to 126 years' imprisonment is excessive. He does not suggest that the court imposed

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[9] *State v. Jones*, 297 Neb. 557, 900 N.W.2d 757 (2017), *cert. denied* 583 U.S. 1064, 138 S. Ct. 656, 199 L. Ed. 2d 549 (2018).

[10] *Id.*

[11] See, *State v. Jones, supra* note 9; *State v. Jackson*, 297 Neb. 22, 899 N.W.2d 215 (2017); *State v. Nollen*, 296 Neb. 94, 892 N.W.2d 81 (2017), *cert. denied* 583 U.S. 858, 138 S. Ct. 165, 199 L. Ed. 2d 98; *State v. Garza*, 295 Neb. 434, 888 N.W.2d 526 (2016), *cert. denied* 583 U.S. 835, 138 S. Ct. 83, 199 L. Ed. 2d 54 (2017); *State v. Mantich*, 295 Neb. 407, 888 N.W.2d 376 (2016), *cert. denied* 583 U.S. 848, 138 S. Ct. 128, 199 L. Ed. 2d 78 (2017).

a sentence outside the statutory limits; instead, he contends that the court abused its discretion in imposing the sentence. We disagree.

[3-5] 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.[12] Relevant factors customarily considered and applied are 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.[13] Because Russell was under the age of 18 when he committed a Class IA felony, § 28-105.02 dictates that the sentencing judge must also consider mitigating factors, such as the defendant's (1) age at the time of the offense, (2) impetuosity, (3) family and community environment, and (4) ability to appreciate risks and consequences of the conduct, as well as (5) the outcome of a comprehensive mental health evaluation of the defendant conducted by an adolescent mental health professional licensed in Nebraska.[14]

Russell asserts that his sentence should be modified because it was tailored to fit the crime rather than the offender. He emphasizes decisions from the U.S. Supreme Court recognizing the reduced culpability of juveniles and developments in the field of neuropsychology.[15] We, like the district court, are

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[12] *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017), *cert. denied* 583 U.S. 915, 138 S. Ct. 315, 199 L. Ed. 2d 208.

[13] *Id.*

[14] See *id.*

[15] See, *Miller v. Alabama, supra* note 1; *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

mindful of evidence showing that the brain of an adolescent is not fully developed. But that does not necessarily mean that an offender no longer poses a risk after age 25.

Under *Miller*, a juvenile offender convicted of a homicide offense may be sentenced to life imprisonment without parole so long as the sentencer considered specific, individualized factors before handing down that sentence.[16] Rather than life imprisonment, the court sentenced Russell to a term of years that allows for parole eligibility. And it is clear from the court's statements during the resentencing hearing that it considered the relevant sentencing factors set forth above.

Russell also argues that the sentence imposed was a de facto life sentence. He will be eligible for parole at age 72, and he will be 80 years old on his projected release date. Russell highlights cases from other states where courts have found shorter terms of imprisonment to be de facto life sentences.[17] But we have declined to follow that line of cases.

In *State v. Smith*,[18] we considered a claim that a lengthy term-of-years sentence was a de facto life imprisonment. In doing so, we discussed in some detail the U.S. Supreme Court's decision in *Graham v. Florida*.[19] The *Graham* Court found it unconstitutional to sentence a nonhomicide juvenile offender to a "sentence [that] guarantees he [or she] will die in prison without any meaningful opportunity to obtain release."[20] But we noted that the Court had not decided whether a lengthy term-of-years sentence was, for constitutional purposes, the same as a sentence of life imprisonment

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[16] *State v. Nollen, supra* note 11.

[17] See, *Casiano v. Commissioner of Correction*, 317 Conn. 52, 115 A.3d 1031 (2015), *cert. denied* 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016) (50-year sentence); *State v. Ronquillo*, 190 Wash. App. 765, 361 P.3d 779 (2015) (mandatory release at age 68).

[18] *State v. Smith, supra* note 12.

[19] *Graham v. Florida, supra* note 15.

[20] *Id.*, 560 U.S. at 79.

without the possibility of parole. We observed that "a number of courts have held that sentences that allow the juvenile offender to be released in his or her late sixties or early seventies satisfy the 'meaningful opportunity' requirement."[21] We also recognized that "other courts have interpreted *Graham* to mean that the juvenile offender must be released a certain number of years *before* his life expectancy."[22] Ultimately, we concluded in *Smith* that a sentence for kidnapping in which the juvenile offender would be eligible for parole at age 62 comported with the principles set forth in *Graham*.

Although this case involves a homicide, our analysis in *Smith* provides guidance. The *Miller* Court highlighted that the reasoning from *Graham* still applied to homicide offenses:

> *Graham*'s flat ban on life without parole applied only to nonhomicide crimes, [but] none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. . . . So, *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.[23]

And, in a homicide case,[24] we adhered to our conclusions in *Smith*. There, we found no merit to the juvenile offender's contention that his parole eligibility at age 56 was unconstitutional.

We digress at this point to recognize the reversal of *State v. Zuber*,[25] a New Jersey case that we have discussed[26] and cited[27] approvingly. In that case, the sentences imposed on a

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[21] *State v. Smith, supra* note 12, 295 Neb. at 977, 892 N.W.2d at 65.

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

[23] *Miller v. Alabama, supra* note 1, 567 U.S. at 473.

[24] See *State v. Jones, supra* note 9.

[25] *State v. Zuber*, 442 N.J. Super. 611, 126 A.3d 335 (2015), *reversed* 227 N.J. 422, 152 A.3d 197 (2017).

[26] See *State v. Cardeilhac*, 293 Neb. 200, 876 N.W.2d 876 (2016).

[27] See *State v. Smith, supra* note 12.

juvenile offender for nonhomicide crimes totaled 110 years but the offender would be eligible for parole in 55 years at approximately age 72. The Superior Court of New Jersey assumed, but did not decide, that *Graham* could apply. As part of its analysis, it used life expectancy tables, which predicted that the offender would outlive his parole ineligibility period. The court concluded that the aggregate sentence was not a de facto life sentence, because the offender had a meaningful and realistic opportunity to obtain release. We thus included this case as one in which a court found that a lengthy term of years was not the equivalent of a life sentence.[28] Slightly over 1 year ago, the New Jersey Supreme Court reversed, and remanded for resentencing.[29] It found that lengthy term-of-years sentences imposed on juveniles implicated the principles of *Graham* and *Miller*. It directed that at the new sentencing hearing, the trial court should consider the offender's "'immaturity, impetuosity, and failure to appreciate risks and consequences'; 'family and home environment'; family and peer pressures; 'inability to deal with police officers or prosecutors' or his own attorney; and 'the possibility of rehabilitation.'"[30]

The theme emerging from all the jurisprudence discussed above is that a sentencing court must consider a juvenile offender's "youth and attendant characteristics"[31] in fashioning a punishment. The district court has done that here. And we are mindful that the U.S. Supreme Court has not precluded a court from imposing a sentence of life imprisonment without possibility of parole for a juvenile convicted of homicide. The *Miller* Court stated: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different,

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[28] See, *id.*; *State v. Cardeilhac, supra* note 26.

[29] *State v. Zuber*, 227 N.J. 422, 152 A.3d 197 (2017).

[30] *Id.* at 453, 152 A.3d at 215.

[31] *Miller v. Alabama, supra* note 1, 567 U.S. at 483.

and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[32] While Russell will not be eligible for parole until age 72, the sentence imposed affords a "meaningful and realistic opportunity to obtain release"[33] from prison. We cannot say that the court abused its discretion in resentencing Russell.

CONCLUSION

The record shows that the district court considered principles from *Miller* and the relevant sentencing factors. Because the district court did not abuse its discretion in resentencing Russell to 110 to 126 years in prison, we affirm.

Affirmed.

Wright and Kelch, JJ., not participating.

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[32] *Id.*, 567 U.S. at 480.

[33] *State v. Smith, supra* note 12, 295 Neb. at 979, 892 N.W.2d at 66.

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

First National Bank North Platte, a national banking association, appellee, v. Jose A. Cardenas and Christina Cardenas, husband and wife, and Joya de Andalucia Farms, LLC, a Nebraska limited liability company, appellants.

909 N.W.2d 79

Filed March 30, 2018. No. S-17-360.

1. **Verdicts: Juries: Appeal and Error.** An appellate court will set aside a jury verdict because of insufficient evidence only if the verdict is clearly wrong.
2. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
3. ____: ____. A jury verdict will be upheld if there is competent evidence presented to the jury upon which it could reasonably find for the successful party.
4. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
5. **Motions for New Trial: Damages: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912.02(2) (Reissue 2016), when an action has been tried before a jury, a motion for a new trial shall be a prerequisite to obtaining appellate review of the issue of inadequate or excessive damages.
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. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.
9. ____: ____. 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. **Statutes: Intent.** When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context.
11. ____: ____. A court ascertains the meaning of a statute by reading it in pari materia, in light of the broader structure of the relevant act and related statutes.
12. **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.

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

Luke T. Deaver and Taylor A. L'Heureux, of DeWald Deaver, P.C., L.L.O., for appellants.

David W. Pederson and Matthew D. Pederson, of Pederson & Troshynski, for appellee.

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

Cassel, J.

I. INTRODUCTION

After a bank lender exercised powers of sale under deeds of trust, it sought to recover a deficiency owed by the borrowers. The borrowers appeal from a jury verdict in favor of the bank. Because the borrowers failed to move for a new trial, we cannot review their assertion that excessive damages were awarded, but we examine and reject their argument that the

evidence was insufficient to support the jury's verdict. We also find no error in the trial court's refusal to give the borrowers' requested jury instructions. Accordingly, we affirm.

II. BACKGROUND

1. Move to North Platte

In 2006, Jose A. Cardenas and Christina Cardenas moved to North Platte, Nebraska, where Jose began working as a neurologist. Jose and Christina purchased 127 acres of land on which to build a house. They obtained a loan from First National Bank North Platte (FNBNP) for the purchase of the land. The 127 acres were ultimately divided into three parcels: a 57-acre tract (the pasture tract), a 20-acre tract (the house tract), and a 50-acre tract (the barn tract). After purchasing the land, Jose and Christina obtained a loan from FNBNP for the construction of their house.

Christina purchased two Andalusian horses. She planned to provide horse riding and polo lessons and to operate a horse breeding business. Jose and Christina formed a Nebraska limited liability company to conduct their horse business (the LLC). Christina was the sole member of the LLC. Jose, Christina, and the LLC (collectively the Cardenases) constructed on their property a barn, indoor stable, and horse breeding area, financed by FNBNP. The Cardenases also financed the purchase of Andalusian breeding stallions and a horse trailer.

The Cardenases obtained multiple loans from FNBNP, which were refinanced multiple times. These promissory notes were secured by a variety of collateral, including their real property through several deeds of trust.[1] The details of these notes and deeds of trust will be expanded later in this opinion.

2. Move to Kentucky

The LLC never became profitable. The Cardenases' tax returns showed a loss from the LLC of over $100,000 most

[1] See Neb. Rev. Stat. §§ 76-1001 to 76-1018 (Reissue 2009) (Nebraska Trust Deeds Act).

years. Jose's annual income as a neurologist increased to over $400,000.

In 2012, Jose and Christina moved from Nebraska to Kentucky. They decided that the climate in Nebraska was not conducive to the Andalusian breed of horses and that the LLC was unlikely to be successful in Nebraska. Jose was able to obtain employment as a neurologist in Kentucky.

The Cardenases listed for sale all of their real property—the house tract, the barn tract, and the pasture tract—for $855,000. After receiving no written offers, they relisted the house tract and the barn tract (not including the pasture tract) for $774,000. The Cardenases received only one offer for the property at $300,000, which they did not accept.

3. FNBNP Trustee's Sales

In February 2013, the president of FNBNP demanded that the Cardenases pay their loans in full within 10 days due to their failure to make installment payments. As a statutory prerequisite to exercising its power of sale under the trust deeds that secured the Cardenases' real property, FNBNP sent them a notice of default in March. This first notice of default pertained to the trust deeds securing the house tract. It provided the Cardenases 1 month to cure the default by repaying their debt in full. In May, FNBNP sent a second notice of default to the Cardenases with regard to the trust deeds securing the barn tract and the pasture tract, giving them 2 months to cure the default.

In May 2013, FNBNP exercised its power of sale as trustee under the trust deed and sold the house tract at auction. The bank bid $380,000 and was the only bidder. The bank issued itself a trustee's deed from the sale.

In September 2013, FNBNP sold the barn tract and the pasture tract. The bank purchased the property at auction for $100,000.

4. Litigation Ensues

In April 2013, FNBNP filed a replevin action in Kentucky to recover horses and other personal property collateral that

had been moved to Kentucky. In August, the Kentucky court granted FNBNP's motion for summary judgment, based on three of the loans from FNBNP to the Cardenases, in the amount of $476,612.02.

In July 2013, following the trustee's sale of the house tract, FNBNP filed a deficiency action against the Cardenases in the district court for Lincoln County, Nebraska. In September, after the remaining property was sold separately by trustee's sale, FNBNP filed a second deficiency action. The two cases were consolidated prior to trial.

The consolidated cases were tried to a jury. The jury returned a verdict for FNBNP in the amount of $171,162.66—the amount it had requested. The district court entered judgment in accordance with the jury verdict. The Cardenases did not file a motion for new trial, but they filed a timely appeal from the judgment.

III. ASSIGNMENTS OF ERROR

The Cardenases assign that the district court erred by (1) "awarding an excessive verdict for [FNBNP] that was unsupported by the evidence" and (2) refusing their requested jury instructions on (a) FNBNP's duty to comply with the Farm Mediation Act,[2] (b) FNBNP's failure to comply with § 76-1012 and the terms under the deed of trust by denying the Cardenases their right to cure the defaults, and (c) whether FNBNP "bid the fair market value of each of the properties at both of the foreclosure sales as required under . . . § 76-1013."

IV. STANDARD OF REVIEW

[1-3] An appellate court will set aside a jury verdict because of insufficient evidence only if the verdict is clearly wrong.[3] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence

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[2] See Neb. Rev. Stat. §§ 2-4801 to 2-4815 (Reissue 2012).

[3] See *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017).

most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.[4] A jury verdict will be upheld if there is competent evidence presented to the jury upon which it could reasonably find for the successful party.[5]

[4] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[6]

V. ANALYSIS

1. Sufficiency of Evidence to Support Amount of Damages

The Cardenases assign that the district court "erred in awarding an excessive verdict for [FNBNP] that was unsupported by the evidence." They argue that FNBNP's calculation of the amount they still owed was inaccurate because it failed to offset the second trustee's sale in the amount of $100,000. However, the Cardenases' failure to file a motion for new trial precludes review for excessive damages and limits our examination to the sufficiency of the evidence. As we explain below, the evidence was sufficient.

(a) Additional Facts

At trial, FNBNP introduced into evidence the five different notes signed by the Cardenases on which it based its claims. It presented multiple bank records showing amounts still owing. Jose admitted that they could not keep up with payments and did not make any payments after February 2013. FNBNP presented the testimony of multiple bank employees who stated that the amount due and owing after the trustee's sales, calculated with interest as of the time of trial, was $171,162.66.

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[4] *Pierce v. Landmark Mgmt. Group*, 293 Neb. 890, 880 N.W.2d 885 (2016).

[5] See *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, supra* note 3.

[6] *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

After the jury returned a verdict in favor of FNBNP, the court entered judgment accordingly. The Cardenases did not move for a new trial.

(b) Application

[5] Neb. Rev. Stat. § 25-1912.01(2) (Reissue 2016) provides:

> When an action has been tried before a jury a motion for a new trial shall not be a prerequisite to obtaining appellate review of the sufficiency of the evidence, *but a motion for a new trial shall be a prerequisite to obtaining appellate review of the issue of inadequate or excessive damages*.

(Emphasis supplied.) The Cardenases' first assignment of error melds a claim of insufficient evidence with one that damages were excessive. Because "a motion for a new trial [is] a prerequisite to obtaining appellate review of the issue of . . . excessive damages,"[7] that issue is not properly before us. Thus, we review only the sufficiency of the evidence to support the jury's verdict in favor of FNBNP.

There was undoubtedly sufficient evidence upon which the jury could find in favor of FNBNP. The Cardenases did not dispute that they borrowed money from FNBNP. They did not dispute that they failed to pay those loans. What they disputed was the amount still due. Viewing the evidence in the light most favorable to FNBNP and giving it the benefit of every reasonable inference deducible from the evidence, FNBNP clearly presented sufficient evidence upon which the jury could have reasonably found that a deficiency was still owed by the Cardenases after the trustee's sale. Under our clear error standard of review, this assignment of error fails.

For the sake of completeness, we note the Cardenases' argument relies upon a misunderstanding. The $100,000 from the second trustee's sale, which the Cardenases claim is unaccounted for in FNBNP's requested damages, was in

[7] § 25-1912.01(2).

fact credited to the accounts of two of the notes on which the Kentucky court granted judgment. After $6,000 was withheld for estimated sales expenses, a $47,000 credit for the sale was included on the accounts of each of these two notes. Thus, the $100,000 from the second trustee's sale has been credited in partial satisfaction of the Kentucky judgment. FNBNP did not reduce its calculation of the amount it was due in the Nebraska deficiency action by $100,000, because it had already reduced its calculation by the amounts owed on the notes subject to judgment from the Kentucky litigation, which notes those proceeds were credited toward.

2. Jury Instructions

The Cardenases' remaining assignments of error all address jury instructions that they proposed and the district court refused. The legal rules governing these assignments are well settled, and as they apply to all three assignments, we begin by recalling them.

[6-9] 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] 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] It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.[10] 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

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[8] *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017).

[9] *Id.*

[10] *Id.*

prejudicial error concerning the instructions and necessitating a reversal.[11]

(a) Farm Mediation Act

The Cardenases assign that the district court "erred by failing to instruct the jury on [FNBNP's] duty to comply with the Farm Mediation Act." Specifically, they claim that the court should have given the jury their requested instruction on FNBNP's alleged failure to provide them notice of the availability of mediation as required by § 2-4807(1).

However, Jose and Christina do not meet the statutory definition of "[b]orrower"[12] for purposes of § 2-4807(1). And only three notes were in the record on which the LLC was a borrower. These three notes were subject to judgment from the litigation in Kentucky, but were not the basis of the deficiency judgment sought by FNBNP in the case before us. Thus, the evidence did not support the giving of the Cardenases' requested jury instruction.

(i) Additional Facts

The Cardenases refinanced multiple times their loans for the land, residence, barn, horses, and other expenses and equipment. There were approximately 31 separate notes between the Cardenases and FNBNP. These notes were secured by a variety of collateral, including the Cardenases' real property, which was secured by various deeds of trust. However, FNBNP's complaints and the evidence presented at trial identify five outstanding loans:

- note No. xxx243, a $399,000 note executed on January 25, 2008, on which Jose was the sole borrower;
- note No. xxx521, a $215,700 note executed on January 2, 2009, which was a Small Business Administration loan made to the LLC with separate guarantees by Jose and Christina;

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[11] *Id.*

[12] See § 2-4802(2).

- note No. xxx541, a $110,000 note executed on January 2, 2009, which was also a Small Business Administration loan made to the LLC with separate guarantees by Jose and Christina;
- note No. xxx332, a $118,977 note executed on January 13, 2009, which listed Jose and Christina as borrowers; and
- note No. xxx261, a $174,305 note executed on November 30, 2010, which listed the Cardenases as borrowers.

FNBNP's complaints state that as a result of the Kentucky litigation, it received summary judgment on notes Nos. xxx521, xxx541, and xxx261. Its complaints and testimony at trial were that the $171,162.66 it claimed was owed it by the Cardenases was based on the amount due on note No. xxx332, plus accrued interest. The borrowers on that note were Jose and Christina only.

At trial, FNBNP introduced tax returns from the Cardenases. The gross income of the LLC was never greater than the gross income from Jose's wages.

The Cardenases requested that the court instruct the jury that the failure to provide notice of the availability of mediation pursuant to § 2-4807 of the Farm Mediation Act was an affirmative defense. The court did not give this requested instruction, but instead told the jury that it must accept as true the court's legal conclusion that FNBNP "was not required to participate in mediation with the [Cardenases] under the Farm Mediation Act."

(ii) Application

The Farm Mediation Act at § 2-4807(1) provides:

> At least thirty days prior to the initiation of a proceeding on an agricultural debt in excess of forty thousand dollars, a creditor, except as provided in subsection (2) or (3) of this section, shall provide written notice directly to the borrower of the availability of mediation and the address and telephone number of the farm mediation service in the service area of the borrower.

"Creditor" is defined as "any individual, organization, cooperative, partnership, limited liability company, trust, or state or federally chartered corporation to whom an agricultural loan is owed."[13] "Borrower" is defined as "an individual, limited liability company, corporation, trust, cooperative, joint venture, or other entity entitled to contract who is engaged in farming or ranching, who derives more than fifty percent of his or her gross income from farming or ranching, and who holds an agricultural loan."[14] Section 2-4802 does not define "agricultural loan" or "agricultural debt."

While creditors subject to § 2-4807 are required to provide notice of the availability of mediation, participation in mediation is optional. The Farm Mediation Act at § 2-4808(2) provides in part:

> The parties shall not be required to attend any mediation meetings under this section, and failure to attend any mediation meetings or to participate in mediation under this section shall not affect the rights of any party in any manner. Participation in mediation under this section shall not be a prerequisite or a bar to the institution of or prosecution of legal proceedings by any party.

We have never held that the failure to provide notice of the availability of mediation as required by § 2-4807(1) is an affirmative defense to enforcement of agricultural debt subject to this notice requirement. And we need not, and do not, reach this question here, because we conclude that the instruction requested by the Cardenases was not warranted by the evidence. We also do not address whether Jose and Christina were "engaged in farming or ranching" with the LLC.[15]

FNBNP sought a deficiency judgment on the amount owed on note No. xxx332. Thus, that note is the relevant "debt"

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[13] § 2-4802(3).

[14] § 2-4802(2).

[15] See *id.*

in this "proceeding" for purposes of § 2-4807. Jose and Christina—not the LLC—were the borrowers on this note. Jose and Christina, with or without the inclusion of the gross income from the LLC, do not meet the definition of borrower for purposes of § 2-4807(1), because they do not "derive[] more than fifty percent of [their] gross income from farming or ranching."[16]

Because Jose and Christina were not borrowers for purposes of the notice requirement of § 2-4807(1), the Cardenases' requested jury instruction was not warranted by the evidence. Thus, it was not error for the trial court to refuse to give this instruction. If the Cardenases wanted to raise the failure of FNBNP to provide notice as required by § 2-4807(1) before seeking to enforce those notes on which the LLC was a borrower, they should have done so in the Kentucky litigation. This assignment of error lacks merit.

(b) Right to Cure

The Cardenases argue that the district court erred by refusing to give their proposed jury instructions on the affirmative defense that FNBNP refused to allow them to cure their default. We conclude that the Cardenases' requested instructions were not correct statements of law and that they were not warranted by the evidence.

(i) Additional Facts

Many of the notes and trust deeds contained acceleration clauses allowing FNBNP, in the event of a default, to declare immediately due the entire amount owed. The first notice of default stated that FNBNP as trustee "has elected to and does declare the entire unpaid principal balance, together with the interest thereon, immediately due and payable." The second notice of default provided a section entitled "Notice of Right to Cure Default," which provided 2 months to cure the default

[16] See *id.*

and notified the Cardenases of the amount of the entire principal and the amount of principal that would not be due had there been no default.

At trial, Christina admitted that she and Jose did not tender or offer to tender money to cure the default.

The Cardenases' first requested instruction addressing the first notice of default read:

> The [Cardenases] raised an affirmative defense that [FNBNP] failed to comply with the Nebraska Trust Deeds Act by failing and refusing to allow [the Cardenases] their right to cure the default in the Notice of Default filed on March 11, 2013.
>
> In connection with this affirmative defense, the [Cardenases] have the burden of proving, by the greater weight of the evidence, each and all of the following:
>
> 1. That [FNBNP] failed to comply with the Nebraska Trust Deeds Act by allowing [the Cardenases] to cure the default in the Notice of Default filed on March 11, 2013; and
>
> 2. That the [Cardenases] were willing and able to exercise their right [to] cure the default in the Notice of Default filed on March 11, 2013 had [FNBNP] allowed them to do so.
>
> If [the Cardenases] have met this burden of proof, then [FNBNP] is barred from recovery of any alleged damages on its deficiency action and your verdict must be for [the Cardenases].

The requested jury instruction with regard to the second notice of default was identical other than the date of the notice.

The district court did not give these requested instructions. Instead, the court instructed the jury that it must accept the court's legal conclusion that "[FNBNP] as trustee of the deeds of trust filed notices of default pursuant to Nebraska law, and served those notices of default on all parties as required by Nebraska law."

(ii) Application

a. Not Correct Statement of Law or Warranted by Evidence

First, we note that the requested instructions stated that FNBNP's refusal to allow the Cardenases to cure their default was a violation of the Nebraska Trust Deeds Act (the Act). But the Cardenases' assignment of error and brief argue that this also violated the terms of the deeds of trust. However, because the Cardenases did not request a jury instruction about a violation of the terms of the trust deed, we will consider this assignment of error only as it relates to the claimed violation of the Act.

The Act authorizes a trust deed to be used as a security device and provides that real property can be conveyed by trust deed to a trustee as a means to secure the performance of an obligation.[17] The Act includes detailed procedures that, in the event of a breach of the underlying obligation, permit the trust property to be sold without the involvement of any court.[18] Specifically, the Act allows a trust deed to expressly confer upon a trustee the power of sale.[19] Pursuant to this power of sale, a trustee can sell the property conveyed by a trust deed without any court's authorization or direction, though the trustee must comply with procedural requirements contained in the Act.[20] Because the Act allows the property securing an obligation to be sold without the judicial involvement that would be required to foreclose upon a mortgage, the proceedings surrounding a trustee's sale pursuant to the Act are sometimes referred to as "'nonjudicial foreclosure'" or "'trustee foreclosure.'"[21]

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[17] See *First Nat. Bank of Omaha v. Davey*, 285 Neb. 835, 830 N.W.2d 63 (2013).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 838, 830 N.W.2d at 66.

The Act includes detailed requirements that a trustee must satisfy prior to exercising the power of sale in a trust deed. A trustee must file with the county register of deeds a notice of default identifying the trust deed, stating that a breach of the obligation secured by the trust deed has occurred, setting forth the nature of the breach, and stating its election to sell the property to satisfy the obligation.[22] A notice of default with regard to property used in farming operations has additional requirements, including a 2-month period to cure the default and that the trustee provide "[a] statement of the amount of the unpaid principal which would not then be due had no default occurred."[23]

Although § 76-1006 imposes the requirement for notices of default, § 76-1012 provides the means by which a trustor may cure the default of an obligation secured by a trust deed. It states, in relevant part:

> Whenever all or a portion of the principal sum of any obligation secured by a trust deed has . . . become due or been declared due by reason of . . . a default in the payment . . . of any installment of principal . . . the trustor . . . may pay to the beneficiary . . . the entire amount then due under the terms of such trust deed and the obligation secured thereby . . . other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and thereupon all proceedings theretofore had or instituted shall be dismissed or discontinued, and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no acceleration had occurred.[24]

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[22] § 76-1006(1). See, also, *24th & Dodge Ltd. Part. v. Acceptance Ins. Co.*, 269 Neb. 31, 690 N.W.2d 769 (2005); *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003).

[23] § 76-1006(2).

[24] § 76-1012(1).

The Cardenases' requested jury instructions were not correct statements of law, because they required the Cardenases to prove only that they "were willing and able to exercise their right [to] cure the default." But § 76-1012 provides that in order to cure a default, the trustor must "pay to the beneficiary . . . the entire amount then due." Thus, a default must be cured by paying the beneficiary, i.e., by tendering payment.

A tender of payment is more than being "willing and able" to pay. It is "an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made."[25]

And even if the Cardenases' requested instructions correctly stated the law, they would not be warranted by the evidence. The Cardenases do not claim that they did, in fact, tender payment to cure the default, but only that they desired and intended to do so. But a desire is not a tender.

b. FNBNP's Notice of Default Complied With Act

The Cardenases argue that FNBNP did not allow them the right to cure based on the notices of default, which they argue showed a "firm resolve"[26] to accelerate the debt and deny them the right to cure the default by paying the amount due "other than such portion of the principal as would not then be due had no default occurred,"[27] i.e., the nonaccelerated amount due. But this argument melds together the separate provisions regarding notices of default in § 76-1006 and the right to cure in § 76-1012.

[10,11] When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language,

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[25] *Graff v. Burnett*, 226 Neb. 710, 716, 414 N.W.2d 271, 276 (1987).

[26] Brief for appellants at 29.

[27] See § 76-1012(1).

understood in context.[28] We ascertain the meaning of a statute by reading it in pari materia, in light of the broader structure of the relevant act and related statutes.[29]

Section 76-1012 provides a trustor the ability to cure a default on an obligation secured by a trust deed prior to a trustee's sale and have the trust deed reinstated. This section contemplates and references the filing of a notice of default, but does not itself require the notice of default or specify the necessary contents of a notice of default. These requirements are set forth in § 76-1006. Section 76-1012 adds no additional requirements for notices of default to those in § 76-1006.

The notices of default satisfied the requirements of § 76-1006. The first notice stated that a default had occurred, that the nature of the default was "[f]ailure to pay installment payments when due," and that FNBNP had elected to sell the property to satisfy the obligation. We have held that under § 76-1006(1), "for nonagricultural property, the notice of default need not contain information on how to cure the default."[30]

The second notice of default met the additional requirements of § 76-1006(2), which applies to property used for farming operations. It included "[a] statement of the amount of the unpaid principal which would not then be due had no default occurred."[31] Thus, the district court was correct to instruct the jury that the notices of default were made in accordance with the Act.

c. Conclusion

In sum, the district court did not err by refusing to give the Cardenases' requested jury instructions on the right to cure. The right to cure in § 76-1012 does not add additional

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[28] *Robinson v. Houston*, 298 Neb. 746, 905 N.W.2d 636 (2018); *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017).

[29] *Kozal v. Nebraska Liquor Control Comm., supra* note 28.

[30] *Gilroy v. Ryberg, supra* note 22, 266 Neb. at 629, 667 N.W.2d at 556.

[31] § 76-1006(2).

requirements to the requirements for notices of default in § 76-1006. And the requested instructions were not correct statements of law, because they required only that the Cardenases be "willing and able" to cure, not that they actually tender payment. The instructions were not warranted by the evidence, because it is undisputed that the Cardenases did not tender payment to cure the default. This assignment of error lacks merit.

(c) Fair Market Value

The Cardenases argue that the district court erred by not instructing the jury to determine the fair market value of the property sold at the foreclosure sales. The court did not err, because the requested instruction was not a correct statement of law and because the court did instruct the jury to determine fair market value as part of its calculation of damages, although not in the particular language the Cardenases requested.

(i) Additional Facts

At trial, the Cardenases requested that the district court give the following jury instruction on the affirmative defense that FNBNP purchased the property at the trustee's sales at below fair market value:

> The [Cardenases] affirmatively allege that [FNBNP] has failed to ascertain and bid the Fair Market Value of the subject real estate at one or both of the Trustee's Sales and has waived its right to, and is further barred from claiming a deficiency, if any, as a result of its actions in purchasing the properties at one or both of the Trustee's Sales at a value below the Fair Market Value.
>
> In connection with this affirmative defense, the [Cardenases] have the burden of proving, by the greater weight of the evidence, the following:
>
> 1. That [FNBNP's] bid and purchase of the properties at the Trustee's Sale held on May 28, 2013 was at a value below their Fair Market Value; or

> 2. That [FNBNP's] bid and purchase of the properties at the Trustee's Sale held on September 9, 2013 was at a value below their Fair Market Value.
>
> If [the Cardenases] have met this burden of proof, then [FNBNP] is barred from recovery of any alleged damages on its deficiency action and your verdict must be for [the Cardenases].

However, the court did give the following jury instruction on the issue of damages:

> If you return a verdict for [FNBNP], then you must determine how much money will fairly compensate [FNBNP] for its damages. [FNBNP] in [this] deficiency action under the . . . Act can recover the difference between the total indebtedness with interest and the costs and expenses of sale, including trustee's fees, and the greater of the sale price or *the fair market value of the property as of the date of sale*.

(Emphasis supplied.) The court also gave a jury instruction defining the term "fair market value."

(ii) Application

The content of the court's instruction was driven by § 76-1013. It provides a mechanism for creditors to recover a deficiency judgment for amounts still due and owing after a trustee's sale. Section 76-1013 states:

> Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court shall not render judgment for more than the amount by which the amount of the indebtedness with interest and the costs and expenses of sale, including trustee's fees, exceeds the fair market value of the property or interest therein sold as of the date of the sale . . . .

We find no error regarding refusal of the requested instruction, for three reasons.

First, the requested jury instruction was not a correct statement of law. It stated that if the Cardenases proved that FNBNP bid below fair market value, the bank would be "barred from

recovery of any alleged damages on its deficiency action." But the proposition that selling property at a trustee's sale for below fair market value is an absolute bar to recovery in a deficiency action has no basis in § 76-1013. Rather, a below fair market value sale would reduce the amount the creditor could recover in a deficiency action. Depending upon the mathematics of the transaction, a below market sale would not necessarily be a total bar to a recovery of a deficiency.

Second, the instructions given included the substance of the requested instruction. The district court instructed the jury to determine the fair market value of the property. The court instructed the jury that FNBNP could recover "the difference between the total indebtedness with interest and the costs and expenses of sale, including trustee's fees, and the greater of the sale price or the fair market value of the property as of the date of sale." This language tracks the language of § 76-1013. Thus, the substance of the Cardenases' proposed instruction, or at least the portion that was not an incorrect statement of law, was contained in the instructions actually given.

[12] Finally, the general verdict rule applies here. 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.[32] By rendering a verdict for FNBNP in the amount it claimed it was still owed, $171,162.66, the jury necessarily determined that the properties sold at or above fair market value. The district court did not err in refusing to give the Cardenases' requested jury instruction on fair market value.

VI. CONCLUSION

Because we find no merit to any of the Cardenases' assignments of error, we affirm the judgment of the district court.

Affirmed.

Wright and Kelch, JJ., not participating.

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[32] *Heckman v. Burlington Northern Santa Fe Ry. Co.*, 286 Neb. 453, 837 N.W.2d 532 (2013).

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

In re Application of City of Neligh, Nebraska. City of Neligh, Nebraska, appellee, v. Elkhorn Rural Public Power District, appellant.

909 N.W.2d 73

Filed March 30, 2018. No. S-17-433.

1. **Nebraska Power Review Board: Appeal and Error.** A decision of the Nebraska Power Review Board will be affirmed if it is supported by the evidence and is not arbitrary, capricious, unreasonable, or otherwise illegal.
2. **Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made below.

Appeal from the Power Review Board. Reversed and remanded for further proceedings.

David A. Jarecke and Ellen C. Kreifels, of Blankenau, Wilmoth & Jarecke, L.L.P., for appellant.

David C. Levy and Krista M. Eckhoff, of Baird Holm, L.L.P., and Joseph McNally, of McNally Law Office, for appellee.

Heavican, C.J., Cassel, Stacy, and Funke, JJ., and Riedmann and Arterburn, Judges.

Heavican, C.J.

INTRODUCTION

The City of Neligh, Nebraska (Neligh), filed an application with the Nebraska Power Review Board (Board) seeking to

transfer two newly annexed territories from the Elkhorn Rural Public Power District (ERPPD) to Neligh's electrical service area and to have the Board determine the total economic impact of the transfer to the ERPPD. The Board transferred the service and assessed the economic impact at $490,445.90. ERPPD appeals. We reverse the decision and remand the cause for further proceedings.

BACKGROUND

Relevant Statutes.

Neb. Rev. Stat. § 70-1008(2) (Reissue 2009) provides:

> A municipally owned electric system, serving such municipality at retail, shall have the right, upon application to and approval by the board, to serve newly annexed areas of such municipality. Electric distribution facilities and customers of another supplier in such newly acquired certified service area may be acquired, in accordance with the procedure and criteria set forth in section 70-1010, within a period of one year and payment shall be made in respect to the value of any such facilities' customers or certified service area being transferred. The rights of a municipality to acquire such distribution facilities and customers within such newly annexed area shall be waived unless such acquisition and payment are made within one year of the date of annexation. If an application is made to the board within one year of the date of annexation for a determination of total economic impact as provided in section 70-1010, such right shall not be waived unless the municipality fails to make payment of the price determined by the board within one year of a final decision establishing such price. Notwithstanding other provisions of this section, the parties may extend the time for acquisition and payment by mutual written agreement.

Neb. Rev. Stat. § 70-1010 (Reissue 2009) further provides:

> (1) The board shall have authority upon application by a supplier at any time to modify service areas or

customers to be served as previously established. The same procedures as to notice, hearing, and decision shall be followed as in the case of an original application. Suppliers shall have authority by agreement to change service areas or customers to be served with the approval of the board. This section shall not apply to agreements referred to in subsection (2) of section 70-1002.

(2) In the event of a proposed transfer of customers and facilities from one supplier to another in accordance with this section or section 70-1008 or 70-1009, the parties shall attempt to agree upon the value of the certified service area and distribution facilities and customers being transferred. If the parties cannot agree upon the value, then the board shall determine the total economic impact on the selling supplier and establish the price accordingly based on, but not limited to, the following guidelines: The supplier acquiring the certified service area, distribution facilities, and customers shall purchase the electric distribution facilities of the supplier located within the affected area, together with the supplier's rights to serve within such area, for cash consideration which shall consist of (a) the current reproduction cost if the facilities being acquired were new, less depreciation computed on a straight-line basis at three percent per year not to exceed seventy percent, plus (b) an amount equal to the nonbetterment cost of constructing any facilities necessary to reintegrate the system of the supplier outside the area being transferred after detaching the portion to be sold, plus (c) an amount equal to two and one-half times the annual revenue received from power sales to existing customers of electric power within the area being transferred, except that for large commercial or industrial customers with peak demands of three hundred kilowatts or greater during the twelve months immediately preceding the date of filing with the board, the multiple shall be five times the net revenue, defined as gross power sales,

> less costs of wholesale power including facilities rental charges, received from power sales to large commercial or industrial customers with measured demand of three hundred kilowatts or greater during the twelve months immediately preceding the filing with the board for service area modification. After the board has determined the price in accordance with such guidelines, the acquiring supplier may acquire such distribution facilities and customers by payment of the established price within one year of the final order.

Factual and Procedural Background.

On July 14, 2015, Neligh passed ordinances Nos. 578 and 579, annexing areas to the north and the south of Neligh. On July 13, 2016, Neligh filed an application under § 70-1008 to transfer these territories from the ERPPD, which had provided electrical service to those areas, to an electrical service area operated by Neligh. As part of that application, Neligh sought to have the Board assess the economic impact of the transfer to ERPPD.

A hearing was held on January 27, 2017, to determine the total economic impact of the proposed transfer and the compensation owed to ERPPD by Neligh under § 70-1010. The parties stipulated that Neligh owed $490,445.90 for the loss of the service area, customers, and facilities inside the south annexation, as well as a partial amount owed for reintegration costs. As relevant to this appeal, the issue presented at this hearing was what compensation was due to ERPPD under § 70-1010(2)(b) for remaining reintegration costs in the south annexation area.

The substation in question is substation 71-18, located outside the south annexation area but near the southeast edge of the annexed territory. The substation was built in or around 1998. The record establishes that at the time of its construction, the substation was not built at the center point of its load. Such substations usually have a life cycle of about 50 years. The

substation serves approximately 4 megawatts of load over three circuits. One of these three circuits is used primarily to serve the load in the south annexation area. Overall, the substation will lose approximately 26 percent of its current load following the annexation.

Given this loss, ERPPD investigated options for the substation following the annexation. The option ERPPD felt was most cost efficient and feasible was to move the substation 2½ miles to the northeast. Such a move would allow ERPPD to best serve its remaining load following the annexation, but also had the potential to increase the capacity of the substation. ERPPD calculated that the total cost of moving the substation would be approximately $935,000 and that $337,567 was solely attributable to the Neligh annexation.

The Board found in Neligh's favor, concluding that ERPPD had not built the substation in the center of its load and that to require a move partially paid for by Neligh would be a betterment to which ERPPD was not entitled. The Board denied ERPPD's motion for reconsideration. ERPPD appeals.

ASSIGNMENTS OF ERROR

ERRPD assigns three assignments of error that can be restated as one: The Board erred in failing to award compensation for reintegration costs under § 70-1010(2)(b) to ERPPD for the lost substation circuit.

STANDARD OF REVIEW

[1,2] A decision of the Board will be affirmed if it is supported by the evidence and is not arbitrary, capricious, unreasonable, or otherwise illegal.[1] The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made below.[2]

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[1] *In re Application of City of North Platte*, 257 Neb. 551, 599 N.W.2d 218 (1999).

[2] *Id.*

ANALYSIS

This appeal presents the question of what compensation is owed to ERPPD for reintegration costs under § 70-1010(2)(b).

On appeal, ERPPD observes it is largely undisputed that one of the three circuits of the substation at issue carries no load as a result of the annexation and that the substation has lost 26 percent of its total load due to the nonuse of this circuit. As such, ERPPD contends that moving the substation nearer to the center of its load is the most efficient solution to the loss of capacity and is a direct result of the annexation. ERPPD seeks reimbursement for a portion of this cost as reintegration costs under § 70-1010(2)(b).

Neligh, however, argues that this loss of load was already accounted for via the payment Neligh stipulated to under § 70-1010(2)(c). Neligh also notes that prior to the annexation, the substation was not at the load center. Because the substation was not at the load center and would allow ERPPD to more efficiently serve its existing customers as well as offer the potential for new customers, Neligh contends that such a move is a betterment not permitted under § 70-1010(2)(b). The Board concurred with Neligh.

Under § 70-1010(2), Neligh, as the "supplier acquiring the certified service area, distribution facilities, and customers," is statutorily required to "purchase the electric distribution facilities of the supplier located within the affected area, together with the supplier's rights to serve within such area." This payment should include

> (a) the current reproduction cost if the facilities being acquired were new, less depreciation computed on a straight-line basis at three percent per year not to exceed seventy percent, plus (b) an amount equal to the nonbetterment cost of constructing any facilities necessary to reintegrate the system of the supplier outside the area being transferred after detaching the portion to be sold, plus (c) an amount equal to two and one-half times the annual revenue received from power sales to existing

> customers of electric power within the area being transferred . . . .[3]

The parties agree as to the consideration due for § 70-1010(2)(a) and (c). At issue are certain "reintegrat[ion]" costs under § 70-1010(2)(b).

"Reintegration" is not explicitly defined in statute or by Nebraska case law. As such, we turn to other jurisdictions for guidance. In *City of Cookeville v. Upper Cumberland Elec.*,[4] the Sixth Circuit, applying Tennessee statutes nearly identical to Nebraska's statutes, noted that the dictionary definition of "'reintegrate'" was "'to restore to unity after disintegration.'" The court observed:

> The structure of [subsection (a)(2) of the relevant statute] suggests that the reintegration costs are those necessary to place the system in the same state of integration that it was in prior to the condemnation. [Subsection (a)(2)(A) of the statute] provides for replacement costs for any facilities acquired by the municipality whereas [subsection (a)(2)(B)] then provides for the cost of constructing "necessary facilities to reintegrate the system of the cooperative." This scheme suggests that the reintegration costs are those necessary to reconnect the replaced facilities into the cooperative's existing electrical system. To bring the system back to "unity" would involve placing the system in as integrated a condition as existed prior to the annexation.[5]

ERPPD presented the Board with multiple options for allowing it to restore unity to its system following the south annexation: (1) upgrading the line to extend the reach of the substation to new customers, (2) moving the substation to the exact load center, or (3) moving the substation 2½ miles closer to the load center. In addition, the Board heard testimony on

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[3] § 70-1010(2).

[4] *City of Cookeville v. Upper Cumberland Elec.*, 484 F.3d 380, 392 (6th Cir. 2007).

[5] *Id.*

a fourth option: reducing the capacity of the substation by replacing its existing transformers with smaller ones. ERPPD's expert testified that ERPPD's preferred method was to move the substation 2½ miles closer to the load center. ERPPD sought a portion of the costs of this move as reintegration costs under § 70-1010(2)(b).

The Board rejected ERPPD's proposed substation move, instead agreed with Neligh that "any effect on the total economic impact [on ERPPD was] captured by the compensation [Neligh] will pay to [ERPPD] for the loss of the customers and facilities located inside the south annexation" area, and accordingly rejected ERPPD's claim for reintegration costs under § 70-1010(2)(b). The Board noted that the relocation of the substation would be a betterment to ERPPD.

This court will affirm decisions of the Board unless they are unsupported by the evidence or are arbitrary, capricious, unreasonable, or otherwise illegal. We conclude that in this case, the Board's actions were arbitrary, capricious, and unreasonable.

It is undisputed that ERPPD's loss of load came from customers in the south annexed area. Indeed, the parties have stipulated to the compensation due for lost revenue. But reintegration costs are based on the amount needed to compensate ERPPD for the impact to its physical asset—the substation—and are not related to the loss of revenue or loss of facilities, which are provided for separately under § 70-1010(2).

We held as much in *In re Application of City of Lexington*.[6] In that case, we affirmed the Board's decision, made on similar facts, that compensation was owed for surplus property—a transmission line substation and feeder circuits—lying outside of an annexed area. We agreed with the Board's conclusion that this cost was not subsumed in the compensation provided for under § 70-1010(2)(c) and was instead distinct from that loss of revenue.

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[6] *In re Application of City of Lexington*, 244 Neb. 62, 504 N.W.2d 532 (1993).

Section 70-1010(2) clearly contemplates compensation for loss of revenue, facilities, and impact to physical assets. ERPPD was entitled to have its system "'restore[d] to unity'" following the south annexation.[7] By conflating the revenue due for the load under § 70-1010(2)(c) with the reintegration costs ERPPD was entitled to under § 70-1010(2)(b), and despite our prior holding in *In re Application of City of Lexington* suggesting that the two types of compensation are distinct, the Board failed to provide compensation for ERPPD's reintegration costs and acted in an arbitrary, capricious, and unreasonable manner.

Moreover, the Board also acted in an arbitrary, capricious, and unreasonable manner when it focused its analysis solely on the preferred route of moving the substation 2½ miles to the northeast without also considering the alternative proposals presented or otherwise determining Neligh's liability for the undisputed injury caused to ERPPD's system by the south annexation. The Board abdicated in part its statutory duty under § 70-1010(2) to "determine the total economic impact on the selling supplier and establish the price accordingly based on, but not limited to, the . . . guidelines" set forth in § 70-1010(2)(a), (b), and (c).

There is merit to ERPPD's argument on appeal. We reverse the decision of the Board and remand the cause for further proceedings.

CONCLUSION

The decision of the Board is reversed, and the cause is remanded for further proceedings.

Reversed and remanded for
further proceedings.

Wright, Miller-Lerman, and Kelch, JJ., not participating.

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[7] See *City of Cookeville v. Upper Cumberland Elec., supra* note 4, 484 F.3d at 392.

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

Mark Alan Carlson, appellant, v. Karen Sue Carlson, appellee.

909 N.W.2d 351

Filed April 6, 2018. No. S-17-064.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Divorce: Judgments: Appeal and Error.** The meaning of a divorce decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
4. **Divorce: Judgments: Property Settlement Agreements: Contracts.** Once a property settlement agreement has been incorporated into a dissolution decree, the contractual character of the agreement is subsumed into the court-ordered judgment. At that point, the court and the parties are no longer dealing with a mere contract between the parties.
5. **Divorce: Judgments: Property Settlement Agreements: Final Orders.** A decree is a judgment, and once a decree for dissolution becomes final, its meaning, including the settlement agreement incorporated therein, is determined as a matter of law from the four corners of the decree itself.
6. **Judgments: Appeal and Error.** Whether a judgment is ambiguous is a question of law for which the appellate court has an obligation to reach a conclusion independent from the lower court's conclusion.
7. **Judgments: Words and Phrases.** Ambiguity in a judgment exists when a word, phrase, or provision therein has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Judgments: Parties.** The fact that the parties advance differing interpretations does not, by itself, compel the conclusion that a judgment is ambiguous.

9. **Divorce: Judgments: Appeal and Error.** Even if ambiguity exists in a dissolution decree, its meaning nevertheless presents a question of law that an appellate court reviews de novo.
10. **Courts: Child Support: Minors.** As a general rule, absent agreement of the parties, a Nebraska district court cannot order a party to pay child support beyond the age of majority.
11. **Courts: Divorce: Jurisdiction: Property Settlement Agreements: Child Support: Minors.** In the exercise of its broad jurisdiction over marriage dissolutions, a district court retains jurisdiction to enforce all the terms of approved property settlement agreements, including agreements made to support children of the marriage past the age of majority.
12. **Courts: Property Settlement Agreements: Child Support: Minors.** If the parties voluntarily include a provision for post-majority child support in an approved property settlement agreement, a district court has the authority to enforce that provision.
13. **Modification of Decree: Property Settlement Agreements: Child Support: Minors.** A provision for post-majority child support in an approved property settlement agreement can be modified either as agreed to by the parties in the agreement or according to the general standard for modifying an approved property settlement agreement under Nebraska law.
14. **Divorce: Motions to Vacate: Modification of Decree: Property Settlement Agreements.** Where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, its provisions as to real and personal property and maintenance will not thereafter be vacated or modified in the absence of fraud or gross inequity.
15. **Divorce: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.

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

Adam E. Astley and Kathryn D. Putnam, of Astley Putnam, P.C., L.L.O., for appellant.

Benjamin M. Belmont and Wm. Oliver Jenkins, of Brodkey, Peebles, Belmont & Line, L.L.P., for appellee.

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

Stacy, J.

This appeal arises from a dispute over the meaning of provisions in a divorce decree and incorporated property settlement agreement (PSA) regarding payment of post-majority child support. The district court construed the decree and incorporated PSA to require the father to pay post-majority child support if certain conditions were met, and it denied the father's request to modify such support. Finding no error, we affirm.

FACTS

Mark Alan Carlson and Karen Sue Carlson married in 1994 and divorced in March 2008. Three children were born during the marriage. At the time of the divorce, the children were 6, 8, and 10. Mark and Karen are both physicians, but Karen did not actively practice medicine during most of their marriage.

The parties represented themselves during their divorce. Through mediation, they reached an agreement on the division of their assets and debts, the custody and support of their children, and the payment of alimony. The mediator drafted the parties' PSA and the dissolution decree. The record on appeal does not include the hearing at which the parties proved up their PSA and asked the court to approve it, but it does contain the signed and notarized PSA, as well as the consent decree entered by the court.

As relevant here, the parties agreed they would have joint legal custody of the children and Karen would have physical custody. Mark agreed to pay both child support and alimony. The decree addressed child support as follows:

> [Mark] shall pay . . . child support . . . commenc[ing] on the first day of the first month following the entry of the decree and shall continue to [pay] each month thereafter, until the child reaches the age of majority under Nebraska law, becomes emancipated, becomes

self-supporting, marries or dies, or until further order of the court.

The decree also recited that the parties had negotiated a PSA which the court had examined and "found to be fair and reasonable and conscionable." According to the decree, a signed copy of the PSA had been filed with the clerk and the agreement was "incorporated [in the decree] with the same force and effect as if set forth in this decree in its entirety." The decree further recited that the "parties' [PSA] shall be enforced by all remedies available for the enforcement of a judgment, including contempt proceedings." No party appealed from the entry of the decree.

Incorporated PSA

Section 3 of the PSA is titled "Child Support and Expenses, Educational Expenses, Health Insurance and Care Expenses and Life Insurance." It provides in relevant part:

> 3.01 Terms and Definitions.
>
> . . . .
>
> (2) Age of Majority The age of majority for most legal purposes is 19 and generally defines when child support is terminated unless the parties agree otherwise, or circumstances set by law apply.
>
> . . . .
>
> (4) Support Past Age 19: A child will not be determined to be emancipated and child support may continue past age 19 in the following circumstances:
>
> a. If a child attends college or vocational training, child support may continue until age 27 or graduation from college, trade school, or graduate school, whichever occurs first. (The child must be regularly attending college (enrolled in 12 or more credit hours of course work per semester) or a vocational school. (However, the parties intend to allow some flexibility in the child's college attendance, therefore a child may have up to two (2) semester[s] of nonattendance at school, not

> including summer vacations, without being understood to be emancipated.[)]
>
> . . . .
>
> 3.02 Child Support
>
> (1) MARK shall pay to KAREN the amount of $2,400.00 per month for the support of three children, $2,089.00 per month when two children remain eligible for support and $1,468.00 per month when only one child is eligible for child support. Child support will be payable until each child reaches majority, becomes emancipated, marries or dies or until further order of the court as provided by law.

For the sake of completeness, we note the PSA contains a definition of "emancipation" which does not expressly reference post-majority child support. Neither party suggests that provision is determinative of the issues presented, so we do not address it. We also note the PSA addressed payment of post-majority child support if a child becomes mentally or physically incapacitated, but the parties did not seek a declaratory judgment regarding the interpretation of such provisions so we express no opinion thereon.

Complaint to Modify

In March 2010, Mark filed a complaint to modify the decree as it regarded post-majority child support, alimony, health care expenses, and college expenses. He claimed, inter alia, that the court lacked jurisdiction to order child support after a child attained the age of majority, and he claimed he should not be required to pay both post-majority child support and college expenses for the same child.

In January 2011, the parties stipulated to an order modifying the decree to, among other things, reduce Mark's alimony payment and increase his monthly child support obligation. The stipulated order reflected that Mark had withdrawn "without prejudice" his request for an order terminating his obligation to pay post-majority child support. And the stipulated order

expressly provided that all provisions of the decree and PSA "not specifically altered by this Order shall remain in full force and effect."

Contempt Proceedings

In January 2015, the parties' oldest child turned 19. She was a full-time college student at the time. Mark stopped paying child support for this child, and Karen filed an application to show cause why Mark should not be held in contempt of court for willfully failing to pay post-majority child support.

At the show cause hearing, both Mark and Karen were represented by counsel. After a meeting in chambers between the court and counsel, Karen withdrew her contempt application and instead filed the complaint for declaratory judgment which is at issue in this appeal.

Complaint and Counterclaim for Declaratory Judgment

Karen's complaint sought a declaration of the rights, duties, and obligations of the parties under the dissolution decree as it regarded post-majority child support. Specifically, she sought a declaration that under the PSA incorporated into the decree, Mark had an obligation to continue paying child support past the age of majority for a child attending college.

In a counterclaim, Mark also sought a declaratory judgment regarding post-majority child support. As relevant to the issues on appeal, Mark sought a declaration that the provisions regarding post-majority child support were unenforceable or, in the alternative, that any obligation to pay post-majority child support was "completely discretionary on the part of the person paying it." Alternatively, Mark sought modification of the decree to relieve him of any post-majority child support obligation, alleging there had been a material change in circumstances.

Both parties moved for summary judgment on their requests for declaratory judgment. The trial court denied both motions and set the matter for trial.

Trial

By the time of trial, two of the parties' children had reached the age of majority, and each was a full-time college student. At trial, the parties were allowed to present extrinsic evidence as to the meaning of the PSA incorporated into the decree. Neither party had a clear recollection of how the language regarding post-majority child support came to be in the PSA. According to Karen, the mediator brought up the issue of supporting the children through college, and Mark had no disagreement, so the provisions regarding post-majority support were included in the PSA with "no discussion." Mark testified he intended the agreement to be flexible and "leave[] the door open" to paying post-majority child support if Karen was unable to return to employment as a physician after the divorce. The attorney who mediated the property settlement agreement invoked the statutory privilege[1] and refused to testify about mediation communications.

Ultimately, the district court concluded that the decree and incorporated PSA obligated Mark to pay post-majority child support for any child regularly attending college, trade school, or graduate school, until the child attained the age of 27 or graduated, whichever first occurred. Regarding Mark's complaint to modify, the court noted the agreement to pay post-majority child support was contained in the parties' PSA which had been approved by the court and incorporated into the decree. It thus reasoned the approved PSA could not be vacated or modified in the absence of fraud or gross inequity. The court found Mark had neither alleged nor offered evidence of fraud or gross inequity, and it denied his complaint to modify.

The court entered an order granting Karen's request for declaratory judgment, denying Mark's counterclaims, and awarding Karen attorney fees and costs in the amount of $3,500. Mark filed this timely appeal, which we removed to

[1] See Neb. Rev. Stat. § 25-2933 (Reissue 2016).

our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state.[2]

ASSIGNMENTS OF ERROR

Mark assigns that the district court erred in (1) finding the decree was ambiguous, (2) interpreting the decree and property settlement to require post-majority child support, (3) granting declaratory relief to Karen, (4) failing to consider his request for modification of the post-majority support obligation, and (5) awarding $3,500 in attorney fees to Karen.

STANDARD OF REVIEW

[1,2] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.[3] The meaning of a divorce decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below.[4]

[3] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.[5]

ANALYSIS

Before addressing the assignments of error we address two threshold issues.

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[2] Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

[3] *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013); *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011).

[4] *Rice v. Webb*, 287 Neb. 712, 844 N.W.2d 290 (2014).

[5] *Board of Trustees v. City of Omaha*, 289 Neb. 993, 858 N.W.2d 186 (2015); *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

Use of Declaratory Judgment to Construe Decree

Both parties sought a declaratory judgment interpreting their rights and obligations under the consent decree and incorporated PSA. Our case law has generally permitted the use of declaratory judgment actions to resolve genuine disputes over the meaning of language in a dissolution decree.[6] But parties have also resolved similar issues via complaints to modify,[7] contempt proceedings,[8] motions to enforce the judgment,[9] and motions to determine amounts due under the decree.[10] Without endorsing any particular procedure, we observe the general rule that an action for declaratory judgment does not lie where another equally serviceable remedy is available.[11] In this case, no party has challenged the availability of declaratory relief or alleged that a more serviceable remedy is available. We therefore assume, without deciding, that it was proper for the district court to entertain the parties' requests for declaratory judgment.

Parties' Subjective Intent Is Irrelevant

In addressing the parties' dispute over the meaning of the decree and incorporated PSA, the district court and the parties

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[6] *Buhrmann v. Buhrmann*, 231 Neb. 831, 835, 438 N.W.2d 481, 484 (1989) ("[w]here there is a genuine controversy between the parties as to the meaning of language in a decree of dissolution, and the appeal period has passed, a proper method to resolve the controversy is by a separate action for declaratory relief"). See, *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008); *Hohertz v. Estate of Hohertz*, 19 Neb. App. 110, 802 N.W.2d 141 (2011).

[7] *Boyle v. Boyle*, 12 Neb. App. 681, 684 N.W.2d 49 (2004).

[8] *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008).

[9] *Rice v. Webb, supra* note 4.

[10] *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

[11] *Mansuetta v. Mansuetta*, 295 Neb. 667, 890 N.W.2d 485 (2017); *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002).

relied, in part, on traditional contract principles. For example, the court found the PSA was ambiguous regarding the payment of post-majority child support, and it thus allowed the admission of extrinsic evidence of the parties' intent. As a general matter, if a contract is ambiguous, the meaning of the contract is a question of fact and a court may consider extrinsic evidence to determine the meaning of the contract.[12] But in the present case, we are not dealing with a contract; we are dealing with a judgment.

The intentions of the parties regarding the PSA may have been relevant when the dissolution court was examining the agreement to determine whether it was fair and reasonable, not unconscionable, and in the children's best interests. But once the PSA was approved by the court and incorporated into the decree, it became a judgment of the court.[13] Thereafter, the parties' subjective interpretations and intentions were irrelevant to the court's declaration of the meaning of the decree.[14]

[4] In both *Ryder v. Ryder*[15] and *Rice v. Webb*,[16] this court specifically disapproved of the application of contract principles to a PSA that had been incorporated into a dissolution decree. In *Ryder*, we held:

> Once a property settlement agreement has been incorporated into a dissolution decree, the contractual character of the agreement is subsumed into the court-ordered judgment. "'At that point the court and the parties are no longer dealing with a mere contract between the parties.'"

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[12] *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 860 N.W.2d 391 (2015).

[13] See, *Ryder v. Ryder*, 290 Neb. 648, 861 N.W.2d 449 (2015); *Rice v. Webb, supra* note 4.

[14] See *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986) (once decree becomes final, what parties thought it meant is irrelevant; meaning of decree is question of law determined from four corners of decree).

[15] *Ryder v. Ryder, supra* note 13.

[16] *Rice v. Webb, supra* note 4.

> . . . [W]hen a decree is ambiguous, "the parties must bring some form of action which raises the issue and thereby requires the court before whom the matter is then pending to resolve the issue as a matter of law in light of the evidence and meaning of the decree as it appears."[17]

Thus, in the present case, we are considering the meaning of a judgment rather than a contract.[18]

[5] A decree is a judgment, and once a decree for dissolution becomes final, its meaning, including the settlement agreement incorporated therein, is determined as a matter of law from the four corners of the decree itself.[19] With this standard in mind, we address the assignments of error.

No Error in Finding Decree Ambiguous

Mark assigns error to the trial court's finding that the terms of the decree and incorporated PSA were ambiguous. He concedes the documents are poorly drafted but suggests that "after reviewing the document five or six times, a single meaning becomes clear."[20] Mark suggests that "when read in a vacuum [the language of the decree] is susceptible to only one meaning, which is that child support ends when each child reaches the age of majority under Nebraska law, becomes emancipated, becomes self-supporting, marries or dies, or until further order of the court."[21] We understand this argument to suggest that if the decree is construed without reference to the language of the incorporated PSA, there is no ambiguity. But we reject the invitation to construe the decree without considering the terms of the PSA that was expressly incorporated into the decree at the parties' request.

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[17] *Ryder v. Ryder, supra* note 13, 290 Neb. at 656-57, 861 N.W.2d at 456.

[18] See *Rice v. Webb, supra* note 4.

[19] *Id.*

[20] Brief for appellant at 17.

[21] *Id.* at 16.

[6,7] Whether a judgment is ambiguous is a question of law for which the appellate court has an obligation to reach a conclusion independent from the lower court's conclusion.[22] Ambiguity in a judgment exists when a word, phrase, or provision therein has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[23]

[8] We agree with the district court that the decree and incorporated PSA are ambiguous regarding the parties' rights and obligations concerning payment of post-majority child support. The fact that the parties advance differing interpretations does not, by itself, compel the conclusion that the PSA is ambiguous.[24] But we agree that the conflicting interpretations advanced by Mark and Karen illustrate an ambiguity in the PSA which necessitated construction.

As it regards the payment of post-majority child support, the operative language in the PSA provides:

> A child will not be determined to be emancipated and child support may continue past age 19 in the following circumstances:
>
> a. If a child attends college or vocational training, child support may continue until age 27 or graduation from college, trade school, or graduate school, whichever occurs first.

Mark argues the phrase "may continue" indicates that payment of post-majority support is discretionary and allows him the flexibility to decide whether such support is necessary under the circumstances. Karen argues the language creates an affirmative obligation to pay post-majority child support so long as the conditions of college attendance are satisfied. Although we ultimately reject Mark's interpretation, we agree the operative language of the PSA is susceptible to at least two reasonable but conflicting interpretations, and we thus

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[22] *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015).

[23] See *Rice v. Webb, supra* note 4.

[24] See *Strunk v. Chromy-Strunk, supra* note 10.

agree with the district court that it is ambiguous.[25] Mark's first assignment has no merit.

[9] We also reject as incorrect the suggestion in Mark's briefing that the presence or absence of ambiguity in a decree affects our standard of review. This court has long held that the meaning of a dissolution decree presents a question of law,[26] and we recently clarified that even if ambiguity exists in a dissolution decree, its meaning nevertheless presents a question of law that we review de novo.[27]

No Error in Construing Decree

Mark's main contention on appeal is that the district court erred in construing the decree and incorporated PSA to require him to pay post-majority child support under certain circumstances. Mark contends the court should have interpreted the decree to provide that his obligation to pay child support ends when the children reach the age of 19 and that any continued payment of support post-majority is entirely discretionary. The district court rejected this construction. After our independent review of the four corners of the decree and incorporated PSA,[28] we do too.

The parties' primary disagreement relates to the proper interpretation of the phrase "may continue" as used in the operative provision of the PSA:

> (4) Support Past Age 19: A child will not be determined to be emancipated and child support may continue past age 19 in the following circumstances:
>
> a. If a child attends college or vocational training, child support may continue until age 27 or graduation from college, trade school, or graduate school, whichever occurs first. (The child must be regularly attending

[25] See *Rice v. Webb, supra* note 4.

[26] See *Strunk v. Chromy-Strunk, supra* note 10.

[27] *Ryder v. Ryder, supra* note 13.

[28] See *id*.

> college (enrolled in 12 or more credit hours of course work per semester) or a vocational school. (However, the parties intend to allow some flexibility in the child's college attendance, therefore a child may have up to two (2) semester[s] of nonattendance at school, not including summer vacations, without being understood to be emancipated.[)]

Mark suggests the term "may" is permissive and affords him the discretion to pay post-majority child support if he thinks it is needed. We reject this construction not only because it invites construing the judgment to be conditional upon Mark's decision to pay,[29] but because there is no support for such a construction within the four corners of the judgment.

Instead, considering the entirety of the decree and incorporated PSA, we find the parties agreed to an affirmative obligation to pay post-majority child support so long as the agreed-upon conditions precedent are satisfied. Those conditions include that the child be regularly attending college, trade school, or graduate school and not have attained the age of 27. This construction is compelled by several provisions within the judgment.

Section 3.01(2) of the PSA recognizes that child support generally terminates when the child turns 19 "unless the parties agree otherwise." Section 3.01(4) then reflects the parties' agreement that the children "will not be determined to be emancipated and child support may continue past the age of 19" under specific enumerated circumstances. Within this framework, the phrase "child support may continue past age 19" in § 3.01(4) is not permissive or discretionary; rather, it reflects the prior acknowledgment that ordinarily child support terminates at age 19.

That the payment of post-majority support is not discretionary is further supported by language in the PSA acknowledging the possibility that payment of post-majority child

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[29] See *Strunk v. Chromy-Strunk, supra* note 10.

support will overlap with the separate obligation to contribute to college expenses under the agreement. In that regard, the PSA provides:

> 3.03 Educational Expenses: Trade School or College Education Costs and Expenses
>
> (1) The parties agree that should any of the children desire to attend college (trade or vocational school after high school) and be accepted to a school, the parties shall be responsible to provide for the costs and expenses of that education in an amount no more than the cost of an education at the primary state college or university (University of Nebraska-Lincoln) in the state where the children may reside at the time the child has been accepted, regardless of where he/she may attend school or college.
>
> (2) This Agreement contemplates a four-year undergraduate college education that may extend beyond the age of majority as long as the child is in good standing as a student, but in no event beyond the child's 23rd birthday.
>
> . . . .
>
> (5) The parties understand that amounts paid for the college educations of the children still may not fully cover other child care expenses including car insurance, clothing, recreation, or time spent at home during vacations. Alternatively, the amounts being paid in child support by one party to the other party may duplicate amounts being paid for college room and board. The parties agree to negotiate, or if necessary, mediate the balance between payment of child support and college costs and expenses if and when a child attends college.
>
> (6) These provisions are intended to set out the minimum amounts obliged to be paid by a parent to assure that the children obtain further training or an undergraduate college education, should the children be capable and desire to so do. These provisions are not intended to

> limit the additional contribution either parent may voluntarily make toward a child's undergraduate or graduate school education.

These provisions not only acknowledge the potential for duplication between payment of post-majority child support and payment of college expenses, but also express the intent of the parties to "set out the minimum amounts obliged to be paid" to continue supporting a child beyond the age of majority who wishes to pursue further education.

We hold that the decree and incorporated PSA affirmatively obligate Mark to pay post-majority child support so long as the conditions set forth in § 3.01(4) of the PSA are met. We find this construction is supported by the language of the judgment, can be harmonized with the standard child support language set out in the decree, and results in a sensible construction that is consistent with the best interests of the children.

No Error in Denying Complaint to Modify

In a counterclaim, Mark sought to modify the decree based on a material change in circumstances in the event the court determined he was obligated to pay post-majority child support. The district court denied his request to modify. It reasoned that the post-majority child support was agreed to in a PSA that had been approved by the court and incorporated into the decree and as such it could be vacated or modified only upon a showing of fraud or gross inequity.[30] The court concluded Mark had failed to allege or prove fraud or gross inequity, and it denied the modification.

On appeal, Mark argues the court applied the wrong legal standard. He claims that rather than being required to show fraud or gross inequity, he should have been permitted to modify the terms of his post-majority child support upon showing a material change in circumstances. In making this argument,

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[30] See *Ryder v. Ryder, supra* note 13.

Mark relies on the statutory provisions[31] and case law[32] governing modification of statutory child support for minors.

But the present case does not involve modification of statutory child support for a minor and requires us to answer a different question: Under what circumstances can a party seek to vacate or modify an approved PSA that requires payment of post-majority child support? To answer this question, we look to our jurisprudence on post-majority child support.

[10-12] As a general rule, absent agreement of the parties, a Nebraska district court cannot order a party to pay child support beyond the age of majority.[33] In *Zetterman v. Zetterman*,[34] however, we held that a court can enforce an approved PSA voluntarily entered into by the parties which provides for post-majority child support. We held that a district court, "in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all the terms of approved property settlement agreements, including agreements made to support children of the marriage past the age of majority."[35] Thus, pursuant to *Zetterman*, if the parties voluntarily include a provision for post-majority child support in an approved PSA, a district court has the authority to enforce that provision.

We have not yet addressed whether a district court has the authority to modify such a provision and, if it does, what standard applies to the modification. The general consensus of other jurisdictions that, like Nebraska, hold that a court lacks authority to impose an obligation to pay post-majority child support but can enforce an agreement to pay such support

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[31] See Neb. Rev. Stat. § 42-364 (Reissue 2016).

[32] See, *State on behalf of B.M. v. Brian F.*, 288 Neb. 106, 846 N.W.2d 257 (2014); *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013).

[33] See *Foster v. Foster*, 266 Neb. 32, 662 N.W.2d 191 (2003).

[34] *Zetterman v. Zetterman*, 245 Neb. 255, 512 N.W.2d 622 (1994).

[35] *Id.* at 261, 512 N.W.2d at 625.

made via an approved PSA is that post-majority child support can be modified using either the standard adopted by the parties in their agreement or the standard applied in that jurisdiction to modify an approved PSA.[36] The rationale for such a rule is that the court could not have imposed the post-majority child support obligation in the first instance, so it lacks the authority to modify it as a child support obligation.[37]

[13] We agree with this rationale and find it is consistent with our holding in *Zetterman*.[38] We thus hold that a provision for post-majority child support in an approved PSA can be modified either as agreed to by the parties in the agreement[39] or according to the general standard for modifying an approved PSA under Nebraska law.

In this case, neither the decree nor the incorporated PSA contained provisions for modifying post-majority child support. Thus, Mark's request for modification of post-majority support will be governed by the general standard for modifying an approved PSA under Nebraska law.

[14] This court has consistently held that where parties to a divorce action voluntarily execute a PSA which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, its provisions as to real and personal property and maintenance will not thereafter be vacated or modified in the absence of fraud or gross inequity.[40]

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[36] See, *Van Camp v. Van Camp*, 333 Ark. 320, 969 S.W.2d 184 (1998); *Miner v. Miner*, 48 Conn. App. 409, 709 A.2d 605 (1998); *Katz v. Katz*, 258 Ga. 184, 366 S.E.2d 766 (1988); *Helms v. Schultze*, 161 N.C. App. 404, 588 S.E.2d 524 (2003).

[37] *Id.*

[38] *Zetterman v. Zetterman, supra* note 34.

[39] See, also, Neb. Rev. Stat. § 42-366(7) ("[e]xcept for terms concerning the custody or support of minor children, the decree may expressly preclude or limit modification of terms set forth in the decree").

[40] *Ryder v. Ryder, supra* note 13; *Whitesides v. Whitesides*, 290 Neb. 116, 858 N.W.2d 858 (2015).

The district court correctly applied this standard to Mark's complaint to modify the post-majority child support provision and properly found he had not met his burden of proof in that regard. Mark's arguments to the contrary are without merit.

No Error in Award of Attorney Fees

[15] The district court awarded Karen $3,500 in attorney fees and costs. Mark assigns this as error. In an action for the dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.[41] Having reviewed the parties' arguments and the record, we find no abuse of discretion in the award of attorney fees.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

Kelch, J., not participating in the decision.
Wright, J., not participating.

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[41] *Vlach v. Vlach, supra* note 3.

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

Citizens of Humanity, LLC, a Delaware limited liability company, and CM Laundry, LLC, a California limited liability company, appellants, v. Applied Underwriters Captive Risk Assurance Company, Inc., a British Virgin Islands company, appellee.

909 N.W.2d 614

Filed April 6, 2018. No. S-17-178.

1. **Arbitration and Award.** Arbitrability presents a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Final Orders: Arbitration and Award.** A court order staying an action pending arbitration is a final, appealable order under Neb. Rev. Stat. § 25-1902 (Reissue 2016), because it affects a substantial right and is made in a special proceeding.
4. **Federal Acts: Contracts: Arbitration and Award: Intent.** The purpose of the Federal Arbitration Act is to make arbitration agreements as enforceable as other contracts, but not more so.
5. **Federal Acts: Insurance: Contracts: Arbitration and Award.** The Uniform Arbitration Act, at Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2016), limits the enforceability of mandatory arbitration in an agreement concerning or relating to an insurance policy of future policyholder claims.
6. **Federal Acts: Insurance: States.** Under the McCarran-Ferguson Act, state law regulating the business of insurance reverse preempts federal laws that do not specifically govern insurance.
7. ____: ____: ____. Under the McCarran-Ferguson Act, courts consider three elements for determining when a state law controls over a federal statute: (1) The federal statute does not specifically relate to the business of insurance; (2) the state law was enacted for regulating the business of

insurance; and (3) the federal statute, if applied, operates to invalidate, impair, or supersede the state law.

8. **Federal Acts: Insurance: Contracts: Arbitration and Award.** The Federal Arbitration Act does not preempt Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2016).
9. **Courts: Statutes: Intent.** When two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.
10. **Courts: Statutes.** Courts will harmonize overlapping statutes so long as each reaches some distinct cases.
11. **Federal Acts: Contracts: Arbitration and Award.** The Federal Arbitration Act's saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses.
12. **Contracts: Public Policy.** A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
13. **Courts: Contracts: Arbitration and Award.** Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is decided by the court, not the arbitrator.
14. ____: ____: ____. Disputes about arbitrability for a court to decide include questions such as whether the parties are bound by a given arbitration clause or whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.
15. **Arbitration and Award.** Parties may delegate arbitrability to the arbitrator, because it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide.
16. **Federal Acts: Contracts: Arbitration and Award: Words and Phrases.** A delegation clause is an agreement to arbitrate a threshold issue and is simply an additional, severable, antecedent arbitration agreement the party seeking arbitration asks the court to enforce, and the Federal Arbitration Act operates on this additional arbitration agreement just as it does on any other.
17. **Federal Acts: Contracts: Arbitration and Award**. A delegation agreement, like any other arbitration agreement, is valid under the Federal Arbitration Act except by application of 9 U.S.C. § 2 (2012), which invalidates such agreements upon such grounds as exist at law or in equity for the revocation of any contract.
18. **Federal Acts: Arbitration and Award: Presumptions.** Under the Federal Arbitration Act, there is a presumption of arbitrability, and any doubts are resolved in favor of arbitration.

19. **Federal Acts: Contracts: Arbitration and Award.** Under the Federal Arbitration Act, if a delegation provision is valid, the validity of the remainder of the arbitration contract is for the arbitrator to decide.
20. ____: ____: ____. Two types of validity challenges under the Federal Arbitration Act are (1) a challenge specifically to the validity of the agreement to arbitrate and (2) a challenge to the contract as a whole, either on a ground that directly affects the entire agreement or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid. Only the first type of challenge is relevant to a court's determination of a challenged arbitration agreement. A party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.
21. **Federal Acts: Contracts: Arbitration and Award: Courts.** Under the Federal Arbitration Act, a challenge to a delegation provision must be directed specifically to the delegation before the court will assume authority over the matter.
22. **Contracts.** A court must consider a contract as a whole and, if possible, give effect to every part of the contract.
23. **Insurance: Contracts: Arbitration and Award.** A delegation of arbitrability of future policyholder claims in an agreement concerning or relating to an insurance policy is invalid under Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2016).

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Reversed and remanded for further proceedings.

Jonathan J. Papik and Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellants.

David A. Blagg and Michael K. Huffer, of Cassem, Tierney, Adams, Gotch & Douglas, and Spencer Y. Kook, of Hinshaw & Culbertson, L.L.P., for appellee.

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

Miller-Lerman, J.

I. NATURE OF CASE

Appellants, Citizens of Humanity, LLC, and CM Laundry, LLC (collectively Citizens), filed a declaratory judgment action

in the district court for Douglas County in connection with a dispute in which appellee, Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA), claimed it was owed money from Citizens. Citizens appeals from an order of the district court for Douglas County, in which the court granted AUCRA's motion to stay the court case pending arbitration, including arbitration of the issue of arbitrability. Because we conclude that the district court's ruling enforcing delegation of the issue of arbitrability was error, we reverse this ruling and remand the cause for further proceedings.

II. STATEMENT OF FACTS

Citizens of Humanity is a blue jean manufacturing company organized in Delaware with its principal place of business in California. Its subsidiary, CM Laundry, is organized and has its principal place of business in California, and its business is laundering the blue jeans manufactured by its parent company before they are sold to customers. AUCRA is organized in the British Virgin Islands and has its principal place of business in Douglas County, Nebraska.

1. EquityComp and the Reinsurance Participation Agreement

Citizens purchased a workers' compensation insurance package known as the EquityComp program. The EquityComp program is a workers' compensation program marketed by AUCRA and offered through California Insurance Company. The program is sometimes referred to by AUCRA as a "profit-sharing plan." Under this program, Citizens purchased a workers' compensation policy identified as a "guaranteed cost" policy from California Insurance Company and Continental National Indemnity, which are affiliated with AUCRA but are not parties to this appeal. Citizens' "Request to Bind Coverages & Services" for the EquityComp workers' compensation policies stated that issuance of the insurance coverage was conditioned on Citizens' executing a "Reinsurance Participation Agreement" (RPA). Citizens executed the related

RPA with AUCRA on August 8, 2012. The RPA is the subject of this appeal.

By Citizens' participation in the EquityComp program, and by the terms of the RPA, portions of Citizens' premiums and losses billed by the affiliated workers' compensation insurers were to be subsequently ceded to AUCRA. AUCRA then agreed to fund a segregated account or "cell" held by AUCRA. The amount to be funded into the cell would be dependent on a prospective formula set forth in the RPA that would take into account claims filed against Citizens' workers' compensation policies. This was known as Citizens' "loss experience." Citizens, through its segregated cell account, effectively would be partially self-insured, because it would then be responsible for an amount equal to all of its actual losses under the workers' compensation policies, up to a limit. Excess losses, beyond that limit, would be paid by the workers' compensation insurance, but such experience would obligate the insured to fund the cell in a greater amount.

The EquityComp proposal materials claimed that the "Profit Sharing Plan is not a filed retrospective rating plan or dividend plan." However, the RPA required a 3-year minimum contractual commitment and amounts subsequently returned to the insured or increases in premiums were computed based on past loss experience.

Two types of workers' compensation policies—guaranteed cost and retrospective rating plan—have been described in case law, and we find the following description to be consistent with treatise authority. See 5 Steven Plitt et al., Couch on Insurance 3d § 69:16 (2012). The opinion in *Nat. Convention v. Applied Underwriters Captive*, 239 F. Supp. 3d 761, 769 (S.D.N.Y. 2017), states:

> A [guaranteed cost] policy essentially fixes insurance premiums at the outset, meaning that the actual cost of the claims against the policy will not cause premiums to fluctuate during the life of the policy. . . . By contrast, a [retrospective rating plan] policy is loss sensitive, meaning

> that premiums can fluctuate during the life of the policy depending on the actual cost of the claims . . . .

Retrospective pricing has long been recognized. See *American Ins. Co. v. C.S. Mc Crossan, Inc.*, 829 F.2d 702 (8th Cir. 1987) (discussing retrospective pricing). For purposes of this suit, we view the RPA as an agreement adding a feature of retrospective pricing thereby impacting the underlying "guaranteed cost" workers' compensation policies. And for completeness, we note that our characterization of the RPA is not critical to our disposition, but, rather, as we discuss below, illustrates that the RPA is "concerning or relating to an insurance policy" under Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2016).

AUCRA has patented its "Reinsurance Participation Plan." See "Reinsurance Participation Plan," U.S. Patent No. 7,908,157 B1 (issued Mar. 15, 2011). See, also, *Nat. Convention v. Applied Underwriters Captive, supra*. The patent states as follows:

> One of the challenges of introducing a fundamentally new premium structure into the marketplace is that the structure must be approved by the respective insurance departments regulating the sale of insurance in the states in which the insureds operate.
>
> In the United States, each state has its own insurance department and each insurance department must give its approval to sell insurance with a given premium plan in its respective jurisdiction. Getting approval can be extremely time consuming and expensive, particularly with novel approaches that a department hasn't had experience with before. Also, many states require insurance companies to only offer small sized and medium sized companies a Guaranteed Cost plan, without the option of a retrospective plan. In part, this is because of governmental rules and laws that regulate the insurance industry.
>
> Disclosed herein is a reinsurance based approach to providing non-linear retrospective premium plans to insureds that may not have the option of such a plan directly.

U.S. Patent No. 7,908,157 B1, col. 6, lines 22-40.

The patent further explains that the insured can "have a retrospective rating plan because of the arrangement among the insurance carrier . . . , the reinsurance company . . . , and the insured even though, in fact, the insured has Guaranteed Cost insurance coverage with the insurance carrier." *Id.*, col. 7, lines 51-54. See, also, *Nat. Convention v. Applied Underwriters Captive, supra*.

This patented arrangement has been scrutinized and found noncompliant by several state insurance commissions. The arrangement has been deemed in violation of state insurance laws, generally for the reason that the RPA is considered a collateral agreement that modifies the underlying compliant guaranteed cost policy. *Nat. Convention v. Applied Underwriters Captive, supra* (summarizing insurance commission cease-and-desist orders filed in California, Vermont, and Wisconsin).

2. Provisions in the RPA Pertaining to the Arbitration Issue

The RPA includes an arbitration provision which provides, in pertinent part:

> 13. Nothing in this section shall be deemed to amend or alter the due date of any obligation under this Agreement. Rather, this section is only intended to provide a mechanism for resolving accounting disputes in good faith.
>
> (A) It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation in order to protect the confidentiality of their relationship and their respective businesses and affairs. Any dispute or controversy that is not resolved informally pursuant to sub-paragraph (B) of Paragraph 13 arising out of or related to this Agreement shall be fully determined in the British Virgin Islands under the provisions of the American Arbitration Association.
>
> (B) All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement, (2) the management

> or operations of the Company, or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein shall be settled amicably by good faith discussion among all of the parties hereto, and, failing such amicable settlement, finally determined exclusively by binding arbitration in accordance with the procedures provided herein. The reference to this arbitration clause in any specific provision of this Agreement is for emphasis only, and is not intended to limit the scope, extent or intent of this arbitration clause, or to mean that any other provision of this Agreement shall not be fully subject to the terms of this arbitration clause. All disputes arising with respect to any provision of this Agreement shall be fully subject to the terms of this arbitration clause.

The RPA also contains a choice-of-law clause providing for Nebraska law, stating:

> 16. This Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska and any matter concerning this Agreement that is not subject to the dispute resolution provisions of Paragraph 13 hereof shall be resolved exclusively by the courts of Nebraska without reference to its conflict of laws.

3. Procedural History and Present Dispute

A dispute over costs arose, and AUCRA claimed that Citizens owed it $842,802.78. Citizens contended that its participation in the RPA was premised on assurances of cost savings, but Citizens instead incurred excessive costs under the RPA.

On December 12, 2014, AUCRA filed an arbitration demand with the American Arbitration Association. Citizens filed a counterclaim with the association, alleging that it could not be compelled to arbitrate.

On February 9, 2015, Citizens filed a complaint against AUCRA and other defendants in a trial court in Los Angeles, California. In January 2016, the California trial court overruled

a renewed motion by Citizens to stay the arbitration. In April, Citizens dismissed AUCRA as a defendant in the California action. After AUCRA was dismissed, the remaining defendants filed a "renewed" motion to compel arbitration and stay the California action. On July 14, the California trial court overruled the remaining defendants' motion to compel arbitration. The California court determined that the RPA's arbitration clause was unenforceable under the controlling Nebraska statute, § 25-2602.01(f)(4). On November 22, 2017, the California Court of Appeal affirmed the California trial court's order refusing to compel arbitration. See *Citizens Humanity v. Applied Underwriters*, 17 Cal. App. 5th 806, 226 Cal. Rptr. 3d 1 (2017).

In April 2016, 1 day after it had dismissed AUCRA from the California action, Citizens filed the present action against AUCRA in the district court for Douglas County. An amended complaint was filed on July 25. In this action, Citizens asked the district court to enjoin the arbitration which had been commenced by AUCRA. Citizens alleged that it could not be compelled to arbitrate for various reasons, including the fact that § 25-2602.01(f)(4) prohibits mandatory arbitration provisions in "any agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance contract." By virtue of is pleading and arguments made to the district court, Citizens challenges the enforceability of arbitration, including the delegation of arbitribility to an arbitrator.

AUCRA filed a motion to dismiss this action or, in the alternative, to stay this action pending arbitration. After a hearing, in an order filed January 19, 2017, the district court sustained the motion to stay this action pending arbitration. In reaching its conclusion, the court reasoned that because Citizens and AUCRA were organized and had principal places of business in different states and the RPA involved interstate commerce, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 to 14 (2012), governed its analysis. The court determined that based

on the "broad and sweeping language" of the RPA's arbitration provision, the provision's incorporation of the American Arbitration Association rules, and Citizens' lack of a direct challenge to delegation of arbitrability, the parties had "clearly and unmistakably delegated threshold issues of arbitrability to an arbitrator."

Having rejected Citizens' arguments claiming that it was not required to arbitrate, the court sustained AUCRA's motion to stay this action, thus delegating the issue of arbitrability to the arbitrator.

This appeal followed.

III. ASSIGNMENTS OF ERROR

Citizens assigns error to the district court, for (1) determining that the FAA and not Nebraska state law governed the enforceability of the RPA's arbitration agreement, (2) finding that delegation of arbitrability in the RPA was enforceable rather than finding that it was unenforceable under § 25-2602.01(f)(4), (3) failing to find that the arbitration clause as a whole was unenforceable under § 25-2602.01(f)(4), and (4) staying the case pending arbitration.

IV. STANDARD OF REVIEW

[1,2] Arbitrability presents a question of law. *Speece v. Allied Professionals Ins. Co.*, 289 Neb. 75, 853 N.W.2d 169 (2014). On a question of law, we reach a conclusion independent of the court below. *Id.*

V. ANALYSIS

AUCRA contended that under its broad arbitration agreement, the RPA requires all questions concerning construction and enforceability of that agreement, including applicability of § 25-2602.01(f)(4), to be decided by an arbitrator and that the FAA alone governs the RPA's arbitration provision (notwithstanding the RPA's general choice of Nebraska law provision) and thus moved to stay arbitration under the FAA. AUCRA therefore asserts that the district court correctly

reasoned that under FAA jurisprudence, Citizens did not adequately and specifically challenge the RPA arbitration provisions and that therefore, the arbitration should proceed. See *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).

Citizens contended that because paragraph 16 of the RPA provides that the RPA "shall be exclusively governed" by Nebraska law, the antiarbitration provision of § 25-2602.01(f)(4) renders the arbitration provisions of the RPA, including arbitration of arbitrability, unenforceable. Citizens reasons that because this court has held that § 25-2602.01 regulates the business of insurance and by virtue of the federal McCarran-Ferguson Act, see *Speece v. Allied Professionals Ins. Co., supra*, the court should determine the threshold question of arbitrability. Citizens further asserts that because the arbitration provisions in the RPA are invalid under § 25-2602.01(f)(4), the district court erred when it granted AUCRA's motion to stay the case to permit arbitration.

Below, we examine the relevant statutory framework forming the basis of the parties' dispute and conclude that § 25-2602.01(f)(4) applies to this case and that the arbitration provision delegating the issue of arbitrability to the arbitrator—sometimes referred to as a "delegation clause"—in the RPA is invalid. We explain why the gateway issue of arbitrability should have been decided in the district court, and we reverse, and remand for further proceedings.

1. Jurisdiction Is Proper

[3] As an initial matter, we note that a court order staying an action pending arbitration is a final, appealable order under Neb. Rev. Stat. § 25-1902 (Reissue 2016), because it affects a substantial right and is made in a special proceeding. See *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010). See, also, *Shasta Linen Supply v. Applied Underwriters*, 290 Neb. 640, 861 N.W.2d 425 (2015). In this context, a stay has the same effect as a dismissal, because the "parties cannot litigate their dispute in state courts." *Kremer*

v. Rural Community Ins. Co., 280 Neb. at 600, 788 N.W.2d at 548. Therefore, this court has jurisdiction to consider this appeal of the district court's order granting AUCRA's motion to stay the case.

2. Relevant Statutes

We first identify the federal and state statutes relevant to our analysis.

(a) The FAA

The FAA, at 9 U.S.C. § 2, provides, in pertinent part, that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The FAA was enacted in "response to judicial hostility to arbitration," *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012), and to ensure judicial enforcement of privately made agreements to arbitrate. That is, the FAA "'declare[d] a national policy favoring arbitration.'" *Nitro-Lift Technologies, L. L. C. v. Howard*, 568 U.S. 17, 20, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)).

[4] As noted, § 2 of the FAA extends its jurisdiction over arbitration agreements contained within "'contract[s] evidencing a transaction involving commerce'" and governs whether such an arbitration provision is enforceable. *Aramark Uniform & Career Apparel v. Hunan, Inc.*, 276 Neb. 700, 705, 757 N.W.2d 205, 209 (2008). The U.S. Supreme Court has given this jurisdictional phrase a broad interpretation to give expansive scope to the FAA. *Aramark Uniform & Career Apparel v. Hunan, Inc., supra.* See, also, *Kremer v. Rural Community Ins. Co., supra*. However, it has been observed that the purpose of the FAA is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint v. Flood &*

Conklin, 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). Thus, an arbitration agreement under the FAA is enforced according to its terms "unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 565 U.S. at 98 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)).

(b) The McCarran-Ferguson Act

As we have explained in previous opinions of this court, Congress passed the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 to 1015 (2012), to overturn a U.S. Supreme Court decision under the Commerce Clause that threatened the continued supremacy of states to regulate "'the activities of insurance companies in dealing with their policyholders.'" *Kremer v. Rural Community Ins. Co.*, 280 Neb. at 604, 788 N.W.2d at 550 (quoting *SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969)). It has been stated that the "McCarran-Ferguson Act . . . endows states with plenary authority over the regulation of insurance and, in certain instances, exempts state laws from FAA preemption." *Milmar v. Applied Underwriters*, 58 Misc. 3d 497, 501, 68 N.Y.S.3d 645, 648 (2017).

The McCarran-Ferguson Act sets out the statutory provision relevant to the case before us: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012(b). By virtue of this provision, the federal McCarran-Ferguson Act creates a narrow circumstance under which federal law does not preempt state laws regulating the business of insurance.

(c) § 25-2602.01

[5] Although state laws vary on whether or not agreements to arbitrate future disputes under an insurance policy are

enforceable, a provision in Nebraska's Uniform Arbitration Act, § 25-2602.01(f)(4), decidedly limits the enforceability of mandatory arbitration of future policyholder claims. See John M. Gradwohl, *Arbitration: Interface of the Federal Arbitration Act and Nebraska State Law*, 43 Creighton L. Rev. 97 (2009).

In relevant part, § 25-2602.01 provides generally for the enforcement of arbitration agreements and states:

> (b) A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract, if the provision is entered into voluntarily and willingly.

However, subsection (f)(4) of § 25-2602.01, excepts from this provision "any agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance contract."

In other words, where applied, § 25-2602.01 provides that agreements to arbitrate existing and future agreements are valid and enforceable except in specified circumstances sometimes referred to as "antiarbitration provisions." See *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010). Agreements to arbitrate "concerning or relating to an insurance policy" are one such circumstance where arbitration is not permitted. Such agreements would be invalid, and contrary contract provisions agreed to by the parties do not control over this statutory bar to enforcement of arbitration. See § 25-2602.01(d).

3. Where They Interact, the McCarran-Ferguson Act Generally Preserves § 25-2602.01(f)(4) From Preemption by the FAA

The three statutory schemes just described interact in the instant case and, on appeal, present the narrow issues of whether the McCarran-Ferguson Act causes § 25-2602.01(f)(4) to reverse preempt the FAA, thus rendering the delegation

of arbitrability under the RPA invalid and whether the court should have decided this threshold issue.

[6] As noted above, the FAA provides that written provisions for arbitration are valid and enforceable and that the FAA preempts inconsistent state laws that apply solely to the enforceability of arbitration provisions. However, under the McCarran-Ferguson Act, state law regulating the business of insurance reverse preempts federal laws that do not specifically govern insurance. See 1 Steven Plitt et al., Couch on Insurance 3d § 2:5 at 2-28 (2009) (discussing types of state laws "saved" by McCarran-Ferguson Act, including state uniform arbitration acts).

[7] As we have previously stated, in the insurance area under the McCarran-Ferguson Act, courts consider three elements for determining when a state law controls over a federal statute: (1) The federal statute does not specifically relate to the business of insurance; (2) the state law was enacted for regulating the business of insurance; and (3) the federal statute, if applied, operates to invalidate, impair, or supersede the state law. See *Kremer v. Rural Community Ins. Co., supra*.

[8] Applying these elements to § 25-2602.01(f)(4), we have held in previous cases that (1) the FAA is a federal law which does not specifically relate to the business of insurance; (2) § 25-2602.01(f)(4) is a state statute enacted to regulate the business of insurance; and (3) the FAA, if applied, would operate to invalidate, impair, or supersede § 25-2602.01(f)(4). See, *Speece v. Allied Professionals Ins. Co.*, 289 Neb. 75, 853 N.W.2d 169 (2014); *Kremer v. Rural Community Ins. Co., supra*. Based on these conclusions, and applying § 1012(b) of the McCarran-Ferguson Act, we have concluded under the facts of these previous cases that the FAA was reverse preempted by § 25-2602.01(f)(4) but that due to the fact a second federal law relating to insurance was at play in these cases, the second federal law ultimately served to preempt § 25-2602.01(f)(4). See, *Speece v. Allied Professionals Ins. Co., supra*; *Kremer v. Rural Community Ins. Co., supra.* Thus,

unless another applicable federal insurance law directly preempts § 25-2602.01(f)(4), agreements to arbitrate future controversies in insurance policies are invalid under Nebraska law. *Kremer v. Rural Community Ins. Co., supra*. See, also, *Speece v. Allied Professionals Ins. Co., supra*. In the instant case, aside from our consideration of the FAA and the McCarran-Ferguson Act, no other federal law has been proposed which bears directly on the RPA. Compare, *Speece v. Allied Professionals Ins. Co., supra* (determining that second federal law, Liability Risk Retention Act of 1986, which specifically related to business of insurance, was not reverse preempted by Nebraska antiarbitration law, § 25-2602.01(f)(4), under McCarran-Ferguson Act); *Kremer v. Rural Community Ins. Co., supra* (determining that second federal law, Federal Crop Insurance Act, which specifically related to business of insurance, was not reverse preempted by Nebraska antiarbitration law, § 25-2602.01(f)(4), under McCarran-Ferguson Act).

[9,10] AUCRA contends that there is an inherent conflict between the FAA and the McCarran-Ferguson Act because the latter implicates § 25-2602.01(f)(4). AUCRA asserts that the FAA, which generally favors arbitration agreements, trumps the other statutes. We believe there is no such conflict. Instead, we note that "'[w]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528, 533, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995) (quoting *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)). And courts will harmonize overlapping statutes "so long as each reaches some distinct cases." *J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 144, 122 S. Ct. 593, 151 L. Ed. 2d 508 (2001). Thus, when two federal statutes, each with its own scope and purpose and imposing different requirements and protections, complement each other, "it would show disregard for the congressional design to hold that

Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115, 134 S. Ct. 2228, 189 L. Ed. 2d 141 (2014). Below, we explain that the applicable statutes are harmonious.

[11,12] As we read the statutes, there is no conflict between the McCarran-Ferguson Act and the FAA, because, although the FAA generally favors arbitration, through its savings clause—"save upon such grounds as exist at law or in equity for the revocation of any contract"—the FAA does not permit illegal or invalid agreements to arbitrate to be enforced. See 9 U.S.C. § 2. It has been held that the FAA's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)). Illegality and inconsistency with statutorily prescribed public policy are widely recognized general contract defenses. Restatement (Second) of Contracts § 178(1) at 6 (1981) ("[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms"). The illegality of an arbitration "agreement concerning or relating to an insurance policy" under § 25-2602.01(f)(4) would constitute grounds warranting invalidation of that agreement under § 2 of the FAA.

Were we considering a single agreement to arbitrate in an "agreement concerning or relating to an insurance policy," by harmonizing the federal statutory framework and ultimately applying § 25-2602.01(f)(4), the parties' arbitration provision would not be valid on this basis, and our analysis would end here. However, in this case, the issues delegated to the arbitrator in the parties' agreement encompassed arbitrability itself and we must determine whether the court may consider the

parties' assertions regarding the propriety of delegating arbitrability to the arbitrator.

4. Threshold Issue of Arbitrability Is Question for the Court, Not Arbitrator, When Party Specifically Challenges Validity of Delegation Agreement

AUCRA contends that the parties clearly and unmistakably agreed to arbitrate threshold issues, including arbitrability, and argues that whether § 25-2602.01 applies to invalidate any feature of the parties' arbitration clause is a question of enforceability of the arbitration agreement, which the parties reserved for the arbitrator. AUCRA further asserts that when considering Citizens' challenge, we should presume the validity of the parties' broad arbitration agreement, including the broad delegation of arbitrability contained in the RPA. AUCRA relies primarily on a U.S. Supreme Court decision applying the FAA to a delegation provision and which concluded under the facts therein to leave "any challenge to the validity of the Agreement as a whole for the arbitrator." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).

(a) Delegation of Arbitrability

[13,14] It has been held that unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is decided by the court, not the arbitrator. *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). Disputes about arbitrability for a court to decide include questions such as "'whether the parties are bound by a given arbitration clause'" or "'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *BG Group plc v. Republic of Argentina*, 572 U.S. 25, 34, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)). Disputes over "formation of the parties'

arbitration agreement" and "its enforceability or applicability to the dispute" at issue are "matters . . . 'the court' must resolve." *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299-300, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010).

[15-19] Parties, however, may delegate arbitrability to the arbitrator, because "it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide." *BG Group plc v. Republic of Argentina*, 572 U.S. at 33. A contractual provision that delegates to the arbitrator all questions regarding the scope or enforceability of an arbitration provision is referred to as a "delegation clause." See, e.g., *Rent-A-Center, West, Inc. v. Jackson, supra*. A delegation clause is an agreement to arbitrate a threshold issue and is simply an additional, severable, antecedent arbitration agreement the party seeking arbitration asks the court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. *Id*. The additional delegation agreement, like any other arbitration agreement, is valid under the FAA except by application of § 2 of the FAA, which invalidates such agreements "'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. at 70 (quoting 9 U.S.C. § 2). Under the FAA, there is a presumption of arbitrability, and any doubts are resolved in favor of arbitration. *AT&T Technologies v. Communications Workers, supra*. Under the FAA, if the delegation provision is valid, the validity of the remainder of the arbitration contract is for the arbitrator to decide. See *Nitro-Lift Technologies, L. L. C. v. Howard*, 568 U.S. 17, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012).

(b) Challenging a Delegation of Arbitrability

A presumption that agreements to arbitrate threshold issues are valid "does not mean that they are unassailable." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. at 71. "If a party challenges the validity under § 2 [of the FAA] of the precise

agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with the agreement under § 4." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. at 71. See, also, *Nitro-Lift Technologies, L. L. C. v. Howard, supra*. Arbitration is purely a matter of contract. *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002). Delegation agreements, like other agreements to arbitrate, are not "immunize[d] . . . from judicial challenge," because to do so would be to "elevate it over other forms of contract." *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). And, as we have indicated above, "[a]s the 'saving clause' in § 2 [of the FAA] indicates, the purpose of Congress . . . was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint v. Flood & Conklin*, 388 U.S. at 404 n.12.

[20] Two types of validity challenges under § 2 have been identified. They are (1) a "'challenge[] specifically [to] the validity of the agreement to arbitrate'" and (2) a challenge to "'the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.'" *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)). According to the U.S. Supreme Court, only the first type of challenge is relevant to a court's determination of a challenged arbitration agreement. See *Rent-A-Center, West, Inc. v. Jackson, supra.* A party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. *Id*.

In *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. at 71-72, the U.S. Supreme Court examined a delegation clause similar to that at issue in this case, and stated:

> Here, the "written provision . . . to settle by arbitration a controversy," 9 U.S.C. § 2, that [the employer] asks us to enforce is the delegation provision—the provision that gave the arbitrator "exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement," . . . Section 2 operates on the specific "written provision" to "settle by arbitration a controversy" that the party seeks to enforce. Accordingly, unless [the objector] challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.

[21] In *Rent-A-Center, West, Inc. v. Jackson, supra*, the Court determined that under the FAA, a challenge to a delegation provision must be directed specifically to the delegation before the court will assume authority over the matter. In examining the objector's challenge, the Court determined that he had raised his challenge to the delegation provision too late in appellate litigation and that thus, the Court would not consider it in light of clear contract language delegating arbitrability. *Id*. In the instant case, the district court grounded its decision on *Rent-A-Center, West, Inc.* and determined, inter alia, that Citizens' challenge was directed to the entire arbitration agreement and that due to a lack of specificity, the resolution of the threshold issue of arbitrability was to be arbitrated before the arbitrator.

(c) National Litigation of Delegation

We are aware of cases around the country challenging the delegation feature of the RPA, inter alia, on the grounds of state antiarbitration insurance laws similar to § 25-2602.01(f)(4). See, *Minnieland Private Day Sc. v. Applied Underwriters*, 867 F.3d 449 (4th Cir. 2017), *cert. denied* 583 U.S. 1102, 138 S. Ct. 926, 200 L. Ed. 2d 203 (2018); *South Jersey Sanitation v. Applied Underwriters*, 840 F.3d 138 (3d Cir. 2016); *Citizens Humanity v. Applied Underwriters*, 17 Cal. App. 5th 806, 226

Cal. Rptr. 3d 1 (2017); *Milmar v. Applied Underwriters*, 58 Misc. 3d 497, 68 N.Y.S.3d 645 (2017); *Milan Exp. Co., Inc. v. Applied Underwriters Captive Risk Assur. Co., Inc.*, 590 Fed. Appx. 482 (6th Cir. 2014); *Jade Apparel, Inc. v. United Assurance, Inc.*, No. A-2001-14T1, 2016 WL 5939470 (N.J. Super. Oct. 13, 2016) (unpublished opinion); *Mountain Valley Property, Inc. v. Applied Risk Services, Inc.*, No. 1:15-CV-187-DBH, 2016 WL 755614 (D. Me. Feb. 25, 2016) (unpublished order); *Randazzo Enterprises, Inc. v. Applied Underwriters Captive Risk Assurance Company, Inc.*, No. 5:14-CV-02374-EJD, 2014 WL 6997961 (N.D. Cal. Dec. 11, 2014) (unpublished order). A circuit split has arisen between the Third and Sixth Circuits and the Fourth Circuit in which the Third and Sixth Circuits have ordered arbitration and the Fourth Circuit has allowed the court to consider a challenge to the RPA's delegation clause. See, *Minnieland Private Day Sc. v. Applied Underwriters, supra*; *South Jersey Sanitation v. Applied Underwriters, supra*; *Milan Exp. Co., Inc. v. Applied Underwriters Captive Risk Assur. Co., Inc., supra*.

Relying primarily on *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010), as did the district court in this case, the Third and Sixth Circuits concluded that when a challenge could apply equally to the arbitration agreement as a whole and the delegation provision, the challenge is not specific to the delegation provision and the delegation provision must be enforced. See, *South Jersey Sanitation v. Applied Underwriters, supra*; *Milan Exp. Co., Inc. v. Applied Underwriters Captive Risk Assur. Co., Inc., supra*. Based on the reasoning discussed below, and contrary to the Third and Sixth Circuits, we favor the approach taken by the Fourth Circuit, because it did not erroneously conflate a challenge to the validity of the RPA's delegation clause and the nature of the inquiry necessary to resolve that challenge. See *Minnieland Private Day Sc. v. Applied Underwriters, supra*. See, also, *Citizens Humanity v. Applied Underwriters, supra*; *Milmar v. Applied Underwriters, supra.*

5. Citizens Specifically Challenges the Validity of the Agreements to Arbitrate, Including the Arbitration Provision Delegating Arbitrability Issues, Distinguishing This Case From *Rent-A-Center, West, Inc. v. Jackson*

AUCRA contends that this action for declaratory judgment is based in substantive law and is a challenge to the entire agreement to arbitrate. Given the record, we reject this contention. Instead, we read Citizens' challenge in its amended complaint and in oral arguments at the district court to be a sufficiently specific challenge to the validity of the delegation clause under *Rent-A-Center, West, Inc. v. Jackson, supra*, and a challenge which should have been considered by the district court.

As noted above, in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. at 73, an employee challenged "'the *entire agreement*'" as unconscionable and did not raise a more specific challenge to the delegation provision until later on appeal. (Emphasis in original.) In contrast, Citizens' amended complaint addressed the RPA's arbitration provisions in addition to the underlying RPA. Paragraph 32 alleges: "[AUCRA] cannot compel [Citizens] to arbitrate because the RPA is governed by Nebraska law and under Nebraska law, specifically Neb. Rev. Stat. § 25-2602.01(f)(4), mandatory arbitration provisions . . . are . . . unenforceable." In its prayer for relief, Citizens requested the court to "declare that there is no valid and enforceable agreement to arbitrate the parties' dispute." The parties' dispute, according to the amended complaint, included whether Citizens could be compelled to arbitrate. At the hearing on AUCRA's motion to stay pending arbitration, Citizens made clear at the trial level that its challenge to arbitration included the delegation of arbitrability. Contrary to the type of challenge made in *Rent-A-Center, West, Inc. v. Jackson, supra*, here, Citizens specifically challenges the validity of the arbitration clauses, including the arbitration

provision which delegates arbitrability to the arbitrator, based on § 25-2602.01(f)(4).

[22] As part of resolving Citizens' challenge, we must inquire whether the RPA's delegation clause could be enforced under Nebraska law. However, this additional inquiry necessary to address Citizens' challenge does not make it a challenge to the entire agreement. A court must consider a contract as a whole and, if possible, give effect to every part of the contract. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). At paragraph 16 of the RPA, the parties chose to apply Nebraska law, including Nebraska's Uniform Arbitration Act and necessarily the antiarbitration provision in § 25-2602.01(f)(4). We must apply the Nebraska choice-of-law provision to the challenge to the delegation clause in order to determine whether the delegation clause could be enforced. See, also, *Citizens Humanity v. Applied Underwriters*, 17 Cal. App. 5th 806, 226 Cal. Rptr. 3d 1 (2017). Compare *Pinela v. Neiman Marcus Group, Inc.*, 238 Cal. App. 4th 227, 190 Cal. Rptr. 3d 159 (2015). In this regard, we note that an arbitration agreement contrary to policy and unenforceable under statute is just as unenforceable as any other illegal contract that is contrary to public policy. See *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). The unenforceability of a contract which is contrary to public policy is a "generally applicable" doctrine, not one specifically applied to disfavor arbitration. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

Even though resolving Citizens' challenge may require this court to ask whether the RPA includes an "agreement concerning or relating to an insurance policy" under § 25-2602.01(f)(4), this inquiry does not transform the § 25-2602.01(f)(4) challenge into one implicating the RPA as a whole under *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). See *Milmar v. Applied Underwriters*, 58 Misc. 3d 497, 68 N.Y.S.3d 645 (2017). Compare *South Jersey Sanitation v. Applied Underwriters*,

840 F.3d 138 (3d Cir. 2016). Citizens' challenge to arbitration based on the preemptive effect of the McCarran-Ferguson Act and § 25-2602.01(f)(4) goes to the validity of the arbitration agreement, including its arbitration provision delegating arbitrability, but not the validity of the RPA as a whole. See, *Rent-A-Center, West, Inc. v. Jackson, supra*; *Milmar v. Applied Underwriters, supra.* See, also, *Minnieland Private Day Sc. v. Applied Underwriters*, 867 F.3d 449 (4th Cir. 2017), *cert. denied* 583 U.S. 1102, 138 S. Ct. 926, 200 L. Ed. 2d 203 (2018); *Citizens Humanity v. Applied Underwriters, supra*. Under *Rent-A-Center, West, Inc. v. Jackson*, *supra*, where properly presented, the court must consider the threshold arbitrability issue before it can order arbitration. See, also, *Nitro-Lift Technologies, L. L. C. v. Howard*, 568 U.S. 17, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012). The district court erred when it failed to inquire about arbitrability.

6. The RPA Is an "[A]greement [C]oncerning or [R]elating to an [I]nsurance [P]olicy" and Does Not Evade Application of § 25-2602.01(f)(4) or Fall Into Any of Its Exceptions

Having concluded that Citizens lodged a specific challenge against the validity of the delegation provision as contrary to the antiarbitration provision in § 25-2602.01(f)(4), we next consider whether the RPA is within the scope of that provision. Although AUCRA attempts to evade the ambit of § 25-2602.01(f)(4) by asserting that the RPA is not an insurance policy, we note that § 25-2602.01(f)(4) requires us to determine only whether the RPA is an "agreement concerning or relating to an insurance policy." The phrase "relating to" is to be read broadly and should be interpreted as being comprehensive of the subject indicated. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

We note that in *South Jersey Sanitation v. Applied Underwriters, supra*, the Third Circuit considered our dicta

from *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010), discussing the insurance policies there at issue and determined that our comment suggested that application of § 25-2602.01(f)(4) was limited to agreements in insurance policies. But such an interpretation would render the words "concerning or relating to an insurance policy" meaningless. See § 25-2602.01(f)(4). The whole and every part of a statute must be considered in fixing the meaning of any of its parts. *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016). Under the Nebraska statute, whether or not the RPA is itself an insurance policy is not the determinative inquiry; § 25-2602.01(f)(4) applies to agreements which merely are "concerning or relating to" insurance. Compare, *Minnieland Private Day Sc. v. Applied Underwriters, supra* (remanding factual question of whether RPA was "insurance contract" under language of Virginia antiarbitration law); *Minnieland Private Day Sch., Inc. v. AUCRA*, No. 1:15-cv-01695AJT-IDD (E.D. Va. Nov. 9, 2017) (unpublished order) (concluding upon remand as matter of law that RPA is insurance contract).

Notwithstanding the obvious facts, described in our "Statement of Facts" section and repeated below, showing that the RPA is an "agreement concerning or relating to an insurance policy," AUCRA contends that the RPA is reinsurance and is a "contract between insurance companies including a reinsurance contract," and therefore excepted from the antiarbitration import of § 25-2602.01(f)(4). As discussed above, the RPA has the hallmarks of a retrospective rating plan, albeit achieving that similarity through an unusual contractual arrangement. Despite its billing as a "Reinsurance Participation Agreement," the RPA is a mandatory component of a program of workers' compensation insurance and sold with a minimum 3-year term to add a retrospective pricing feature into a guaranteed cost insurance policy. See, e.g., 5 Steven Plitt et al., Couch on Insurance 3d § 69:16 (2012).

The fact that the RPA references a "Reinsurance Treaty," or an additional contract between AUCRA and its affiliated

workers' compensation insurers, does not for purposes of this case convert the RPA into a "reinsurance contract" "between insurance companies" even if the affiliated insurers participate in a pooling arrangement and act as billing agents for the EquityComp program. See § 25-2602.01(f)(4). Citizens is not an insurer, see Neb. Rev. Stat. § 44-102 (Reissue 2010), and the RPA between Citizens and AUCRA is not reinsurance, see Neb. Rev. Stat. § 44-103(16) (Reissue 2010). The RPA was not executed between insurance companies. Contrary to AUCRA's assertion, the RPA is therefore not "a reinsurance contract" nor "between insurance companies" under § 25-2602.01(f)(4). We decline here to characterize the RPA as reinsurance, and, as reflected in other cases, we are not alone in rejecting AUCRA's varied characterizations of its agreement. See, *Citizens Humanity v. Applied Underwriters*, 17 Cal. App. 5th 806, 820, 226 Cal. Rptr. 3d 1, 11 (2017) (taking judicial notice of 2016 consent order entered into by California Insurance Company and California Department of Insurance defining term "RPA" as "'ancillary or collateral to a guaranteed cost workers' compensation insurance policy that covers claims by California workers'"); *Milmar v. Applied Underwriters*, 58 Misc. 3d 497, 68 N.Y.S.3d 645 (2017) (concluding RPA concerns or relates to insurance); *Minnieland Private Day Sch., Inc. v. AUCRA, supra* (determining RPA is insurance contract).

[23] Above, we noted the extensive relationship between the RPA and affiliated policies of workers' compensation insurance throughout the marketing and sale of the EquityComp program, its billing, the creation of a cell in which insurance premiums would be placed, and a retrospective rate pricing feature drawn from the insureds' workers' compensation claims. The RPA was an integral part of the EquityComp program, which provided workers' compensation insurance to Citizens. We conclude that the RPA is an "agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance

contract" and that thus, § 25-2602.01(f)(4) applies. Because the RPA is within the ambit of Nebraska's antiarbitration statute, § 25-2602.01(f)(4), whereunder certain agreements to arbitrate are prohibited, the RPA arbitration provision which delegates arbitrability is an invalid agreement. Accordingly, the trial court erred when it granted AUCRA's motion to stay the court case so that an arbitrator could decide issues of arbitrability.

VI. CONCLUSION

In this case, we examine only the district court's decision enforcing the delegation clause in the RPA which had the effect of referring the issue of arbitrability to the arbitrator. Even if Citizens was required to challenge the delegation clause of the RPA under a discrete and specific standard used in the FAA, Citizens properly challenged the validity of the delegation of arbitrability. Giving full effect to the parties' choice of Nebraska law, we harmonize the FAA in conjunction with the McCarran-Ferguson Act and § 25-2602.01(f)(4) and conclude that state law regulating the business of insurance is not preempted by the FAA. Section 25-2602.01(f)(4) invalidates the parties' delegation provision in the RPA and operates here to reserve issues of arbitrability for the court to decide. The district court should have considered Citizens' challenge to the validity of delegating arbitrability to the arbitrator. See Neb. Rev. Stat. § 25-2603(b) (Reissue 2016). Having concluded that questions of arbitrability should have been determined by the district court, not an arbitrator, we reverse the district court's ruling that the issue of arbitrability was delegated to the arbitrator and remand the cause for further proceedings, including the enforceability of the remainder of the arbitration provision.

Reversed and remanded for
further proceedings.

Kelch, J., not participating in the decision.

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. Keshaud D. Hunt, appellant.

909 N.W.2d 363

Filed April 6, 2018. No. S-17-327.

1. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
4. **Courts: Juvenile Courts: Jurisdiction.** In order to retain proceedings in criminal court, the court need not resolve every statutory factor in favor of transfer against the juvenile, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.
5. **Courts: Juvenile Courts: Evidence.** Under Neb. Rev. Stat. § 29-1816(3) (Reissue 2016), after considering the evidence and the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 2016), the court shall transfer the case to juvenile court unless a sound basis exists for retaining the case in county court or district court.
6. **Courts: Juvenile Courts: Judgments.** When ruling on a motion to transfer to juvenile court under Neb. Rev. Stat. § 29-1816(3) (Reissue 2016), the county or district court must set forth findings supporting its decision.

7. **Courts: Juvenile Courts: Jurisdiction: Proof.** In a motion to transfer to juvenile court, the burden of proving a sound basis for retaining jurisdiction in county court or district court lies with the State.
8. **Courts: Juvenile Courts: Jurisdiction: Evidence.** When a district court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to juvenile court.
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.
11. ____. 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.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

James Martin Davis, of Davis Law Office, for appellant.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

Heavican, C.J., Cassel, Stacy, and Funke, JJ., and Pirtle, Judge.

Stacy, J.

Keshaud D. Hunt was 15 years old when he was charged in district court with multiple felonies arising from two armed robberies. His motion to transfer the case to juvenile court was overruled, and eventually, he pled no contest to an amended information. At the sentencing hearing, the district court denied

Hunt's request for disposition under the Nebraska Juvenile Code[1] and instead imposed consecutive prison sentences. Hunt appeals, assigning error to the denial of his motion to transfer and his request for disposition under the juvenile code. We affirm.

BACKGROUND

On April 21, 2016, Hunt was charged with attempted second degree murder, robbery, attempted robbery, and three counts of using a deadly weapon (firearm) to commit a felony. All charges stemmed from events alleged to have occurred on March 16 in Omaha, Nebraska. Hunt was 15 years old at the time, and the charges were filed in the Douglas County District Court.[2]

Motion to Transfer

After entering pleas of not guilty to the charges, Hunt moved to transfer the case to juvenile court pursuant to § 29-1816(3). An evidentiary hearing was held on September 8, 2016.

The State offered two exhibits, both of which were received. The first exhibit was a probable cause affidavit detailing Hunt's alleged crimes and the ensuing investigation. That exhibit showed that on March 16, 2016, around 8:15 p.m., a suspect wearing a black hooded sweatshirt and gray shoes entered a convenience store on South 24th Street in Omaha. He pulled out a black semiautomatic handgun and pointed it at two store employees while demanding money from the cash register. One of the employees pulled out his own handgun and told the suspect to drop his gun. The suspect exclaimed "'don't do it'" and began retreating toward the door. But instead of leaving, the suspect ran back toward the employee, while firing multiple shots from the handgun. One shot grazed the employee's waist. The suspect then fled the scene.

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[1] See Neb. Rev. Stat. § 29-2204(5) (Supp. 2017).

[2] See Neb. Rev. Stat. §§ 29-1816(1)(a)(ii) and 43-246.01(3)(c) (Reissue 2016).

Later the same night around 10 o'clock, a suspect wearing a black hooded sweatshirt and gray shoes entered another Omaha convenience store, located on North 72d Street. He approached an unarmed security guard and placed a black semiautomatic handgun to the guard's face. The suspect took approximately $200 from the registers and left the store.

A Crime Stoppers tip led investigators to Hunt. After speaking with Hunt's juvenile probation officer, police learned that Hunt's electronic tracking device showed he had visited an Omaha grocery store on the evening of March 16, 2016. Video from the grocery store showed Hunt wearing a black hooded sweatshirt and gray shoes with the same markings as the shoes worn in both convenience store robberies. Police also learned that Hunt returned home from the grocery store and cut off his electronic monitoring device around 7:45 p.m. The first convenience store was robbed approximately 30 minutes later.

The second exhibit was a certified copy of Hunt's juvenile court file. That file showed that in 2015, Hunt was found to be within the meaning of Neb. Rev. Stat. § 43-247 (Cum. Supp. 2014) as a result of committing multiple armed robberies when he was 14 years old. The juvenile petition alleged that on or about July 28, 2015, Hunt committed the crimes of (1) using a deadly weapon (firearm) to commit a felony, (2) two counts of robbery, (3) two counts of attempted robbery, and (4) two counts of tampering with physical evidence. Hunt eventually admitted to one count of using a deadly weapon (firearm) to commit a felony (a Class IC felony), one count of robbery (a Class II felony), one count of attempted robbery (a Class II felony), and one count of tampering with physical evidence (a Class IV felony). One of the 2015 robberies involved the same convenience store Hunt was accused of robbing in March 2016.

The juvenile court accepted Hunt's admissions to the 2015 crimes and placed him in "shelter care" under the supervision of juvenile probation pending disposition. On December 22, 2015, Hunt was returned to his mother's home, ordered to wear

an electronic monitoring device and abide by the conditions of the "H.O.M.E." program, and ordered to participate in individual counseling and gang prevention services. On January 25, 2016, the court ordered Hunt to participate in additional counseling and treatment programs and scheduled a continued disposition hearing for June 27. But before that hearing, Hunt was arrested for the March 2016 robberies.

At the transfer hearing, Hunt offered the testimony of his juvenile probation officer, Ladonna Strong. Strong had supervised Hunt since June 2016. Strong testified that Hunt, who was being housed at the Douglas County Youth Center at the time of the transfer hearing, had been respectful, patient, open, and honest with her. According to Strong, Hunt was a member of a gang in Omaha. She suggested Hunt would benefit from a structured rehabilitative environment.

Strong testified that after the 2015 robberies but before the robbery charges in March 2016, the State sought a group home placement for Hunt given the amount of time he had spent in the Douglas County Youth Center, but Hunt was rejected by both Boys Town and Omaha Home for Boys primarily due to the serious nature of his 2015 charges. Hunt applied to a group home facility in Arizona which was willing to accept him, but he was returned home with his mother and put on electronic monitoring.

Strong testified that Hunt and his family received numerous services once Hunt returned home, including family support, gang intervention, individual and family therapy, and electronic monitoring. Hunt was ordered to participate in "pro-social activit[ies]," attend school, and attend individual and family therapy. He initially complied, but within a few weeks, he was suspended from school for fighting, began missing curfew, cut off his electronic monitoring device, and used marijuana. As a result, the State already was seeking to revoke Hunt's placement when, on March 16, 2016, Hunt cut off his electronic monitor a second time and allegedly committed the current felony offenses.

Strong testified that although Hunt had been accepted to the Arizona group home facility before his current charges, he had no pending application at the time of the transfer hearing, and there was no guarantee Hunt would be accepted into the Arizona facility again. Strong testified that the secure youth detention facility in Kearney, Nebraska, was a housing option of last resort from which Hunt could not be rejected. Strong testified the Kearney facility offered therapy and services directed to youth that she believed would benefit Hunt. But she noted that therapy and other services are also available in adult prisons.

The district court took the motion to transfer under advisement and later denied it in a written order entered September 12, 2016. In its order, the district court found that Hunt's current and prior offenses were extremely violent and aggressive and committed in a premeditated manner. It found that although Hunt was only 15 years old, he was charged with crimes of violence involving guns used to rob others, and his crimes exhibited sophistication and maturity. The district court found that Hunt was a gang member and his motivation for committing the charged offenses was self-serving. It determined that although Hunt may be amenable to treatment, there were no guarantees "or even reasonable assurances" that Hunt would be accepted into a group home setting given this was his second episode of seriously violent offenses within a 9-month period, and the court concluded that without detention and rehabilitative treatment, Hunt presented a serious risk to the community. The court also found it was in Hunt's best interests to be continued in secure detention.

Ultimately, after weighing all the statutory factors, the district court concluded Hunt "exhibited behavior . . . of being a juvenile out of control, with access to multiple hand guns willing to commit violent acts of robbery without regard for the safety and welfare of others and as a result [found Hunt] to be a danger to the community." Thus, the district court retained jurisdiction and overruled Hunt's motion to transfer.

At the time Hunt's motion to transfer was denied, such an order was not final and appealable.[3] However, we note that effective August 24, 2017, the Legislature amended the relevant statute to provide that "[a]n order granting or denying transfer of the case from county or district court to juvenile court shall be considered a final order for the purposes of appeal" and to give "any party" the right to appeal from such order within 10 days.[4]

Plea and Sentence

Thereafter, pursuant to a plea agreement, Hunt pled no contest to an amended information charging one count of using a deadly weapon (firearm) to commit a felony (a Class IC felony), one count of robbery (a Class II felony), and one count of first degree assault (a Class II felony). The court accepted Hunt's pleas, found him guilty, and ordered a presentence investigation report.

The presentence report concluded Hunt was at a high risk to reoffend and recommended the court consider a sentence of incarceration "to promote accountability, to protect society and provide [Hunt] with any and all services deemed to be appropriate through the Douglas County Youth Center and the Nebraska Department of [Correctional Services]."

At the sentencing hearing on February 23, 2017, Hunt's counsel asked the court to consider disposition under the Nebraska Juvenile Code.[5] In support, Hunt's counsel cited Strong's testimony at the transfer hearing that Hunt would improve in a structured, secured facility geared toward youth. The attorney reminded the court about the facility in Arizona, but offered no proof the facility would still accept Hunt. Alternatively, Hunt's attorney asked the court to impose the "lowest level of incarceration" permitted for the convictions.

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[3] See *State v. Bluett*, 295 Neb. 369, 889 N.W.2d 83 (2016).

[4] § 29-1816(3)(c) (Supp. 2017). See 2017 Neb. Laws, L.B. 11, § 1.

[5] See § 29-2204(5).

The State asked the court to impose consecutive prison terms and asked that the terms be "substantial," observing that Hunt already had "committed more violent crime in [a] few years [than] most really violent offenders do in a lifetime."

The district court denied Hunt's request for disposition under the juvenile code, reasoning that Hunt was on probation for violent armed robberies when he committed the violent crimes for which he was being sentenced, and "obviously [was] getting no benefits from the supervision of the juvenile court." The court referenced Hunt's violent criminal history and the impact of Hunt's crimes, particularly on the convenience store employee who was shot. The court expressed how difficult it was to sentence Hunt, who had turned 16 by the time of the hearing, to prison. But the court stated that after reading the presentence investigation report, it concluded Hunt was a public danger and, in order to protect the community, Hunt needed to be incarcerated "long enough [to] grow up."

The court sentenced Hunt to 15 to 20 years' imprisonment on the robbery conviction, 15 to 20 years' imprisonment on the first degree assault conviction, and 5 to 20 years' imprisonment on the conviction for use of a firearm to commit a felony. All sentences were ordered to be served consecutively. The court advised Hunt that assuming he lost no good time, he would be eligible for parole in 20 years, at the age of 36, and would be mandatorily discharged in 32½ years. Hunt timely filed this direct appeal.

ASSIGNMENTS OF ERROR

Hunt assigns the district court erred by (1) denying his motion to transfer to juvenile court and (2) refusing his request for disposition under the Nebraska Juvenile Code and, instead, imposing excessive sentences.

STANDARD OF REVIEW

[1,2] A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for

an abuse of discretion.[6] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[7]

[3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[8]

ANALYSIS

No Abuse of Discretion in Denying Transfer

Motions to transfer a pending criminal case to juvenile court are governed by § 29-1816(3) (Reissue 2016) and Neb. Rev. Stat. § 43-276(1) (Reissue 2016). Generally speaking, § 29-1816(3) sets forth the procedure to be followed, and § 43-276(1) enumerates the factors a court must consider when ruling on a motion to transfer, which include

> (a) [t]he type of treatment such juvenile would most likely be amenable to; (b) whether there is evidence that the alleged offense included violence; (c) the motivation for the commission of the offense; (d) the age of the juvenile and the ages and circumstances of any others involved in the offense; (e) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court; (f) the best interests of the juvenile; (g) consideration of public safety; (h) consideration of the juvenile's ability to appreciate the nature and seriousness of his or her conduct; (i) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority and, if so,

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[6] *State v. Bluett, supra* note 3.

[7] *Id.*

[8] *State v. Stone*, 298 Neb. 53, 902 N.W.2d 197 (2017).

> the available alternatives best suited to this purpose; (j) whether the victim agrees to participate in mediation; (k) whether there is a juvenile pretrial diversion program established pursuant to sections 43-260.02 to 43-260.07; (l) whether the juvenile has been convicted of or has acknowledged unauthorized use or possession of a firearm; (m) whether a juvenile court order has been issued for the juvenile pursuant to section 43-2,106.03; (n) whether the juvenile is a criminal street gang member; and (o) such other matters as the parties deem relevant to aid in the decision.

[4] In order to retain the proceedings, the court need not resolve every statutory factor against the juvenile, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor.[9] It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.[10]

[5,6] After the court considers the evidence in light of the § 43-276 factors, "the case shall be transferred to juvenile court unless a sound basis exists for retaining the case in county court or district court."[11] The court is required to "set forth findings for the reason for its decision" on the motion to transfer.[12]

[7] The burden of proving a sound basis for retention lies with the State.[13] Hunt argues that the State failed to meet its burden and that the district court abused its discretion in failing to grant the transfer. We disagree.

Summarized, the evidence at the transfer hearing showed Hunt was a gang member and had been adjudicated in 2015

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[9] *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

[10] *Id.*

[11] § 29-1816(3)(a).

[12] § 29-1816(3)(b).

[13] *State v. Dominguez, supra* note 9.

for robberies involving firearms when he was 14 years old. He had been detained in the Douglas County Youth Center, placed in "shelter care," and returned home under probation supervision on electronic monitoring. Hunt had received, among other services, drug and alcohol testing, a psychological evaluation, electronic monitoring, individual and family therapy, and gang intervention services. Despite these services, Hunt was suspended from school for fighting, cut off his electronic monitoring device to avoid supervision, and used controlled substances. On March 16, 2016, Hunt cut off his electronic monitor for the second time, robbed two convenience stores at gunpoint, and shot an employee.

In its order denying Hunt's motion to transfer, the district court considered each of the applicable factors listed in § 43-276 and made specific findings. After weighing the various factors, the district court concluded there was a sound basis for retaining jurisdiction over the case and denied the motion to transfer.

[8] When a district court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to juvenile court.[14] The record in this case fully supports the reasoning of the district court, and we find no abuse of discretion in denying Hunt's motion to transfer the case to juvenile court.

No Abuse of Discretion in Sentences

Hunt argues the district court abused its discretion by refusing to enter disposition under the Nebraska Juvenile Code and, instead, imposing consecutive prison sentences totaling 35 to 60 years, which he argues is excessive.

Hunt was convicted of (1) using a deadly weapon (firearm) to commit a felony, a Class IC felony punishable by

[14] *Id.*

imprisonment for a mandatory minimum of 5 years and a maximum of 50 years[15]; (2) robbery, a Class II felony punishable by imprisonment for 1 to 50 years[16]; and (3) first degree assault, a Class II felony punishable by imprisonment for 1 to 50 years.[17] And because Hunt was under 18 years of age when he committed his crimes, the district court had the discretion to make disposition under the Nebraska Juvenile Code:

> Except when a term of life is required by law, whenever the defendant was under eighteen years of age at the time he or she committed the crime for which he or she was convicted, the court may, in its discretion, instead of imposing the penalty provided for the crime, make such disposition of the defendant as the court deems proper under the Nebraska Juvenile Code.[18]

The district court denied Hunt's request for disposition under the juvenile code, explaining that at the time he committed the violent armed robbery for which he was being sentenced, he was under juvenile probation supervision for committing violent armed robberies in 2015 and "obviously [was] getting no benefits from the supervision of the juvenile court." Moreover, the court reasoned that due to the serious danger Hunt posed to the community, it was necessary that he be incarcerated well beyond the age of majority. We find no abuse of discretion in denying Hunt's motion for disposition under the juvenile code.

[9] Nor do we find an abuse of discretion in the sentences imposed. 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

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[15] See Neb. Rev. Stat. §§ 28-1205(1)(c) (Reissue 2016) and 28-105(1) (Supp. 2015).

[16] See Neb. Rev. Stat. § 28-324 (Reissue 2016) and § 28-105(1).

[17] See Neb. Rev. Stat. § 28-308 (Reissue 2016) and § 28-105(1).

[18] § 29-2204(5).

any applicable legal principles in determining the sentence to be imposed.[19]

[10,11] 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.[20] 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, unless the statute requires that consecutive sentences be imposed.[22]

The sentence imposed on each of Hunt's convictions was well within the statutory limits, and the record shows the court considered and applied the necessary sentencing factors. Hunt's criminal history was significant, his crimes were violent and involved firearms, and his behavior was escalating despite the services and supervision provided in juvenile court. Moreover, Hunt's presentence report concluded he was at a high risk to reoffend. We cannot find an abuse of discretion in the sentences imposed.

CONCLUSION

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

Affirmed.

Wright, Miller-Lerman, and Kelch, JJ., not participating.

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[19] *State v. Stone, supra* note 8.

[20] *Id.*

[21] *Id.*

[22] *Id.*

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

State of Nebraska, appellee and cross-appellant, v. Ivan K. Henk, appellant and cross-appellee.

909 N.W.2d 634

Filed April 13, 2018. No. S-17-291.

1. **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.
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. **Postconviction.** Postconviction proceedings are civil in nature.
4. **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.
5. ____: ____: ____. 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.
6. **Judgments: Appeal and Error.** No judgment or order different from, or in addition to, the appellate mandate can have any effect.
7. **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.
8. **Courts: Judgments: Appeal and Error.** When an appellate court's mandate makes its opinion a part thereof by reference, the lower court

should examine the opinion with the mandate to determine the judgment to be entered or the action to be taken thereon.

9. **Waiver: Appeal and Error.** Issues that an appellant waives on appeal are not part of an appellate court's mandate on remand.
10. **Courts: Appeal and Error.** In order to protect the integrity of the judicial process, a defendant cannot be allowed to assert new claims on remand even when he or she is entitled to an evidentiary hearing on other claims.
11. **Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge, but a court will consider an allegation that the plea was the result of ineffective assistance of counsel.

Appeal from the District Court for Cass County: James T. Gleason, Judge. Affirmed in part, and in part vacated and set aside.

Gregory A. Pivovar for appellant.

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

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Colborn and Samson, District Judges.

Cassel, J.

INTRODUCTION

Ivan K. Henk again appeals from an order denying postconviction relief, this time after an evidentiary hearing mandated by our decision in the first appeal.[1] We conclude that two of Henk's claims were outside the scope of our mandate, and we vacate and set aside those parts of the district court's order. Because the remaining claim lacked merit, we otherwise affirm the order.

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[1] See *State v. Henk*, 284 Neb. xix (No. S-09-1160, July 17, 2012) (memorandum opinion).

BACKGROUND

In October 2003, Henk was charged with first degree murder, with aggravating circumstances, for the death of his son, Brendan Gonzalez, which occurred on or about January 6. He was initially questioned after his son disappeared, but he did not make any admissions. At a subsequent hearing on an unrelated charge, Henk admitted in open court to killing Brendan. He was then interviewed and eventually led investigators to the dumpster in which he said he had placed Brendan's body.

Henk ultimately pled guilty to first degree murder in exchange for the State's not pursuing the death penalty. Once again, he admitted in open court to the killing as part of the factual basis underlying the plea. The court accepted this plea and later sentenced Henk to life imprisonment without the possibility of parole.

Henk filed a pro se motion for postconviction relief in May 2009 alleging that David Kofoed, a crime scene investigator, planted blood evidence in the specific dumpster. He claimed that the identification of the blood as belonging to Brendan was a "critical piece of evidence" for the State and that his choice to plead guilty was influenced in part by the strength of this DNA evidence.

The district court denied Henk's motion for postconviction relief without an evidentiary hearing after determining that the issues were known to Henk at the time of his guilty plea and thus that his claim was procedurally barred. The court also determined that the arguments were without merit, because the blood evidence was not part of the factual basis used at the plea hearing. Henk appealed with the assistance of counsel who had represented him at trial.

On appeal, we determined that Henk's claim could not have been previously raised and thus was not procedurally barred. After finding that Henk had alleged facts which, if proved, could constitute an infringement of his rights under the state or federal Constitution, we concluded that he was entitled to

an evidentiary hearing. Accordingly, we reversed the decision and remanded the matter with directions to the district court to grant an evidentiary hearing.

On remand, Henk was represented by new counsel and requested leave to file an amended motion for postconviction relief in order to raise a third "cause of action," for ineffective assistance of trial counsel. The State objected and argued that pursuant to this court's mandate, the issues should be limited to those in the original motion for postconviction relief.

A hearing was held, after which the court granted Henk leave to file an amended motion. In doing so, the court interpreted the following statement from our opinion, "[t]he purpose of that evidentiary hearing will be to determine whether a constitutional violation occurred and, if so, whether Henk was prejudiced by such violation,"[2] as broad enough to allow the new claim of ineffective assistance of counsel.

Henk then filed an amended motion for postconviction relief in which he alleged that his constitutional rights were violated by (1) the planting of evidence or false reports of Brendan's blood in the dumpster Henk identified to law enforcement, (2) the prosecution's failure to disclose Kofoed's misconduct to Henk, and (3) ineffective assistance of trial counsel when counsel failed to challenge the DNA evidence at issue.

The district court conducted an evidentiary hearing and afterward denied Henk's amended motion for postconviction relief for failure to meet his burden of proof. The court adopted the test applied in *State v. Lee*[3] for analysis of an ineffective assistance of counsel claim and held that "[w]hen a defendant has pled guilty and alleges a constitutional violation in his [motion for] postconviction relief, and the court determines that an evidentiary hearing for a constitutional

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[2] *Id.*

[3] *State v. Lee*, 290 Neb. 601, 861 N.W.2d 393 (2015).

claim is necessitated by the facts, the court will apply a 'but-for' analysis to determine the merits of the claim." In limiting the issue to whether but for the intentional fabrication of evidence Henk would have rejected the plea offer, the court found that there was "ample evidence that [he] would have accepted the plea offer, regardless of the blood evidence from the dumpster." Therefore, it concluded that Henk suffered no actual prejudice. The court applied the same analysis to find that Henk's other claims were without merit.

Henk now appeals.

ASSIGNMENTS OF ERROR

Henk assigns, restated, that the district court erred in denying his amended motion for postconviction relief when (1) his constitutional rights were violated by an investigator falsifying evidence, (2) the prosecution knowingly or recklessly disregarded the falsified evidence, and (3) his trial counsel was ineffective in advising him to take the proffered plea agreement.

The State cross-appeals and assigns that the district court erred in granting Henk's motion for leave to file an amended motion for postconviction relief.

STANDARD OF REVIEW

[1] 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.[4]

[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.[5] An appellate court upholds the trial court's findings unless they are clearly erroneous.[6]

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[4] *State v. Payne*, 298 Neb. 373, 904 N.W.2d 275 (2017).

[5] *State v. Glass*, 298 Neb. 598, 905 N.W.2d 265 (2018).

[6] *Id.*

In contrast, an appellate court independently resolves questions of law.[7]

ANALYSIS

Jurisdiction

[3] Because postconviction proceedings are civil in nature,[8] some principles of jurisdiction derived from civil cases may be applicable to proceedings under the Nebraska Postconviction Act.[9] We turn to the State's jurisdictional argument.

The State argues that granting Henk's motion for leave to file an amended motion for postconviction relief and holding a hearing on the additional claim were outside the scope of the mandate from this court and, thus, outside the district court's authority. We agree. But for reasons discussed below, we also conclude that holding a hearing on the claim of prosecutorial misconduct was outside the scope of our mandate.

[4-7] 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.[10] 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.[11] No judgment or order different from, or in addition to, the appellate mandate can have any effect.[12] 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.[13]

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[7] *Id.*

[8] See *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

[9] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2016).

[10] *State v. Payne, supra* note 4.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[8] In Henk's original appeal from postconviction proceedings, we remanded the cause for an evidentiary hearing "to determine whether a constitutional violation occurred and, if so, whether Henk was prejudiced by such violation."[14] Our mandate directed the district court "to enter judgment in conformity with the judgment and opinion of this court." When an appellate court's mandate makes its opinion a part thereof by reference, the lower court should examine the opinion with the mandate to determine the judgment to be entered or the action to be taken thereon.[15]

In our previous opinion, this court passed on only one issue—whether Henk was entitled to an evidentiary hearing on his claim that his due process rights were violated when Kofoed planted evidence and falsified official reports. Though Henk had initially also asserted a claim of prosecutorial misconduct, he affirmatively abandoned it on appeal and assigned error only to the court's denial of an evidentiary hearing on his first claim. Relying on this sole assignment of error, we did not consider whether Henk was entitled to an evidentiary hearing on the prosecutorial misconduct claim.

[9,10] Since only one issue was passed upon by this court and referenced in our opinion, our mandate was limited to require an evidentiary hearing on that claim alone. Issues that an appellant waives on appeal are not part of an appellate court's mandate on remand.[16] And in order to protect the integrity of the judicial process, a defendant cannot be allowed to assert new claims on remand even when he or she is entitled to an evidentiary hearing on other claims.[17] Because the district court did not have the authority to affect rights and duties

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[14] *State v. Henk, supra* note 1.

[15] *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008).

[16] *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

[17] See, e.g., *State v. Payne, supra* note 4; *State v. Edwards*, 294 Neb. 1, 880 N.W.2d 642 (2016) (Stacy, J., concurring; Cassel, J., joins).

outside the scope of the remand, we vacate and set aside the order granting leave to file an amended motion for postconviction relief and that portion of the district court's order addressing the second and third claims.

We express no opinion as to whether there is a procedural bar on Henk's third claim, because the record on appeal is insufficient to determine whether the claim for ineffective assistance of counsel could have been asserted at the time that he filed the prior motion.[18] Assuming without deciding that he was not procedurally or time barred from doing so, we note that Henk could have filed a second motion for postconviction relief alleging this claim at the time of filing his request for leave to amend his first motion.[19] However, Henk is judicially estopped from reasserting his second claim, because he affirmatively abandoned it in his first appeal.[20]

Having determined that only one issue is properly before us on appeal, we turn to consider the merits of that claim.

Merits

Henk argues that but for the fabricated evidence, he would not have agreed to the plea bargain. He suggests that "[h]ad the fraudulent conduct of the government official been revealed and disclosed it would have tainted the entire process."[21] However, the wrongness of Kofoed's conduct is not the issue in this case. That matter has been settled, and Kofoed has been sentenced in consideration of his crimes.[22] Here, Henk had the

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[18] See *State v. Jackson*, 296 Neb. 31, 892 N.W.2d 67 (2017).

[19] See, e.g., *State v. Edwards, supra* note 17.

[20] See *O'Connor v. Kearny Junction*, 295 Neb. 981, 987, 893 N.W.2d 684, 690 (2017) ("[w]hen a party has unequivocally asserted a position in a proceeding and a court accepts that position, judicial estoppel can bar that party's inconsistent claim against the same or a different party in a later proceeding").

[21] Brief for appellant at 34.

[22] See *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

burden to prove that there was a constitutional violation and that he was prejudiced by the constitutional violation.

[11] Normally, a voluntary guilty plea waives all defenses to a criminal charge, but a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[23] Though this claim was not framed as ineffective assistance of counsel in the first appeal, we nonetheless remanded for an evidentiary hearing. The sufficiency of this allegation thus became the law of the case, and, as neither party addresses it on this appeal, we assume without deciding that a constitutional violation occurred.

To establish prejudice in this context, Henk had to show that but for the fabricated evidence, he would not have accepted the plea bargain.[24] Henk did not meet this burden of proof.

The record demonstrates that Henk's main concern in pleading guilty was preventing the media from disclosing the evidence and his statements detailing the killing to law enforcement. In Henk's own words, he said, "I was very interested in getting the statements that I made and confessions that I made not given to the public. So that was a major consideration." During his interviews with law enforcement, he had gone into detail about killing Brendan and he had made clear even before he was charged that he intended to plead guilty. He also admitted to the killing at the hearing on his plea. And as the district court noted, Henk offered his own deposition into evidence, but it did not state that he would not have pled guilty were it not for the dumpster evidence. With this record, the district court was not clearly wrong in finding that there was ample evidence that Henk would have accepted the plea offer, regardless of the blood evidence from the dumpster.

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[23] See *State v. Lee, supra* note 3.

[24] See *id.*

Because Henk did not show that but for the fabricated evidence, he would not have accepted the plea bargain, he failed to establish that he was entitled to postconviction relief. Accordingly, the district court did not err in denying his motion.

CONCLUSION

We vacate and set aside the district court's order granting leave to file an amended motion for postconviction relief and the portion of its order concerning those claims which were outside the scope of our mandate. Because Henk's remaining claim is without merit, we affirm in all other respects the district court's order denying postconviction relief.

Affirmed in part, and in part vacated and set aside.

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 Marcia G. Abbott-Ochsner, deceased. Mark D. Abbott, Personal Representative of the Estate of Marcia G. Abbott-Ochsner, deceased, appellant, v. Cynthia J. Sellon and Russell G. Abbott, appellees.

910 N.W.2d 504

Filed April 13, 2018. No. S-17-528.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
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 appeal.
3. **Final Orders.** A special proceeding includes every special statutory remedy that is not in itself an action, or an integral step to commence it, join issues in it, and conduct it to a final hearing and judgment.
4. **Decedents' Estates: Final Orders.** A proceeding under Neb. Rev. Stat. § 30-2457 (Reissue 2016) is a special proceeding.
5. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
6. **Final Orders: Appeal and Error.** An order affects a substantial right if it affects the subject matter of the litigation by diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
7. **Final Orders.** It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.
8. **Final Orders: Appeal and Error.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2016) is not affected when that right can be effectively vindicated in an appeal from the final judgment.
9. **Decedents' Estates: Final Orders: Appeal and Error.** Orders denying a request to remove a personal representative for cause are final and immediately appealable by the person interested in the estate who petitioned for the personal representative's removal.

10. **Final Orders: Appeal and Error.** To be a final order, the substantial right affected must be of the appellant and cannot be claimed vicariously.
11. **Decedents' Estates: Final Orders.** In and of itself, and without additional facts indicating otherwise, an order appointing a special administrator pursuant to Neb. Rev. Stat. § 30-2425 (Reissue 2016) is not a final order.
12. **Final Orders: Appeal and Error.** An appellate court does not entertain direct appeals from interlocutory orders in order to avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court.
13. **Decedents' Estates.** The underlying purpose of the Nebraska Probate Code is to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the successors.
14. **Final Orders: Jurisdiction: Appeal and Error.** An appellate court's jurisdiction to review whether the lower court acted extrajurisdictionally presupposes its appellate jurisdiction over an appeal from a final order or judgment.

Appeal from the County Court for Douglas County: Lawrence E. Barrett, Judge. Appeal dismissed.

Michael F. Coyle, Elizabeth A. Culhane, and Jacqueline M. DeLuca, of Fraser Stryker, P.C., L.L.O., for appellant.

John M. Lingelbach, James A. Tews, and Minja Herian, of Koley Jessen, P.C., L.L.O., for appellees.

Heavican, C.J., Cassel, Stacy, and Funke, JJ., and Pirtle, Judge.

Heavican, C.J.

INTRODUCTION

This case involves the probate of Marcia G. Abbott-Ochsner's estate, most of which consists of a trust that was the subject of a previous appeal to this court in *In re Conservatorship of Abbott* (*Abbott I*).[1] Two siblings filed a petition in county court contesting the validity of the will presented for informal

[1] *In re Conservatorship of Abbott*, 295 Neb. 510, 890 N.W.2d 469 (2017).

probate by their brother, who had been appointed by the county court as the personal representative of the estate.

Pursuant to Neb. Rev. Stat. § 30-2429.01(1) (Reissue 2016), the personal representative transferred his siblings' will contest to the district court. Afterward, pursuant to Neb. Rev. Stat. § 30-2425 (Reissue 2016), the county court granted the siblings' request to appoint a special administrator for the estate, pending resolution of the district court proceedings. The siblings had also sought appointment of a different personal representative, but the county court's order did not remove the brother as personal representative. The brother appeals, arguing that the county court lacked jurisdiction to appoint a special administrator, because the case had been transferred to the district court. The siblings disagree and assert, as a threshold matter, that an order appointing a special administrator pursuant to § 30-2425 is not a final order.

BACKGROUND

The "Abbott Living Trust" was created by Marcia G. Abbott-Ochsner (Marcia) and her first husband, George W. Abbott, in 1995. Marcia and George were cotrustees of the trust, which was divided into a revocable "'Survivor's Trust'" and an irrevocable "'Family Trust.'"[2] Marcia and George had three children—Russell G. Abbott, Cynthia J. Sellon (Cynthia), and Mark D. Abbott—who were beneficiaries.

George died in 1996. Marcia suffered a stroke in 2011. As a result of the stroke, Marcia suffered from expressive aphasia—a disorder that affects the brain's ability to use and understand language. In March 2015, Marcia appointed Mark as successor trustee to the living trust and Mark accepted the appointment.

At the behest of Russell and Cynthia, the county court ordered the appointment of a conservator and removed Mark as trustee. At that time, the living trust was valued at approximately $2 million.

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[2] *Id.* at 514, 890 N.W.2d at 475.

As described in *Abbott I*, the county court considered evidence that Mark was hostile toward Cynthia. Mark accused Cynthia of murdering their aunt and receiving an unequal share of their aunt's estate. Mark repeatedly threatened to "'make it even,'" using the assets of the trust.[3] Mark described his relationship with Russell and Cynthia as "'WWIII.'"[4]

The county court also considered evidence that Mark had refused to provide documentation concerning the trust and trust activities, had acted as trustee before being appointed, and had facilitated money transfers resulting in negative tax consequences.

The county court found that Mark had violated several of his duties under the Nebraska Uniform Trust Code, including his duty to administer the trust in good faith, his duty of loyalty, his duty of impartiality, and his duty to inform and report. On appeal, we affirmed Mark's removal as trustee, concluding that Mark's breach of his duty of impartiality was dispositive.[5]

In September 2015, several months after Marcia had appointed Mark as successor trustee, and apparently after a conservator had been appointed for Marcia, Marcia executed a pourover will. Marcia exercised her limited testamentary power in the family trust to change the default equal distribution between the three children to a 100-percent distribution to Mark and a 0-percent distribution to Russell and Cynthia. The pourover will provided that Mark was to be the estate's personal representative, with sole discretion to distribute Marcia's personal possessions.

Marcia died in October 2016. Mark filed an application for informal probate of the 2015 pourover will and informal appointment of a personal representative of Marcia's estate. That same day, Mark accepted informal appointment as

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[3] *Id.* at 516, 890 N.W.2d at 477.

[4] *Id.*

[5] *Abbott I, supra* note 1.

personal representative of the estate. He also filed a petition for declaratory judgment in the district court, seeking an order declaring Marcia's 2015 amendments to the living trust valid, including her distribution of 100 percent of the assets to Mark. The county court confirmed Mark's informal appointment and issued letters of personal representative. Russell and Cynthia filed a petition in the county court to set aside the informal probate of the will, for a formal testacy proceeding, and for appointment of a different personal representative in the formal proceedings. Russell and Cynthia alleged that the 2015 pour-over will was not valid, because Marcia lacked the requisite capacity to execute the will, and that the will was the product of undue influence.

In their petition for formal proceedings, Russell and Cynthia also requested an order, pursuant to § 30-2425, restraining Mark from exercising any powers of a personal representative and appointing a special administrator.

Pursuant to § 30-2429.01(1), Mark filed a notice of transfer of Russell and Cynthia's petition to the district court and paid the required docket fee. After Mark filed his notice of transfer under § 30-2429.01(1), a hearing was held in the county court to determine Russell and Cynthia's request for the appointment of a special administrator during the pendency of the district court proceedings.

Mark argued at the hearing that the county court no longer had jurisdiction to appoint a special administrator, because the proceeding to determine whether Marcia left a valid will had been moved to the district court. Russell and Cynthia, in contrast, asserted that although the will contest had been transferred to the district court, the county court retained jurisdiction over the rest of the formal probate proceedings, such as claims by creditors.

Mark conceded that some "ancillary matters" were still to be handled by the county court, but that the appointment of a special administrator was part of the will contest proceedings in district court. When Mark pointed out that the request

for the appointment of a special administrator had been made in the petition that was moved to district court, Russell and Cynthia offered to file a separate motion.

In support of their argument that a special administrator should be appointed, Russell and Cynthia offered Cynthia's affidavit. The affidavit was admitted over Mark's objections on the basis of subject matter jurisdiction, hearsay, foundation, speculation, and unfair surprise. Cynthia averred in her affidavit that she had reviewed the trust activity records and believed that approximately $800,000 was unaccounted for.

Russell and Cynthia also entered into evidence the county court's prior order appointing a conservator for Marcia and removing Mark as trustee, as well as this court's opinion in *Abbott I* affirming the county court's decision to remove Mark as trustee. Russell and Cynthia argued that a special administrator was appropriate, given Mark's past history of breaching his fiduciary duties as trustee.

On April 10, 2017, the county court issued an order appointing a special administrator. The court did not remove Mark as personal representative of the estate. Mark appeals from the April 10 order.

ASSIGNMENTS OF ERROR

Mark assigns that the county court erred in (1) failing to dismiss Russell and Cynthia's petition when the case had already been removed to district court; (2) failing to dismiss for lack of jurisdiction Russell and Cynthia's request for a special administrator when the case had already been removed to district court; (3) entering an order appointing a special administrator; (4) allowing Cynthia's affidavit into evidence; (5) ruling on the petition to set aside informal probate of the will, for formal adjudication of intestacy, determination of heirs, and appointment of personal representative without allowing Mark the ability to cross-examine Cynthia; and (6) failing to restrict the special administrator from acting during the pendency of the litigation in district court.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law.[6]

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 appeal.[7] Appellate review under the Nebraska Probate Code is governed by Neb. Rev. Stat. § 30-1601 (Reissue 2016), which states that appeals from a county court may be taken in the same manner as appeals from a district court and that "[a]n appeal may be taken by any party and may also be taken by any person against whom the final judgment or final order may be made or who may be affected thereby."

There has not yet been a final judgment in which the probate estate has been finally established.[8] Thus, we must determine whether Mark appeals from a final order.[9] Final orders are defined by Neb. Rev. Stat. § 25-1902 (Reissue 2016). As applicable here, the question is whether, under § 25-1902, the April 10, 2017, order "affect[ed] a substantial right" and was "made in a special proceeding."

[3,4] A special proceeding includes every special statutory remedy that is not in itself an action, or an integral step to commence it, join issues in it, and conduct it to a final hearing and judgment.[10] Neb. Rev. Stat. § 30-2457 (Reissue 2016) confers upon persons interested in an estate the specific right to petition the county court to appoint a special administrator. Thus, a proceeding under § 30-2457 is a special proceeding.

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[6] See *Robinson v. Houston*, 298 Neb. 746, 905 N.W.2d 636 (2018).

[7] See *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

[8] See *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007).

[9] See *In re Adoption of Micah H.*, 295 Neb. 213, 887 N.W.2d 859 (2016).

[10] See *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989).

[5-8] Whether the April 10, 2017, order affected a substantial right requires more analysis. A substantial right is an essential legal right, not a mere technical right.[11] An order affects a substantial right if it affects the subject matter of the litigation by diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.[12] The duration of the order is also relevant to whether it affects a substantial right.[13] It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[14] And a substantial right under § 25-1902 is not affected when that right can be effectively vindicated in an appeal from the final judgment.[15]

This court has never determined whether an order appointing a special administrator upon a petition for formal probate affects a substantial right of the informally appointed personal representative. A formal testacy proceeding is litigation to determine whether a decedent left a valid will.[16] Section 30-2425 states that a formal testacy proceeding "may be commenced by an interested person filing a petition as described in section 30-2426(a) . . . or . . . section 30-2426(b)." Such a petition may be either with or without a request for appointment of a personal representative.[17]

Russell and Cynthia filed a petition as described by § 30-2426(a). In the petition, they requested the appointment of a personal representative. Mark is not appealing the commencement of formal proceedings, and he is not appealing his removal as personal representative, because no such order has been made.

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[11] *Jennifer T. v. Lindsay P.*, 298 Neb. 800, 906 N.W.2d 49 (2018).

[12] See *id*.

[13] See *id.*

[14] *In re Adoption of Madysen S. et al., supra* note 7.

[15] *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

[16] § 30-2425.

[17] See § 30-2425 and Neb. Rev. Stat. § 30-2426 (Reissue 2016).

Upon commencement of a formal testacy proceeding, the court shall fix a time and place of hearing.[18] Section 30-2425 provides that "[u]nless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative . . . must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding."

Section 30-2425 goes on to provide that a petitioner who seeks the appointment of a different personal representative in a formal proceeding "also may request an order restraining the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator."

Section 30-2425 states that if no special administrator is appointed, then the commencement of a formal proceeding has no effect on the powers and duties of the previously appointed special administrator other than those relating to distribution. But Neb. Rev. Stat. § 30-2438(a) (Reissue 2016) states that if a formal proceeding for adjudication regarding the qualification of one who previously has been appointed personal representative in informal proceedings is commenced after appointment, "the previously appointed personal representative . . . shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise." Though the court's order was not explicit in this case, such restriction apparently was to continue until the court determined who is entitled to appointment as set forth in § 30-2438(b).

Section 30-2438 states that a formal proceeding for adjudication regarding the qualification of one who previously has been appointed personal representative in informal proceedings, when an issue concerning the testacy of the decedent is or may be involved, is governed by both §§ 30-2426 and 30-2438. Russell and Cynthia presented in their petition issues

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[18] See Neb. Rev. Stat. § 30-2427(a) (Reissue 2016).

regarding Mark's qualification as personal representative. We treat their petition as a request to have Mark's qualification adjudicated in a formal proceeding under § 30-2438.[19]

Mark asserts that his substantial rights were affected because the April 10, 2017, order appointing a special administrator "stripped Mark" of his powers to act as personal representative.[20] But, as set forth above, the commencement of the formal proceedings had already limited Mark's power to do anything other than preserve the estate.

Mark does not elaborate how appointing a special administrator to protect the estate affected his substantial rights, other than to point out that he was nominated in the contested will and that the estate and, ultimately, Mark, as an heir, will bear the costs of the special administrator's compensation. Mark argues that the effect on these allegedly substantial rights cannot be vindicated in an appeal from the judgment, because the costs and any potential mishandling of the estate by the special administrator cannot later be undone.

While rights of priority among persons seeking appointment, "who are not disqualified," are set forth in Neb. Rev. Stat. § 30-2412 (Reissue 2016), no determination of appointment in the formal proceeding has yet been made. And Mark does not present any reason why the special administrator, an uninterested third party, would mishandle the estate. Mark did not object below that the special administrator was disqualified or move for removal for cause. Mark does not explain how a special administrator's reasonable compensation would be more burdensome to the estate than the reasonable compensation due to a personal representative who would otherwise be acting during that time.[21]

[9] We have held that orders denying a request to remove a personal representative for cause are final and immediately

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[19] See *In re Estate of Sutherlin*, 261 Neb. 297, 622 N.W.2d 657 (2001).

[20] Reply brief for appellant at 7.

[21] Neb. Rev. Stat. § 30-2480 (Reissue 2016).

appealable by the person interested in the estate who petitioned for the personal representative's removal.[22] Neb. Rev. Stat. § 30-2454 (Reissue 2016) grants a person interested in the estate the right to petition for removal of a personal representative for cause. Orders subsequent to a hearing under that statute are the final determination of that right. We have explained that personal representatives have broad powers to administer and distribute the decedent's estate, usually without direction of the county court.[23] We have thus indicated that the right conferred by § 30-2454 is more than a mere technical right, and one that could not be effectively vindicated in an appeal from the final judgment.[24]

We have also held that orders finally determining a personal representative's right to fees, as provided in § 30-2480, are final.[25] We reason that such orders are a final disposition of the personal representative's rights granted under § 30-2480.[26]

In *In re Estate of Muncillo*,[27] we held that the court's denial of an application to appoint a special administrator pursuant to § 30-2457(2) was a final order. As already described, § 30-2457(2) grants to a person interested in the estate the right to petition for appointment of a special administrator to preserve the estate and secure its proper administration. Not only was this right finally determined by the court's order, but we explained that this right could not be effectively vindicated upon appeal from entry of the later final judgment.[28] Explaining that the probate of an estate can remain open for

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[22] See, *In re Estate of Nemetz*, 273 Neb. 918, 735 N.W.2d 363 (2007); *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992); *In re Estate of Snover, supra* note 10.

[23] *In re Estate of Snover, supra* note 10.

[24] *Id.*

[25] *In re Estate of Gsantner*, 288 Neb. 222, 846 N.W.2d 646 (2014).

[26] See *id.*

[27] *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010).

[28] See *id.*

years, we said that after the appeal from the final judgment, a "special administrator cannot go back in time and preserve or administer the estate long after the application to appoint has been denied."[29]

We find these cases inapposite to the present appeal. Even if a personal representative's substantial rights are affected by an order granting a petitioner's request to remove for cause under § 30-2454,[30] the April 10, 2017, order did not remove Mark as the personal representative. While priority among persons seeking appointment "who are not disqualified" is set forth by § 30-2412, to the extent Mark asserts that his right under § 30-2412 has been affected, the order before us is not a final determination of his appointment.

[10] Likewise, our holding in *In re Estate of Muncillo* does not apply to the facts of this case. To be a final order, the substantial right affected must be of the appellant and cannot be claimed vicariously.[31] Given that Mark's status as personal representative has not been finally determined, Mark's remaining right allegedly affected is merely to prohibit the appointment of a special administrator to protect the estate while the underlying will contest and his qualifications as personal representative are litigated. It is unclear where such a right might come from.

Any alleged right to avoid the appointment of a special administrator is meaningfully different from the right conferred by § 30-2457(2) to seek the appointment of a special administrator to protect the estate upon commencement of a formal proceeding that calls into question the informal appointment. Unlike an informally appointed personal representative, the special administrator is appointed by the court in a formal proceeding after notice and a hearing in which the court has determined that the appointment is necessary to preserve

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[29] *Id.* at 674, 789 N.W.2d at 42.

[30] See *In re Estate of Weingarten*, 10 Neb. App. 82, 624 N.W.2d 653 (2001).

[31] See, e.g., *In re Adoption of Amea R., supra* note 15.

the estate.[32] Absent a motion to remove the special administrator for cause, there is no reason to conclude that the appointment of the special administrator creates a risk of improper administration of the estate that cannot later be undone. This is in contrast to the refusal to appoint a special administrator under the circumstances described in § 30-2425.

Other courts with similar final order jurisprudence distinguish orders appointing special administrators, which they hold are not final, from orders appointing or removing a personal representative, which they hold are final.[33] The court in *Estate of Keske*,[34] for instance, reasoned that the appointment of a special administrator is not the kind of interim order that precluded further hearing and investigation of the rights of the parties.

With regard to its effect on any right of the appellant, the April 10, 2017, order is analogous to the order we held was not final in *In re Estate of Peters*.[35] In *In re Estate of Peters*, we held that an order reappointing a personal representative after an estate has been formally closed is not a final order, because it does not affect a substantial right. The estate had been reopened upon discovery that a specific bequest had not been paid, and as a result, excess distributions were made to the residuary beneficiaries of the estate.[36] We noted that while reopening the estate and reappointing the personal representative forced the heirs to defend their distributions, which they claimed was an improper collateral attack, the order was not dispositive of their rights.[37]

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[32] See § 30-2457.

[33] See, *Guess v. Going*, 62 Ark. App. 19, 966 S.W.2d 930 (1998); *Estate of Keske*, 33 Wis. 2d 64, 146 N.W.2d 450 (1966). But see *Matter of Estate of Franchs*, 722 P.2d 422 (Colo. App. 1986).

[34] *Estate of Keske, supra* note 33.

[35] *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000).

[36] See *id.*

[37] See *id.*

We cited, with approval, *In re Miller Estate*,[38] wherein the court said that the test of finality of a probate order is whether it affects with finality the rights of the parties in the subject matter. We concluded that the court's order did not affect a substantial right, because it did not diminish with finality the heirs' claims and defenses to returning a portion of their bequests.[39] The order simply was not dispositive of any of the rights of the parties.[40]

[11] Similarly, here, the April 10, 2017, order did not affect with finality Mark's substantial rights. We hold that in and of itself, and without additional facts indicating otherwise, an order appointing a special administrator pursuant to § 30-2425 is not a final order.

We note that in *In re Estate of Lorenz*,[41] the Nebraska Court of Appeals addressed the merits of an appeal directly from an order of summary judgment in probate proceedings, which determined the allowance of the interested person's claim against the estate, will contest, and request for the appointment of a special administrator. But the court's order appeared to be a final determination of the interested person's claim, and the Court of Appeals did not discuss why it considered the order to be final.[42]

Likewise, the Court of Appeals' decision in *In re Estate of Wilson*[43] does not stand for the proposition that an order appointing a special administrator is final. The court did not discuss the direct appealability of the order, which, in any event, was the denial of a motion to vacate a prior appointment of the special administrator. The special administrator

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[38] *In re Miller Estate*, 106 Mich. App. 222, 307 N.W.2d 450 (1981).

[39] See *In re Estate of Peters, supra* note 35.

[40] See *id.*

[41] *In re Estate of Lorenz*, 22 Neb. App. 548, 858 N.W.2d 230 (2014), *reversed in part on other grounds* 292 Neb. 543, 873 N.W.2d 396 (2016).

[42] See *id.*

[43] *In re Estate of Wilson*, 8 Neb. App. 467, 594 N.W.2d 695 (1999).

in *In re Estate of Wilson* had been appointed some 21 months before. If anything, the court's decision in *In re Estate of Wilson* stands for the proposition that the appointment of a special administrator is not a final order. For, if it were, then the appellant's failure to appeal from the order within 30 days, as required by Neb. Rev. Stat. § 25-1931 (Reissue 2016) would have foreclosed a later challenge to the appointment.

[12,13] We do not entertain direct appeals from interlocutory orders in order to avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court.[44] The underlying purpose of the Nebraska Probate Code is to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the successors.[45] Allowing a piecemeal appeal from an order appointing a special administrator defeats that purpose.

[14] We find no merit to Mark's argument that even if the appeal is not from a final order or judgment, we have appellate jurisdiction to consider whether the lower court acted without jurisdiction. The legal proposition upon which Mark relies states that though we lack jurisdiction over the merits of an extrajurisdictional act, we have jurisdiction to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed.[46] Our jurisdiction to review whether the lower court acted extrajurisdictionally presupposes our appellate jurisdiction over an appeal from a final order or judgment.

We have never held that we have appellate jurisdiction to determine if the lower court acted within its jurisdiction in an appeal from a nonfinal order. Our appellate jurisdiction is governed by statute. Nowhere does the Legislature provide

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[44] *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

[45] Neb. Rev. Stat. § 30-2202 (Reissue 2016); *In re Estate of Kentopp. Kentopp v. Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980).

[46] *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

for our immediate review of all interlocutory orders alleged to be entered by the lower court without jurisdiction. The Legislature has provided only, as relevant here, that an order is final if it affects a substantial right. Whether the lower court acted with jurisdiction does not change the nature of the right affected by the court's action. To the extent that the Court of Appeals in *In re Interest of Angeleah M. & Ava M.*[47] concluded differently, that case is disapproved.

We have already concluded in this case that the April 10, 2017, order did not affect Mark's substantial rights. We express no opinion on the merits of Mark's argument that the county court lacked jurisdiction to appoint a special administrator once the will contest had been removed to district court.

CONCLUSION

For the foregoing reasons, we lack jurisdiction over Mark's appeal from the April 10, 2017, order. We dismiss the appeal.

Appeal dismissed.

Wright, Miller-Lerman, and Kelch, JJ., not participating.

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[47] *In re Interest of Angeleah M. & Ava M.*, 23 Neb. App. 324, 871 N.W.2d 49 (2015).



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Jennifer Westwood, appellant, v. Cheryl A. Darnell, appellee.

909 N.W.2d 645

Filed April 13, 2018. No. S-17-538.

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.
3. ____: ____. 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.
4. **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.
5. **Property Division.** The purpose of a property division is to distribute the marital assets equitably between the parties.
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. 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. ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.

8. **Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
9. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either party during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
10. ____: ____. Exceptions to the rule that all property accumulated and acquired during the marriage is marital property includes property accumulated and acquired through gift or inheritance.
11. **Divorce: Property Division: Taxes.** Ordinarily, a trial court in Nebraska should not consider the speculative tax consequences of its distribution orders unless it has ordered the immediate liquidation or sale of an asset or a party must sell an asset to satisfy a monetary judgment.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Elaine A. Waggoner, of Waggoner Law Office, for appellant.

B. Gail Steen, of Steen Law Office, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Steinke, District Judge.

Heavican, C.J.

INTRODUCTION

The district court entered a decree dissolving the marriage of Jennifer Westwood and Cheryl A. Darnell and dividing their marital estate. Westwood appeals. We affirm.

BACKGROUND

Westwood and Darnell were married in Vermont in 2011. No children were born of the marriage. The parties separated on or about June 25, 2015. The district court's decree awarded each party her personal property, automobile, and retirement account. Westwood was ordered to pay an equalization payment to Darnell in the amount of $3,755.67.

The record indicates that Westwood and Darnell were both employed by the Nebraska Department of Correctional

Services. Both earned comparable salaries and had premarital retirement accounts to which they continued to contribute after they married. Household expenses were split equally.

Westwood quit her job in March 2015. Shortly thereafter, she withdrew $75,393.04 from her retirement account. After taxes, penalties, and fees, the sum of $51,999.99 was deposited in the parties' joint bank account. The couple then paid off outstanding marital debts and deposited some of the money in a new retirement account. Among the bills paid with the proceeds from the withdrawal were the outstanding balances of $20,849.73 for Darnell's vehicle and $12,855.89 for Westwood's vehicle.

When the parties separated in June 2015, they had no marital debt except the mortgage on their home and the balance on a credit card which had been used to purchase items for household improvements. Each party also had a vehicle of somewhat similar value, a retirement account, and jointly held checking and savings accounts.

The parties purchased a home together, though only Westwood was listed on the deed. The marital home was sold in August 2015. Westwood kept the $11,150.81 proceeds from the sale of the home. At some point prior to entry of the decree, Westwood paid Darnell $1,250.

Westwood filed for divorce in December 2015. Following a trial, the district court awarded each party the personal property and automobile in her possession, her separate retirement account, and any bank accounts in her own name. Westwood was ordered to make an equalization payment to Darnell of $3,755.67.

Westwood appeals.

ASSIGNMENTS OF ERROR

On appeal, Westwood assigns that the district court erred in its division of the marital property by (1) not classifying as separate property the proceeds from Westwood's withdrawal

of $51,999.99 from her retirement account; (2) failing to consider that Darnell was unjustly enriched by payment of the loan on her vehicle; and (3) failing to consider that Darnell refused to file taxes jointly, thus refusing to share in the tax burden imposed upon the withdrawal of Westwood's retirement funds.

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]

[2,3] 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]

[4] 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]

ANALYSIS

In her first assignment of error, Westwood asserts that the district court erred in treating as marital property the funds Westwood withdrew from her retirement account.

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[1] *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5-7] The purpose of a property division is to distribute the marital assets equitably between the parties.[5] 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. 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.[6] The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.[7]

[8-10] The burden of proof to show that property is nonmarital remains with the person making the claim.[8] As a general rule, all property accumulated and acquired by either party during the marriage is part of the marital estate, unless it falls within an exception to the general rule.[9] Such exceptions include property accumulated and acquired through gift or inheritance.[10]

Westwood relies on *Lisec v. Lisec*[11] to support her contention that the money she withdrew from her retirement account maintained its status as her separate property. In *Lisec*, the wife argued that she was entitled to proceeds received from the sale of the marital home, because she provided the downpayment for the home from nonmarital funds. Specifically, the wife had received a gift of money from her mother, which she deposited into the parties' joint checking account and then used to make

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[5] Neb. Rev. Stat. § 42-365 (Reissue 2016).

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

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Lisec v. Lisec*, 24 Neb. App. 572, 894 N.W.2d 350 (2017).

the downpayment on the home. The wife argued that these funds retained their identity as gifted funds.

The Nebraska Court of Appeals affirmed the district court's conclusion that the proceeds should be considered marital property, noting that the home was placed in both parties' names and that the settlement agreement the parties entered explicitly provided that jointly titled property was to be considered marital property.

Westwood argues that the Court of Appeals' decision was premised on the settlement agreement; otherwise, the house proceeds would have been considered nonmarital property. Thus, in her case, because there was not a settlement agreement providing as much with regard to these retirement funds, the funds would be considered nonmarital even after their deposit in the parties' joint account.

Westwood's contention with respect to the funds withdrawn from her retirement account is without merit. As an initial matter, *Lisec* is inapposite. Gifts and inheritances, even when received during the marriage, are presumed to be nonmarital. But retirement funds are not. Rather, retirement benefits earned during a parties' marriage are considered to be marital property; only those benefits earned prior to marriage would be considered to be nonmarital.[12] Westwood provides no authority to support the contention that retirement funds are converted into separate property after being withdrawn from a retirement account.

The burden is on Westwood to show that the funds in question are nonmarital. She has not met this burden. As noted, Westwood directs us to no authority suggesting that such funds are presumed to be nonmarital. Nor did Westwood present sufficient evidence to show that the funds withdrawn were her nonmarital property earned prior to marriage and not benefits earned during the marriage. Finally, the funds

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[12] *Lorenzen v. Lorenzen*, 294 Neb. 204, 883 N.W.2d 292 (2016).

in question were withdrawn from Westwood's retirement account, placed into the parties' joint checking account, and used to pay marital debts. This supports the conclusion that the funds were considered marital property. Westwood's first assignment of error is without merit.

In her second assignment of error, Westwood argues that the district court erred in not finding that Darnell was unjustly enriched by having her automobile loan paid off using the funds withdrawn from Westwood's retirement account.

After clarifying Westwood's contention during the oral argument for this appeal, we observe that the term "unjust enrichment" is used here in a colloquial sense: Westwood simply argues that the equities of this situation demand that the retirement proceeds be treated as separate property. And we have concluded that the burden to show that the funds were nonmarital was on Westwood and that she failed to meet this burden. As such, there is no merit to this assignment of error.

In her third and final assignment of error, Westwood contends that the district court erred in not considering that Darnell refused to file joint tax returns when dividing the marital estate. Westwood contends that a joint filing would have shifted the tax burden as to the withdrawal of funds from her retirement account.

[11] Ordinarily, a trial court in Nebraska should not consider the speculative tax consequences of its distribution orders unless it has ordered the immediate liquidation or sale of an asset or a party must sell an asset to satisfy a monetary judgment.[13] In *Bock v. Dalbey*,[14] we were faced with the questions of (1) whether a district court can consider the tax consequences of one party's refusal to file a joint return in dividing the marital estate, and (2) whether it has discretion

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

[14] *Id.*

to order the parties to file a joint return to preserve assets for the marital estate or to equalize its division of the estate. We generally held that a district court does not have discretion to order parties to file a joint tax return. We further noted:

> Married individuals can elect whether to file a joint or separate return. For joint returns, the federal government taxes the income of a married couple in the aggregate. Filing jointly generally, but not always, produces substantial tax savings. But a "[couple] filing a joint return are jointly and severally liable for all tax for the taxable year (not merely the amount shown on the return), including interest, additions for negligence, and fraud penalties if applicable." The right of election under the federal tax code and the possible exposure to liability have prompted several courts to hold that a trial court cannot order a party to file a joint return.
>
> . . . .
>
> Here, the statutory remedy is found in . . . § 42-365 . . . . This statute authorizes a trial court to equitably distribute the marital estate according to what is fair and reasonable under the circumstances. Because § 42-365 is broad in its scope, we agree with the decisions of courts that hold a trial court may adjust its equitable division of the marital estate to account for the tax consequences of filing separate returns.
>
> Therefore, under § 42-365, we hold that if a party seeking an equitable adjustment presents the court with the tax disadvantages of filing separate returns, a trial court may consider a party's unreasonable refusal to file a joint return. Evidence of a tax disadvantage would normally include the parties' calculated joint and separate returns for comparison.[15]

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[15] *Id.* at 996-97, 1001, 815 N.W.2d at 533, 536.

We do not opine today on whether evidence other than a completed joint tax return could serve as sufficient evidence of a tax disadvantage. In this instance, Westwood has failed to introduce any evidence, apart from her and Darnell's separate tax returns and her testimony that the tax consequence would have been different, to support her contention regarding the consequences of a joint filing. Westwood's third and final assignment of error is without merit.

CONCLUSION

The decision 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

E.D., appellee and cross-appellee, v. Bellevue Public School District, appellant, and Bradley Nord, appellee and cross-appellant.

909 N.W.2d 652

Filed April 13, 2018. No. S-17-590.

1. **Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decision made by the lower court.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
4. **Jurisdiction: Statutes: Appeal and Error.** Appellate jurisdiction in Nebraska is purely statutory.
5. **Courts: Jurisdiction: Legislature: Statutes: Appeal and Error.** Through the enactment of statutes, the Legislature has prescribed when a court may exercise appellate jurisdiction; the judicial branch may not circumvent such statutory authorization.
6. **Courts: Legislature: Statutes: Time: Appeal and Error.** Just as courts have no power to extend the time set by the Legislature for taking an appeal, courts have no power to allow an appeal when it is not authorized by statute.
7. **Legislature: Intent.** The intent of the Legislature is expressed by omission as well as by inclusion.
8. **Jurisdiction: Statutes: Judgments: Final Orders: Appeal and Error: Case Overruled.** The Nebraska Supreme Court's decision in *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011), *modified on denial of rehearing* 281 Neb. 978, 802 N.W.2d 420, is overruled to the extent that it authorized appellate jurisdiction in the absence of a judgment or final order and without specific statutory authorization.

Appeal from the District Court for Sarpy County: George A. Thompson and Stefanie A. Martinez, Judges. Appeal dismissed.

Jeanelle R. Lust and Carly Bahramzad, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant.

Matthew A. Lathrop, of Law Office of Matthew A. Lathrop, for appellee E.D.

Thomas J. Culhane and Matthew B. Reilly, of Erickson & Sederstrom, P.C., for appellee Bradley Nord.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Steinke, District Judge.

Funke, J.

E.D. brought suit against the Bellevue Public School District (BPS) and Bradley Nord, under the Political Subdivisions Tort Claims Act (PSTCA).[1] This is an appeal and cross-appeal from an order overruling claims of sovereign immunity in separate motions to dismiss. Because an appeal from the order at issue is not statutorily authorized, we dismiss the appeal and cross-appeal.

BACKGROUND

In November 2016, E.D. filed a complaint in district court alleging various negligence claims against BPS and Nord. In the complaint, E.D. alleged, inter alia, the following: While Nord was a BPS teacher and E.D. was a BPS student, above the age of legal consent, Nord made nonconsensual sexual contact with E.D. that began a nearly yearlong sexual relationship between the two occurring primarily on BPS premises.

E.D.'s negligence claims assert, generally, that BPS breached its duty to provide a safe environment to students and to enact reasonable policies governing an extracurricular teacher's

[1] Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012).

aide program, which paired E.D. and Nord, to protect students. E.D. claims that her harm was a foreseeable result of BPS' negligence.

BPS and Nord filed separate motions to dismiss claiming sovereign immunity under the PSTCA's intentional tort exception,[2] which motions the court denied. Nord filed a motion to reconsider or to alter or amend, which the court also denied. BPS filed a timely appeal, and Nord cross-appealed.

The Nebraska Court of Appeals dismissed BPS' appeal for lack of jurisdiction, under Neb. Ct. R. App. P. § 2-107(A)(2) (rev. 2017), finding the ruling on the motion to dismiss was not a final, appealable order. BPS filed a motion for reconsideration. The Court of Appeals granted the motion for reconsideration and reinstated the 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]

ASSIGNMENTS OF ERROR

BPS assigns, restated, that the court erred (1) in not finding it was entitled to immunity in this case; (2) in failing to dismiss all allegations of negligence against it because Nord's intentional acts were the "but for" cause of the allegations; and (3) in relying on third-party, instead of political subdivision employee, intentional act cases.

On cross-appeal, Nord assigns, restated, that the court erred in failing to find that he was entitled to immunity under the PSTCA.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decision made by the lower court.[4]

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[2] See § 13-910(7).

[3] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

[4] *Tilson v. Tilson, ante* p. 64, 907 N.W.2d 31 (2018).

ANALYSIS

E.D. argues this court is without statutory authority to consider this appeal because the court's order was not final and the collateral order doctrine does not apply in this case.

BPS concedes that the order it appealed from is not a final order but argues that we have jurisdiction over its appeal under the collateral order doctrine. It also asserts that E.D. is precluded from raising the issue of jurisdiction before this court because the Court of Appeals' decision to grant its motion for reconsideration and reinstate the appeal is the law of the case.

This Court Is Not Precluded From Considering Jurisdiction

[2,3] Before reaching the legal issues presented for review, it is our duty to determine whether we have jurisdiction over this appeal.[5] Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[6]

Further, the law-of-the-case doctrine, which precludes a trial court from reconsidering issues decided by an appellate court,[7] in no way precludes the Nebraska Supreme Court from reconsidering decisions by the Court of Appeals.[8] Additionally, the Court of Appeals' reinstatement of the appeal was not a determination of the jurisdictional issue but only a determination that there was not a clear lack of jurisdiction under settled precedent.

There Is No Statutory Authority for Present Appeal

[4] We have long held that appellate jurisdiction in Nebraska is purely statutory and an appellate court acquires

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[5] *Id.*

[6] *Cappel v. State*, 298 Neb. 445, 905 N.W.2d 38 (2017).

[7] See *State v. Lavalleur*, 298 Neb. 237, 903 N.W.2d 464 (2017).

[8] See Neb. Rev. Stat. § 25-204 (Reissue 2016).

no jurisdiction unless the appellant has satisfied the statutory requirements for appellate jurisdiction.[9]

For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.[10] The Legislature has defined a "judgment" as "the final determination of the rights of the parties in an action."[11] Conversely, every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.[12]

The three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.[13] In contrast, if an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court.[14]

The overruling of a motion to dismiss is typically not a final order.[15] BPS conceded that the court's order overruling its motion to dismiss was not a final order, and we agree.

In *StoreVisions v. Omaha Tribe of Neb.*,[16] however, we held that an appeal from an interlocutory order denying sovereign

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[9] See *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017). See, also, Neb. Const. art. V, § 2.

[10] *Heckman, supra* note 9. See, also, Neb. Rev. Stat. §§ 25-1911 and 25-1912 (Reissue 2016).

[11] Neb. Rev. Stat. § 25-1301 (Reissue 2016).

[12] Neb. Rev. Stat. § 25-914 (Reissue 2016).

[13] *Tilson, supra* note 4. See, also, Neb. Rev. Stat. § 25-1902 (Reissue 2016).

[14] *Tilson, supra* note 4.

[15] *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017), citing *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011), *modified on denial of rehearing* 281 Neb. 978, 802 N.W.2d 420.

[16] *StoreVisions, supra* note 15.

immunity vested this court with jurisdiction, under the collateral order doctrine. To fall within the doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.[17]

Our holding in *StoreVisions* was a continuation of several decisions in which we applied the collateral order doctrine to the appeals of nonfinal orders, the genesis of which was our decision in *Richardson v. Griffiths*.[18] In *Richardson*, we addressed the applicability of the collateral order doctrine and determined that a district court's order disqualifying an attorney was appealable despite the fact that it was not a final order.[19] We applied the three factors set forth above and concluded that the collateral order doctrine authorized us to hear the appeal.[20]

Recently, however, in *Heckman v. Marchio*,[21] we overruled our decision in *Richardson* and the cases relying upon its application of the collateral order doctrine, which they primarily referred to as the *Richardson* exception, "to the extent that they authorized appellate jurisdiction in the absence of a judgment or final order and without specific statutory authorization."[22]

[5,6] *Heckman* also concerned an appeal from a court's granting of a motion to disqualify counsel in a civil case. In *Heckman*, we stated that our decision in *Richardson* had been directly contrary to a U.S. Supreme Court decision which specifically rejected the application of the collateral

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[17] *Id.*

[18] *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), *overruled, Heckman, supra* note 9.

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

[20] *Richardson, supra* note 18.

[21] *Heckman, supra* note 9, 296 Neb. at 467, 894 N.W.2d at 303.

[22] See, e.g., *Williams, supra* note 19.

order doctrine to orders disqualifying counsel in civil cases.[23] However, we also disavowed *Richardson* based on the lack of statutory authority for the decision. We stated:

> We used [the *Richardson* exception] to provide for appellate jurisdiction where none would otherwise exist. Through the enactment of statutes, the Legislature has prescribed when a court may exercise appellate jurisdiction; the judicial branch may not circumvent such statutory authorization. Just as courts have no power to extend the time set by the Legislature for taking an appeal, courts have no power to allow an appeal when it is not authorized by statute.[24]

While our holding in *Heckman* was limited to overruling *Richardson* and our use of the *Richardson* exception, our reasoning therein is directly at odds with our continued application of the collateral order doctrine to an interlocutory order denying sovereign immunity.

In *StoreVisions*,[25] the defendant appealed after the court denied its motion to dismiss raising a defense of sovereign immunity. On appeal, we determined that the order appealed from was not final. Nevertheless, citing our opinions in *Hallie Mgmt. Co. v. Perry*[26] and *Williams v. Baird*,[27] we considered the collateral order doctrine and concluded that an order denying sovereign immunity was immediately reviewable, following U.S. Supreme Court precedent.[28]

However, like in *Richardson*,[29] we did not provide any statutory authority for the application of the collateral order

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[23] See *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985).

[24] *Heckman, supra* note 9, 296 Neb. at 464, 894 N.W.2d at 301.

[25] *StoreVisions, supra* note 15.

[26] *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

[27] *Williams, supra* note 19.

[28] See *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993).

[29] *Richardson, supra* note 18.

doctrine to a denial of sovereign immunity in *StoreVisions*, *Hallie*, or *Williams*. *Hallie* and *Williams*, instead, simply relied on our adoption of the collateral order doctrine in *Richardson* and cited the U.S. Supreme Court decision recognizing the doctrine.[30] While, unlike in *Richardson*, the U.S. Supreme Court does apply the collateral order doctrine to the denial of sovereign immunity, the broader reasoning of *Heckman*[31]—that this court cannot provide appellate jurisdiction circumventing that expressly prescribed in Nebraska by the Legislature—continues to apply here.

[7] Similar to the court in *Heckman*, we find that our application of the collateral order doctrine to permit appeals from interlocutory orders denying sovereign immunity has no basis in the statutory definition of "final order" in § 25-1902. Section 25-1902 explicitly presents three orders that are considered "final" for the purposes of §§ 25-1911 and 25-1912. The intent of the Legislature is expressed by omission as well as by inclusion.[32] Accordingly, our decision treating the doctrine as an exception to this statute or, effectively, as a fourth type of final order amounted, instead, to impermissible judicial legislation.

[8] While the issues of legislative acquiescence and stare decisis are implicated in our current reconsideration of *StoreVisions*[33] to the same extent as in *Heckman*, such issues were adequately resolved in *Heckman* and need not be restated here, as that analysis applies with equal force to this context. Therefore, we overrule *StoreVisions* to the extent that it authorized appellate jurisdiction in the absence of a judgment or final order and without specific statutory authorization.

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[30] See *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

[31] *Heckman, supra* note 9.

[32] *In re Interest of Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014).

[33] *StoreVisions, supra* note 15.

CONCLUSION

Because this appeal was from a nonfinal order and because we overrule the application of the collateral order doctrine to the extent that it authorizes an interlocutory appeal from a denial of sovereign immunity, we dismiss the appeal and cross-appeal.

Appeal dismissed.

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 Richard A. Hasterlik, deceased. Kimberlee Voss, Personal Representative of the Estate of Richard A. Hasterlik, deceased, appellant, v. State of Nebraska, appellee.

909 N.W.2d 641

Filed April 13, 2018. No. S-17-592.

1. **Decedents' Estates: Taxation: Appeal and Error.** On appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Parent and Child: Taxation: Appeal and Error.** Factual findings necessary in determining whether the requisite acknowledged parent-child relationship of Neb. Rev. Stat. § 77-2004 (Reissue 2009) exists should be reviewed for sufficient evidence and should not be disturbed on appeal unless clearly wrong.
4. **Decedents' Estates: Taxation: Statutes: Proof.** Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute.
5. **Decedents' Estates: Parent and Child: Taxation.** The following factors serve as appropriate guideposts to the trial court in making a determination of an acknowledged relationship of a parent under Neb. Rev. Stat. § 77-2004 (Reissue 2009): (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of

time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent.

6. **Witnesses: Testimony.** The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit.

Appeal from the County Court for Dodge County: Kenneth J. Vampola, Judge. Affirmed.

Rebecca Abell Brown, of R. Abell Brown Law, L.L.C., for appellant.

Linsey Moran Bryant, Chief Deputy Dodge County Attorney, and Emily A. Beamis for appellee.

Heavican, C.J., Miller-Lerman, Cassel, and Stacy, JJ., and Moore, Chief Judge, and Arterburn, Judge, and Doyle, District Judge.

Cassel, J.

INTRODUCTION

Kimberlee Voss, personal representative of the estate of Richard A. Hasterlik, deceased, appeals from the county court's determination that she, as an individual beneficiary, did not qualify for preferential inheritance tax treatment under Neb. Rev. Stat. § 77-2004 (Reissue 2009). The court found that Voss failed to prove the decedent stood in the acknowledged relation of a parent to her. Because the county court's factual determination was not clearly wrong, we affirm.

BACKGROUND

The evidence presented to the county court established that Voss' biological father passed away in 1983 when she was 25 years old. The decedent became engaged to Voss' mother 2 years later, but the two never married. Instead, they cohabitated in Wisconsin and later in Nebraska until Voss' mother passed away in 2013.

While Voss' mother and the decedent lived in Wisconsin, Voss' family would visit them a few times a year, and she would often have them stay at her home in Nebraska during visits. After the couple moved to Nebraska, Voss' family spent holidays with them and would see them a few times a week. Voss' mother and the decedent would provide money to Voss "at times," and they bought her son a car when he graduated from high school. After Voss' mother passed away, Voss' family continued to spend holidays with the decedent and would see him about once a week. They also helped him with grocery shopping and home maintenance.

Voss' affidavit indicated that the decedent was protective of her and would give her "fatherly advice and guidance." She further testified that the decedent referred to her as his stepdaughter. She attached a "previous" will to her affidavit, which showed that the decedent had previously disinherited his biological daughter and devised his entire estate to Voss' mother. Under that will, Voss was to inherit in the event that her mother predeceased the decedent. Although the affidavit recited that a more recent will had been executed, neither that will nor any other county court filings (other than the order being appealed) were included in the appellate record.

On this evidence, the county court concluded that it was "unable to differentiate that [the decedent] provided anything to [Voss] or acted in a manner toward [her] that was above and beyond the normal circumstances of his companionship with [Voss'] mother." Accordingly, it determined that Voss' inheritance did not qualify for the 1-percent tax rate under § 77-2004.

Voss appealed, and we moved the case to our docket.[1]

ASSIGNMENT OF ERROR

Voss assigns that the county court erred in finding that the evidence did not establish that she was a person to whom the

[1] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

deceased, for more than 10 years prior to death, stood in the acknowledged relation of a parent.

STANDARD OF REVIEW

[1,2] On appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the record.[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3]

[3] Factual findings necessary in determining whether the requisite acknowledged parent-child relationship of § 77-2004 exists should be reviewed for sufficient evidence and should not be disturbed on appeal unless clearly wrong.[4]

ANALYSIS

[4] Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute.[5] Section 77-2004 provides that "any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent" shall receive an inheritance tax exemption of $40,000 and shall be taxed at the rate of 1-percent of the clear market value of the property thereafter. Therefore, it was Voss' burden to establish that she was a person "to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent."

[5] The following factors serve as appropriate guideposts to the trial court in making a determination of an acknowledged relationship of a parent under § 77-2004: (1) reception of the

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[2] See *In re Estate of Craven*, 281 Neb. 122, 794 N.W.2d 406 (2011).

[3] *Id.*

[4] *In re Estate of Kite*, 260 Neb. 135, 615 N.W.2d 481 (2000).

[5] *In re Estate of Breslow*, 266 Neb. 953, 670 N.W.2d 797 (2003).

child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent.[6]

[6] Voss testified that the decedent referred to her as his stepdaughter. The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit.[7] Even if Voss' testimony would have been sufficient for the county court to make the necessary finding, the court was not required to do so.

The evidence offered at trial was sparse and included a two-page affidavit, the decedent's previous will, and Voss' summary answer to a single question. No evidence was offered concerning the third factor—exercise of parental authority and discipline—and, though Voss described her mother's and the decedent's relationship as "a close marital type relationship," no actual blood or marital relationship existed. Neither Wisconsin law[8] nor Nebraska law[9] allows for the establishment of common-law marriages, and Voss conceded that they had not legally married. Therefore, the fourth factor—relationship by blood or marriage—also weighed against Voss' entitlement to the § 77-2004 tax rate. No credible evidence was offered concerning the seventh factor—written documentation of intent—as Voss offered only a copy of the decedent's previous will—not his most recent will. And there is nothing in the

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[6] *In re Estate of Kite, supra* note 4.

[7] *In re Estate of Ross*, 19 Neb. App. 355, 810 N.W.2d 435 (2011).

[8] See *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (1987).

[9] See Neb. Rev. Stat. § 42-104 (Reissue 2016).

record to show that Voss received the same treatment in the controlling will as she did under the previous will.

As to the remaining factors, it is apparent from the record that Voss and the decedent cared for one another and would spend time together for holidays and regular visits. However, the county court concluded that the evidence was insufficient to establish the decedent acted in a manner toward Voss that went above and beyond the normal circumstances of his relationship with her mother. We cannot say that the county court was clearly wrong in determining that Voss failed to carry her burden of proof.

CONCLUSION

Because the county court's factual determination was not clearly wrong, we affirm the order of the county court.

Affirmed.

Wright and Funke, JJ., not participating.

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

In re Interest of K.M., a child under 18 years of age. State of Nebraska, appellee, v. K.M., appellant.

910 N.W.2d 82

Filed April 20, 2018. No. S-16-1205.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Sexual Assault.** A victim's lack of consent is not an element of the crime of sexual assault when the victim is incapable of resisting or appraising the nature of his or her conduct.
3. ____. To render an individual incapable to consent to sexual conduct, a mental impairment must be severe. A person in this category is treated as equivalent to a severely intoxicated or an unconscious person. Not every mental challenge or impairment is so severe that the person lacks the capacity to consent.
4. ____. Lack-of-capacity sexual assault under Neb. Rev. Stat. § 28-319(1)(b) (Reissue 2016) requires on the part of the victim "a significant abnormality, such as severe intoxication or other substantial mental or physical impairment."
5. **Sexual Assault: Proof.** To prove a lack-of-capacity sexual assault on the basis of a mental impairment, under Neb. Rev. Stat. § 28-319(1)(b) (Reissue 2016), the State must prove beyond a reasonable doubt that the victim's impairment was so severe that he or she was mentally incapable of resisting or mentally incapable of appraising the nature of the sexual conduct with the alleged perpetrator.
6. **Sexual Assault: Evidence: Testimony.** Under Neb. Rev. Stat. § 28-319(1)(b) (Reissue 2016), while expert testimony as to a victim's

mental incapacity may be probative, expert testimony is not required in every case of lack-of-capacity sexual assault based on the victim's mental illness or impairment.

Petition for further review from the Court of Appeals, Inbody, Pirtle, and Riedmann, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, Vernon Daniels, Judge. Judgment of Court of Appeals affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy F. Shanahan for appellant.

Donald W. Kleine, Douglas County Attorney, Anthony M. Hernandez, and Laura E. Lemoine, Senior Certified Law Student, for appellee.

Heavican, C.J., Cassel, Stacy, and Funke, JJ., and Colborn and Samson, District Judges.

Funke, J.

I. NATURE OF CASE

The separate juvenile court of Douglas County adjudicated K.M. as being a "juvenile who has committed an act which would constitute a felony under the laws of this state"[1] by committing first degree sexual assault, having "subject[ed] another person to sexual penetration [and] who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct."[2]

On appeal, the Nebraska Court of Appeals reversed the adjudication, finding insufficient evidence to uphold K.M.'s adjudication by proof beyond a reasonable doubt.[3] The State

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[1] Neb. Rev. Stat. § 43-247(2) (Reissue 2016).

[2] Neb. Rev. Stat. § 28-319(1)(b) (Reissue 2016).

[3] *In re Interest of Kalen M.*, No. A-16-1205, 2017 WL 4675799 (Neb. App. Oct. 17, 2017) (selected for posting to court website).

petitioned for further review, which we granted. Because the State failed to prove beyond a reasonable doubt that K.M. knew or should have known that D.F., the alleged victim, "was mentally or physically incapable of resisting or appraising the nature of the conduct," we agree with the Court of Appeals and affirm its ruling.

II. BACKGROUND

Omaha Police Department Det. Kristine Love received a report in early 2016 from Child Protective Services that a school teacher had reported D.F.'s report of sexual contact with K.M. while at D.F.'s home. D.F. has Asperger syndrome.[4] Love observed a forensic interview that was conducted with D.F. at Project Harmony, a child advocacy center, and then conducted her own interview with D.F.

After interviewing D.F., Love contacted K.M. at his school and asked him to speak with her in an interview at police headquarters, which K.M. agreed to do. Upon the completion of the interview, Love arrested K.M. for first degree sexual assault based on statements he made during the interview. K.M. turned 13 years old shortly after the alleged incident but before being interviewed by Love; D.F. was 12 years old.

The Douglas County Attorney filed a petition to adjudicate K.M. under § 43-247(2). The petition alleged that K.M. committed conduct that would constitute first degree sexual assault under § 28-319(1)(b) based on D.F.'s mental impairment. K.M. denied the allegation in the petition.

1. Adjudication Hearing

On November 4, 2016, an adjudication hearing was held before the separate juvenile court of Douglas County. Because

[4] See Asperger Syndrome, Autism Speaks, https://www.autismspeaks.org/what-autism/asperger-syndrome (last visited Apr. 11, 2018) (indicating that what was previously diagnosed as Asperger syndrome has now been categorized as autism spectrum disorder since the publication of the DSM-5 diagnostic manual in 2013).

K.M. denied the petition's allegation, the State had the burden to prove his guilt by proof beyond a reasonable doubt.[5]

(a) Video Interview

Love testified about the investigation and her interview with K.M. A video recording of the interview was entered into evidence.

The video shows that K.M. waived his *Miranda*[6] rights at the beginning of the interview. Love advised K.M. of the allegations made by D.F., which K.M. initially denied. K.M. stated that he would never do that to D.F. because it would be wrong, explaining that D.F. has autism and does not know right from wrong and that it would be as if K.M. were corrupting him. After approximately 40 minutes, K.M. admitted that his penis may have penetrated D.F.'s anus approximately 2 centimeters.

(b) Other Evidence

The State also presented the testimony of Sarah Cleaver, a pediatric nurse practitioner at Project Harmony. Cleaver performed a medical examination of D.F. at Project Harmony's medical clinic and authored a report of her examination of D.F. In doing so, she relied on her examination; a medical history from D.F.'s mother, which included the fact that D.F. has Asperger syndrome and attention deficit hyperactivity disorder; and D.F.'s statements in the Child Protective Services report and the Project Harmony forensic interview. Cleaver's diagnosis of D.F. was suspected child sexual abuse, constipation, and anal fissures. She attributed D.F.'s anal fissures to his history of constipation, but said that they could have also been caused by the penile-anal penetration that he reported.

The court admitted Cleaver's report, which included D.F.'s allegations from the Child Protective Services report and

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[5] Neb. Rev. Stat. § 43-279(2) (Reissue 2016).

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

Cleaver's examination, over K.M.'s objection on hearsay and the Confrontation Clause. The court overruled the objections on the basis of the hearsay exception for statements made for the purpose of medical diagnosis.

On cross-examination, Cleaver said that she thought the most likely explanation for D.F.'s anal fissures was his constipation, as D.F. reported to her he had a large stool and then his bottom began to bleed. She agreed that she could not reach any conclusion about sexual assault from the anal fissures. She did not give any testimony or opinion about D.F.'s mental condition beyond stating that this diagnosis had been reported to her.

Neither D.F. nor K.M. testified at the hearing. And no specific evidence about D.F.'s Asperger syndrome diagnosis or mental condition was offered at the hearing.

The juvenile court issued an order adjudicating K.M. under § 43-247(2), finding the State had proved its case by proof beyond a reasonable doubt. K.M. appealed.

2. Court of Appeals' Opinion

On appeal to the Court of Appeals, K.M.'s sole assignment of error was that "[t]he Juvenile Court erred in finding that [K.M.] subjected D.F. . . . to sexual contact because the evidence presented at trial was insufficient to support a finding of guilt."

The Court of Appeals concluded that the State had proved beyond a reasonable doubt that K.M. subjected D.F. to sexual penetration, relying on K.M.'s confession in the interview. But it concluded that the State had failed to prove that K.M. "knew or should have known that [D.F.] was mentally or physically incapable of resisting or appraising the nature of his conduct."[7]

The Court of Appeals said that to prove a sexual assault under § 28-319(1)(b), the State must establish (1) a significant

[7] *In re Interest of Kalen M., supra* note 3, 2017 WL 4675799 at *2.

abnormality, such as severe intoxication or other substantial mental or physical impairment, on the part of the alleged victim and (2) knowledge of the abnormality on the part of the alleged attacker.

The court further said:

> [T]here was no evidence presented by the State regarding where [D.F.'s] autism fell on the autism spectrum, whether [D.F.'s] autism would render [him] incapable of resisting or appraising the nature of [K.M.'s] conduct, and whether [K.M.] knew or should have known of [D.F.'s] inability to resist or appraise the nature of [K.M.'s] conduct.[8]

It concluded that the State had failed to prove its allegation beyond a reasonable doubt, because it did not present any evidence of D.F.'s inability to resist or appraise the nature of his conduct, beyond reports that D.F. had autism. As a result, the Court of Appeals reversed the adjudication.

The State petitioned for further review, which we granted.

III. ASSIGNMENTS OF ERROR

The State argues that the Court of Appeals "erred in determining that the State failed to adduce sufficient evidence that [K.M.] knew or should have known that [D.F.] was mentally or physically incapable of resisting or appraising the nature of his conduct."

IV. STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[9] When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.[10]

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[8] *Id.*

[9] *In re Interest of Elainna R.*, 298 Neb. 436, 904 N.W.2d 689 (2017).

[10] *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016).

V. ANALYSIS

Before we reach the merits of this matter, we will address a proposition of law articulated by the State during oral argument. The State asserted that on a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a juvenile case where such verdict is supported by relevant evidence. The State seems to be importing into juvenile matters a standard of review applicable in adult criminal matters.

It is correct that Nebraska appellate courts have imported criminal standards into juvenile cases on other instances. For example, we have applied the same standard of review for a motion to suppress filed by a juvenile in juvenile court.[11] In ordering restitution, juvenile courts are to consider factors similar to those utilized in the criminal restitution statute.[12] The Court of Appeals has applied the criminal standard for withdrawal of a plea in the context of a request to withdraw an admission in a juvenile proceeding.[13]

However, in only one juvenile matter, *In re Interest of McManaman*,[14] did we apply a standard of review applicable in adult criminal proceedings. In that matter, we stated that we

> "'will not interfere with a verdict of guilty based on conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding of guilt beyond a reasonable doubt. . . . A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.'"[15]

Instead, in juvenile matters, we have routinely held that our review is de novo on the record and that an appellate

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[11] See *In re Interest of Miah S.*, 290 Neb. 607, 861 N.W.2d 406 (2015).

[12] *In re Interest of Laurance S.*, 274 Neb. 620, 742 N.W.2d 484 (2007).

[13] *In re Interest of Justin V.*, 18 Neb. App. 960, 797 N.W.2d 755 (2011).

[14] *In re Interest of McManaman*, 222 Neb. 263, 383 N.W.2d 45 (1986).

[15] *Id.* at 265-66, 383 N.W.2d at 47.

court is required to reach a conclusion independent of the lower courts' findings.[16] We find this de novo standard of review to be most applicable to juvenile matters. As a result, we take this opportunity to disapprove of our holding in *In re Interest of McManaman* as it relates to importing into a juvenile matter the standard of review used in adult criminal proceedings.

In turning to the merits of the instant matter, § 43-247 defines and delimits the boundaries of the jurisdiction of juvenile courts. Under § 43-247(2), juvenile courts may exercise jurisdiction over "[a]ny juvenile who has committed an act which would constitute a felony under the laws of this state . . . ."

When the State, as it did here, alleges that a juvenile has committed a felony and is thus subject to juvenile court jurisdiction under § 43-247(2), the juvenile is entitled to contest the allegations in an adjudication hearing.[17] Where the juvenile denies the allegations, the State must prove its case by proof beyond a reasonable doubt.[18]

The felony that the State alleges K.M. committed constitutes first degree sexual assault under § 28-319, which provides:

> (1) Any person who subjects another person to sexual penetration (a) without the consent of the victim, (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) when the actor is nineteen years of age or older and the victim is at least twelve but less than sixteen years of age is guilty of sexual assault in the first degree.

The State did not allege that K.M.'s act of sexually penetrating D.F. was "without the consent of the victim," under § 28-319(1)(a). Rather, it argues that K.M.'s conduct violated

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[16] See *In re Interest of Elainna R., supra* note 9.

[17] See § 43-279.

[18] § 43-279(2).

§ 28-319(1)(b), because he "knew or should have known that [D.F.] was mentally or physically incapable of resisting or appraising the nature of his or her conduct."[19]

[2] A victim's lack of consent is not an element of the crime of sexual assault when the victim is incapable of resisting or appraising the nature of his or her conduct.[20] Thus, in this matter, the State was required to prove beyond a reasonable doubt that D.F. lacked the capacity to consent to the sexual penetration and that K.M. knew or should have known that D.F. lacked the capacity to consent.[21]

While K.M. acknowledged that D.F. was autistic and that he did not know right from wrong, such language reflects our application of the *M'Naghten* rule—to determine whether a person is not criminally responsible for his or her actions[22]—not to determine whether a victim had the capacity to consent. Instead, the law of sexual assault has traditionally recognized certain circumstances under which an individual lacks the capacity to consent to sexual conduct and where sexual contact with that person thus constitutes sexual assault: where the victim is severely intoxicated—whether the intoxicant be administered by the defendant, another, or self-administered[23]; where the victim is unconscious[24]; and where the victim is "mentally incompetent."[25]

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[19] Brief on petition for further review for appellee at 3.

[20] *State v. Rossbach*, 264 Neb. 563, 650 N.W.2d 242 (2002).

[21] See *id.*

[22] See 9 A.L.R.4th 526 (1981).

[23] Wayne R. LaFave, Criminal Law §§ 17.3(e) and 17.4(b) (6th ed. 2017). See, also, *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005) (intoxication); *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004); *Rossbach, supra* note 20; 3 Charles E. Torcia, Wharton's Criminal Law § 282 (15th ed. 1995).

[24] LaFave, *supra* note 23. See, also, *Freeman, supra* note 23; *State v. Moeller*, 1 Neb. App. 1046, 510 N.W.2d 500 (1993).

[25] LaFave, *supra* note 23, § 17.4(b) at 1151.

We address in turn two issues regarding the requisite proof for a lack-of-capacity sexual assault under § 28-319(1)(b) based on a victim's mental impairment: the type or severity of mental impairment required for an individual to lack the capacity to consent, and whether expert testimony is necessary to prove a lack of capacity based on mental impairment.

1. Severity of Mental Impairment

[3,4] To render an individual incapable to consent to sexual conduct, a mental impairment must be severe.[26] A person in this category is treated as equivalent to a severely intoxicated or an unconscious person.[27] Thus, not every mental challenge or impairment is so severe that the person lacks the capacity to consent.[28] We have said lack-of-capacity sexual assault under § 28-319(1)(b) requires on the part of the victim "a significant abnormality, such as severe intoxication or other substantial mental or physical impairment."[29]

In *Reavis v. Slominski*,[30] this court considered a civil tort claim for battery based on an alleged sexual assault, but relied on and discussed Nebraska's criminal sexual assault statutes in considering the issue of consent. The court was divided and issued four separate opinions, with none commanding a majority.[31] However, some of the opinions in *Reavis* are helpful here.

The lead opinion by Justice Lanphier discussed the approach taken by other jurisdictions when considering consent and said that "[i]t would appear that issue of effective consent to sexual contact is generally only raised when the victim

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[26] *Rossbach, supra* note 20.

[27] LaFave, *supra* note 23.

[28] See *id.*

[29] *Rossbach, supra* note 20, 264 Neb. at 572, 650 N.W.2d at 250.

[30] *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

[31] *Id.*

suffers from an extreme mental handicap or deficiency."[32] One of the dissenting opinions, written by Justice Caporale and joined by Justice Fahrnbruch, said that "other jurisdictions have concluded that one has such capacity if one understands and appreciates the nature of the act of sexual intercourse, its character, and the probable or natural consequences which may attend it."[33] While the opinions in that case sharply disagreed on some aspects of the law of consent, there was a general consensus that to establish a lack of consent based on a mental impairment, the impairment must be severe.[34]

The Kansas Court of Appeals has articulated the following standard: "If an individual can comprehend the sexual nature of the proposed act, can understand he or she has the right to refuse to participate, and possesses a rudimentary grasp of the possible results arising from participation in the act, he or she has the capacity to consent."[35]

[5] Thus, we hold that to prove a lack-of-capacity sexual assault on the basis of a mental impairment, under § 28-319(1)(b), the State must prove beyond a reasonable doubt that the victim's impairment was so severe that he or she was "mentally . . . incapable of resisting" or "mentally . . . incapable of . . . appraising the nature of" the sexual conduct with the alleged perpetrator.

2. Necessity of Expert Testimony

Having found that proving lack-of-capacity sexual assault based on a mental impairment requires the State to prove that the victim's impairment is so severe that he or she is mentally unable to resist or understand the nature of the sexual act, we

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[32] *Id.* at 722, 551 N.W.2d at 538 (Lanphier, J.).

[33] *Id.* at 743, 551 N.W.2d at 549 (Caporale, J., dissenting; Fahrnbruch, J., joins). See, also, *State v. Johnson*, 155 Ariz. 23, 745 P.2d 81 (1987).

[34] See, generally, *Reavis, supra* note 30.

[35] *State v. Ice*, 27 Kan. App. 2d 1, 5, 997 P.2d 737, 740 (2000).

must also determine whether expert testimony is required to establish this fact.

Under Neb. Rev. Stat. § 27-702 (Reissue 2016), if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

However, when an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by the trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue.[36]

In *State v. Collins*, the Court of Appeals considered this question and concluded that "[w]hether expert testimony as to a victim's mental or physical capacity to resist or to appraise the nature of the perpetrator's conduct is indispensable in a prosecution under § 28-319(1)(b) must be approached on a case-by-case basis."[37]

Several other jurisdictions have also considered the need for expert testimony and have concluded that a lay juror is able to assess the extent of a victim's mental capacity in the context of lack-of-capacity sexual assaults.[38]

A person's capacity to understand something is a factual issue for the jury and, like other facts, may properly be established by circumstantial evidence.[39] More particularly, evidence explaining what a person knows and how the person came to know it may well give rise to an inference of incapacity.

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[36] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[37] *State v. Collins*, 7 Neb. App. 187, 202, 583 N.W.2d 341, 350-51 (1998).

[38] See, *Jackson v. State*, 890 P.2d 587 (Alaska App. 1995); *State v. Summers*, 70 Wash. App. 424, 853 P.2d 953 (1993); *State v. Wallin*, 52 Kan. App. 2d 256, 366 P.2d 651 (2016); *Fuentes v. State*, 454 Md. 296, 164 A.3d 265 (2017); *State v. Hunt*, 365 N.C. 432, 722 S.E.2d 484 (2012).

[39] *Jackson, supra* note 38.

While expert testimony as to a victim's mental incapacity may be probative, and might be required in some factual situations, there is no basis for requiring the State to establish mental incapacity by expert testimony in every case.[40] Evidence which establishes a victim's inability to understand the nature and consequences of sexual intercourse is not the kind of technical evidence which requires medical testimony to decipher. Unlike evidence of medical or legal malpractice, or the functions of technical equipment, a witness' comprehension of the basic consequences of his or her actions may be proved or disproved from his or her testimony and testimony as to behavior.

[6] As a result, we conclude that while expert testimony as to a victim's mental incapacity may be probative, expert testimony is not required in every case of lack-of-capacity sexual assault based on the victim's mental illness or impairment.

3. Application

The State's evidence that D.F. lacked the capacity to consent to the sexual penetration by K.M. is reducible to a secondhand report that D.F. had been diagnosed with Asperger syndrome. The State's evidentiary showing was insufficient to prove beyond a reasonable doubt that D.F. was, in fact, incapable of resisting or appraising the nature of the sexual conduct.

The State presented no evidence about D.F.'s diagnosis. It presented no expert testimony on the nature of Asperger syndrome or how it affects an individual's ability to resist or understand the nature of sexual conduct. D.F. did not testify, and the trier of fact was unable to judge D.F.'s level of mental impairment. No evidence was given about D.F.'s own ability to resist or understand sexual acts. The State apparently relies on the fact of the reported diagnosis and the testimony of K.M.

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[40] *Summers, supra* note 38.

Given the dearth of evidence regarding D.F.'s mental ability, the State understandably focused its arguments in its appellate brief on the evidence that the penetration occurred and on K.M.'s statements showing that he knew that D.F. had autism and was "mentally slower than where he should be."[41] But the occurrence of the penetration is not the primary issue in dispute. And K.M.'s knowledge of D.F.'s autism does not establish that D.F.'s mental condition was so severe that he lacked the capacity to consent.

Moreover, K.M.'s statement that D.F. has autism and does not know right from wrong fails to show that D.F. lacked the capacity to consent. A 13-year-old boy's comment bearing on the quality of D.F.'s moral reasoning does nothing to show that D.F. suffered from a mental impairment so severe that he was unable to resist or understand sexual conduct. Nor is K.M.'s comment about how it would be wrong for him to engage in sexual conduct with D.F. of any help to the State. The test for a lack-of-capacity sexual assault is not one of the defendant's morality, but of the victim's ability to resist or appraise the nature of the sexual conduct.

The State bears the burden, when proving sexual assault based on the victim's lack of capacity, that the victim actually lacked the capacity to consent. It has not done so here.

VI. CONCLUSION

For the reasons set forth herein, we affirm the Court of Appeals' reversal of the juvenile court's adjudication.

Affirmed.

Miller-Lerman, J., participating on briefs.
Wright, J., not participating.

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[41] Brief for appellee at 14.

Nebraska Supreme Court
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State of Nebraska, appellee, v. James Cotton, appellant.

910 N.W.2d 102

Filed April 20, 2018. No. S-17-196.

1. **Pleadings: Parties: Judgments: Appeal and Error.** A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown, and an appellate court will find such an abuse only where the denial caused the defendant substantial prejudice amounting to a miscarriage of justice.
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. **Effectiveness of Counsel: Constitutional Law: Statutes: Records: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. An appellate court determines as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance.
4. **Trial: Joinder.** There is no constitutional right to a separate trial.
5. **Trial: Joinder: Appeal and Error.** An appellate court reviews a trial court's determination on the joinability of offenses, under Neb. Rev. Stat. § 29-2002(1) (Reissue 2016), de novo. However, a misjoinder of

offenses is subject to a harmless error review and will not be reversed unless it resulted in prejudice.

6. **Trial: Joinder: Proof.** A defendant opposing joinder of charges has the burden of proving prejudice.
7. **Trial: Joinder.** Severe prejudice occurs when a defendant is deprived of an appreciable chance for an acquittal, a chance that the defendant would have had in a severed trial.
8. ____: ____. Prejudice is not shown if evidence of one charge would have been admissible in a separate trial of another charge.
9. **Pretrial Procedure: Motions to Suppress.** It is the intention of Neb. Rev. Stat. § 29-822 (Reissue 2016) that motions to suppress evidence are to be ruled on and finally determined before trial, unless the motion is within the exceptions contained in the statute.
10. **Motions to Suppress: Search and Seizure: Waiver.** Absent an exception, a failure to move for the suppression of evidence seized unlawfully waives the objection.
11. **Homicide: Convictions: Proof.** Under Neb. Rev. Stat. § 28-303 (Supp. 2017), the three elements which the State must prove beyond a reasonable doubt to obtain a conviction for first degree murder are as follows: The defendant (1) killed another person, (2) did so purposely, and (3) did so with deliberate and premeditated malice.
12. **Homicide: Intent: Time: Proof.** The premeditation element requires the State to prove that a defendant formed the intent to kill a victim without legal justification before doing so, but no particular length of time for premeditation is required. It is sufficient if an intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.
13. **Homicide: Intent: Time.** Whether premeditation exists depends on numerous facts about how and what the defendant did prior to the actual killing which show he or she was engaged in activity directed toward the killing, that is, planning activity.
14. **Homicide: Intent: Juries.** A question of premeditation is for the jury to decide.
15. **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.
16. **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. Such a claim may be resolved when the record on direct appeal is sufficient to either

affirmatively prove or rebut the merits of the claim. The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.

17. **Postconviction: Effectiveness of Counsel: Records: Claims: Appeal and Error.** In the case of an argument presented for the purpose of avoiding procedural bar to a future postconviction proceeding, appellate counsel must present a claim with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court. A claim insufficiently stated is no different than a claim not stated at all.
18. **Effectiveness of Counsel: Proof.** To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
19. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
20. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment to the U.S. Constitution provides that a criminal defendant has a right to have the assistance of counsel for his or her defense. An essential part of that right is the defendant's ability to select the counsel of his or her choice.
21. **Effectiveness of Counsel: Conflict of Interest.** The right to effective assistance of counsel entitles the accused to his or her counsel's undivided loyalties, free from conflicting interests.
22. **Trial: Conflict of Interest.** In the absence of an objection, the court has a duty to inquire into a potential conflict of interest only when the trial court knows or reasonably should know that a particular conflict exists.
23. **Right to Counsel: Conflict of Interest: Waiver.** A defendant can waive his or her right to assistance of counsel unhindered by a conflict of interest, provided that the waiver is knowing and intelligent, but a court is not required to accept a defendant's waiver in all circumstances.
24. **Right to Counsel: Conflict of Interest: Presumptions.** The right to counsel of choice is not absolute. A trial court must recognize a presumption in favor of a defendant's counsel of choice, but that

presumption may be overcome by a demonstration of actual conflict or a showing of a serious potential for conflict.

25. **Effectiveness of Counsel: Conflict of Interest: Proof.** A defendant who raised no objection at trial must show that an actual conflict of interest existed and that the conflict adversely affected his or her lawyer's performance. When an actual conflict exists, there is no need to show that the conflict resulted in actual prejudice to the defendant.
26. **Right to Counsel: Waiver: Appeal and Error.** There is no formalistic litany required to establish that a waiver was knowingly and intelligently made; instead, when considering whether a defendant voluntarily, knowingly, and intelligently waived his or her right to counsel, an appellate court reviews the totality of the circumstances appearing in the record.
27. **Constitutional Law: Waiver: Records.** A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute.
28. **Constitutional Law: Waiver: Appeal and Error.** In determining whether a defendant's waiver of a statutory or constitutional right was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.
29. **Judgments: Appeal and Error.** Under a clearly erroneous standard of review, an appellate court does not reweigh the evidence, but the appellate court decides the ultimate question independent of the trial court's ruling.
30. **Constitutional Law: Right to Counsel: Attorneys at Law: Conflict of Interest.** When determining whether or not to disqualify a defense counsel, the court must balance two Sixth Amendment rights: (1) the defendant's right to be represented by counsel of choice and (2) his or her right to a defense conducted by an attorney who is free of conflicts of interest. The U.S. Supreme Court has also recognized an independent interest of the courts in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.
31. **Attorney and Client: Conflict of Interest.** Whether a conflict of interest justifies the disqualification of defense counsel is a matter committed to the discretion of the trial court.
32. **Trial: Attorney and Client: Conflict of Interest.** If a defense counsel acts or refrains from acting at trial in a manner that is inconsistent with the defendant's interests based on the preceding sources of conflicts, the defense counsel actively represents conflicting interests.
33. **Conflict of Interest.** The seriousness of any potential conflict of interest depends on its likelihood and dimensions.

34. **Courts: Attorneys at Law: Conflict of Interest.** When weighing the interests at stake, courts generally give substantial weight to defense counsel's representations regarding conflicts of interest.
35. **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 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.
36. **Constitutional Law: Trial.** A defendant has fundamental constitutional right to a fair trial.
37. **Attorney and Client: Trial: Testimony: Waiver.** A defendant who has been fully informed of the constitutional right to testify may not acquiesce in his or her counsel's advice that he or she waive that right, and then later claim that he or she did not voluntarily waive such right.
38. **Trial: Prosecuting Attorneys: Motions for Mistrial: Proof.** When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct and then considers whether the misconduct prejudiced the defendant's right to a fair trial. Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
39. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.
40. **Trial: Prosecuting Attorneys: Appeal and Error.** When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, an appellate court will review the record only for plain error.
41. **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.
42. **Trial: Prosecuting Attorneys.** Public prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial.
43. **Trial: Prosecuting Attorneys: Words and Phrases.** Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.
44. **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. When a prosecutor's comments rest on reasonably drawn inferences from the evidence, he or she is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense.

45. **Trial: Prosecuting Attorneys: Juries.** A distinction exists between arguing that a defense strategy is intended to distract jurors from what the evidence shows, which is not misconduct, and arguing that a defense counsel is deceitful, which is misconduct.
46. **Trial: Prosecuting Attorneys.** In cases where the 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.
47. **Prosecuting Attorneys: Convictions: Juries.** It is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Because the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.
48. **Trial: Prosecuting Attorneys: Appeal and Error.** In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Matthias J. Kraemer for appellant.

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

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

Funke, J.

This is James Cotton's direct appeal of his jury convictions and sentences for first degree murder, use of a deadly weapon to commit a felony, possession of a deadly weapon by a prohibited person, and possession of a controlled substance. Cotton filed a timely appeal, and he proceeds with different counsel than at trial. We affirm his convictions.

I. BACKGROUND

On August 7, 2015, Cotton shot and killed Trevor Bare. During the evening prior to the shooting, Bare saw Cotton in the apartment immediately above his own. Because Cotton and Bare had a negative history together, Bare confronted Cotton and an argument ensued. After the initial altercation, Bare and his girlfriend, McKayla Burnette, left the apartment house. A couple of hours later, someone set a fire in the back of the truck owned by Travis Labno, the new tenant of the apartment immediately above Bare's.

Around 6:30 a.m. on August 7, 2015, Bare and Burnette returned to Bare's apartment. Upon their return, Labno confronted Bare outside the house about the fire, while Cotton exited Labno's apartment with a shotgun. After the argument between Labno and Bare ended, Cotton and Bare commenced an argument, which ended with Cotton's shooting Bare. Bare died from his injuries.

At the crime scene, police found a broken piece of fence wood on the ground, a spent shotgun casing, and a bloodstain on the ground approximately 6 to 10 feet from the porch. They also recovered a sawed-off shotgun in the bushes behind a nearby house, which shotgun was later identified as the murder weapon.

A search warrant was obtained for Labno's apartment. During the execution of the warrant, police discovered the following: in the bathroom, marijuana on top of the toilet, a bag in the toilet bowl, and a glass pipe in the sink; in the kitchen, a broken "meth pipe or crack pipe"; and, in the northwest bedroom closet, two envelopes with Cotton's name on them,

a medication bottle with Cotton's name on it, an unlabeled medication bottle containing marijuana, a spoon, a syringe, and a tin that contained methamphetamine.

The cause of Bare's death was determined to be a shotgun wound to the abdomen. Autopsy results revealed that he had methamphetamine, amphetamine, and "THC" in his system. The autopsy also revealed the presence of fentanyl, which was administered to him after the shooting.

At trial, Burnette testified that she and Bare saw Cotton as they were leaving their apartment at approximately midnight on August 6, 2015. Burnette said Bare was angry about Cotton's presence, so Bare approached Labno's apartment and knocked on the door. Burnette stated that she waited about 10 minutes before approaching Labno's apartment to see what was happening. When she did, she heard Bare say that "[t]his is my block" and that Cotton could not stay there. Burnette testified that she grabbed Bare and pushed him back toward their car and that as they were leaving, Cotton called Bare a "pussy."

Burnette stated that after leaving the apartment, they went to Bare's mother's house where they used marijuana and methamphetamine. At around 6:30 a.m., Bare and Burnette returned to Bare's apartment. When they got there, they saw Labno run into his apartment. While in the apartment, Burnette said she could hear Cotton and Labno talking and recognized Cotton's voice from the earlier argument. She stated that she heard Cotton say, "'I have a round in the gun and I'm going to use it.'" Burnette told Bare what she heard just before she heard the sound of footsteps upstairs running outside, at which point, Bare went outside as well.

Burnette said that after hearing a "smack" outside, she went to the screen door to see what was happening. She testified that she saw Bare holding a piece of wood, Labno by the porch, and Cotton sitting in a chair on the porch behind Labno with a shotgun in his lap, which he was pointing at Bare. Burnette testified that Labno and Bare were arguing at first, but then the argument between them seemed to calm down. Burnette stated

that Cotton then stood up and started arguing with Bare, who still had the piece of wood in his hand. She stated that Bare stepped toward Cotton and said, "[I]f you're going to hold the gun to me, then you better fucking shoot me," at which point, Cotton shot Bare.

Labno testified that on August 6, 2015, Cotton was helping him move into his new apartment and that Cotton was planning on staying with him for a while. According to Labno, Cotton woke him up during the night to tell him Bare and Burnette had set fire to his truck. After looking at the truck, Labno stated that he went back to bed. Cotton's trial counsel, however, introduced Labno's cell phone records, which showed that Labno's cell phone made a number of calls around 4 a.m. from an area away from his apartment. Additionally, in a portion of Labno's deposition testimony that was read into evidence, Labno invoked his right to remain silent in response to a question regarding whether he left his apartment and returned with a shotgun, after which the prosecutor said that "we'll talk about immunity as it relates to the gun."

Labno further testified that as he was getting ready for work the next morning, he saw Bare and Burnette pull into the driveway in two vehicles, blocking his vehicle in the driveway. Labno stated that he yelled out to Cotton that Bare was back and then went out to confront Bare, who had a board in his hand. Labno told Bare to drop the board so they could fight, but Bare refused. Labno testified that he heard a "clack" after his argument had deescalated and turned around to see Cotton holding a shotgun. He stated that Cotton and Bare began arguing at that point, from a distance of about 6 to 8 feet apart, and that the argument then escalated and Cotton shot Bare. Labno testified that their argument lasted about 5 minutes and that Bare was acting "totally crazy" and did not seem like he was going to back down. Labno testified that he was not watching the fight and was unsure if Bare advanced at Cotton, but he stated that Bare did not charge him. However, he did state that just before the shooting, Bare said something like, "If you pull a gun, you better use it . . . ."

Cotton testified at trial and admitted that he shot Bare but claimed that he did so in self-defense. He alleged that Labno obtained the shotgun and brought it to the altercation with Bare. Cotton stated that he grabbed the shotgun only after Bare had hit him with a wooden board and was advancing at him again with the board.

Cotton also testified that Bare and Bare's mother used to live with him. However, issues arose because Bare and his mother were stealing things from Cotton and Bare was causing problems in the neighborhood—yelling at children and flashing a gun in Cotton's garage. Cotton evicted Bare and his mother, but Bare continued to drive through the neighborhood and would occasionally stop in front of Cotton's house. Cotton eventually moved out of that residence and was staying in a hotel on August 6, 2015.

Cotton stated that he stayed at Labno's apartment that night at Labno's request. Cotton also testified that at 2:30 a.m., Bare was knocking on Labno's door, and that when Cotton answered the door, he told Bare to leave. When Bare refused to leave, Cotton said he got Labno and then went back to the bedroom. Cotton heard Bare tell Labno "this is my block" and that Labno slammed the door in Bare's face. Cotton and Labno testified that Bare threatened Labno and told him, "I'll be back, ask [Cotton] what I'll do," as he left with Burnette.

Around 4 a.m., he saw a bright light outside and saw Bare and Burnette lighting Labno's truck on fire. Cotton testified that Labno was not at his apartment at that time, so he went outside and put out the fire himself. Further, he stated that when Labno returned, Labno called his friend, Jeff Faye, and then left and returned with a shotgun.

Cotton stated that later that morning while he was trying to sleep, Labno yelled out, "They're here." He said that Labno went and got the shotgun, "rack[ed] it," and said, "There's one in the chamber" and tried to hand the gun to Cotton. Cotton said he refused to take the gun and told Labno to "take care of your business like a man." Labno said, "I'm going to

get the son of a bitch for doing this" and went outside with the shotgun.

Cotton testified that Bare came to Labno's front door and that a confrontation ensued. Cotton stated that he went outside and tried to leave but could not because his vehicle was blocked in. He heard Bare yelling at Labno, and when he got to the side of the house, Labno had the shotgun in his left hand and Bare was holding a board. He stated that as the argument escalated, Bare swung the board at him in a "karate chop" motion. Cotton said the board hit him in the hand, jamming one of his fingers and giving him a splinter. Cotton said that he tried to leave to remove the splinter but that Bare said, "You ain't going nowhere old mother-fucker, sit down in that chair or I'll split your head," at which point Labno pointed the shotgun at Bare and told him to back up.

Cotton stated that Bare was still in a rage after his argument with Labno ended and started yelling at Cotton about money that Bare thought Cotton owed him. He said that Bare came up toward the porch and told Cotton, "There's a gun there, you punk mother-fucker, you better use it." Then Bare started coming toward Cotton, so he grabbed the gun and shot Bare. He said that he tried to hit Bare in the legs and was not "aiming to kill the kid."

Matthew Krisel, a friend of Bare, testified that after the shooting, he got a telephone call about Bare's death. Krisel immediately called Cotton to ask him what had happened, and Cotton asked Krisel to bring him some "dope," which, according to Krisel, meant methamphetamine. Cotton also asked Krisel if he had heard that Cotton and Labno were "on the lamb because they shot a kid and he was in critical condition." Cotton told Krisel where he was, and Krisel relayed that location to police. The police apprehended Cotton at a nearby residence.

During his trial testimony, Krisel acknowledged that he was testifying against Cotton pursuant to a proffer agreement with the State and was seeking leniency on his own charges in a

separate case. Cotton denied having a conversation with Krisel after the shooting and said that he never asked Krisel to bring him some "dope."

While Cotton was in jail, he made recorded telephone calls to Labno and Faye. During a call to Labno, on August 26, 2015, Cotton asked Labno if he had received Cotton's letters and asked Labno if he has "any violence on [his] record" because he was "just wonderin' on something." Labno testified that he thought Cotton was trying to set him up to take the gun charge.

During the call to Faye, on August 28, 2015, Faye told Cotton that Labno was upset because it appeared Cotton wanted Labno to take the blame for having the shotgun. Cotton said he was "all wound up" and did not recall exactly what he said in his letters to Labno. Cotton said he was just trying to exonerate himself on the gun charge. Cotton also said, "I was out of my mind that day, I was in a heightened thing," and told Faye that he would be testifying that he had acted in self-defense. Faye testified that he believed Cotton was using methamphetamine at the time of the incident.

Cotton called two of his former neighbors as witnesses to testify about Bare's conduct while living with Cotton. The first witness testified that Bare often acted like a tough guy, kind of like a "gangster," and was abusive toward people he was with and was confrontational toward neighbors. The second witness stated that Bare was somewhat aggressive and that he had seen Bare with a sidearm. He said that Cotton had contacted him once about getting Bare out of his house. Both of Cotton's former neighbors also testified that they were aware that Cotton used methamphetamine and other drugs while he lived in their neighborhood.

At the close of the State's case in chief, Cotton filed a motion to dismiss for lack of sufficient evidence, which was denied. After closing augments, Cotton renewed his motion to dismiss and requested a directed verdict for the defense, which was overruled.

The jury found Cotton guilty as charged on all four counts. Cotton filed a motion for new trial, which was denied. In October 2016, the court appointed Cotton new counsel from the Douglas County public defender's office.

In January 2017, Cotton was sentenced to life in prison on count I (first degree murder), 5 to 20 years' imprisonment on count II (use of a deadly weapon to commit a felony), 3 to 20 years' imprisonment on count III (felon in possession of a deadly weapon), and 20 months' to 2 years' imprisonment on count IV (possession of a controlled substance). All four sentences were ordered to run consecutively. Cotton perfected a timely appeal.

II. ASSIGNMENTS OF ERROR

Cotton presents 11 assignments of error, restated and reordered, on appeal. He assigns that the court erred in (1) denying his motion to sever count IV from the amended information, (2) admitting evidence obtained in a search that went beyond the scope of the warrant, (3) finding his conviction of first degree murder was supported by competent evidence, and (4) denying his motion for new trial based on prosecutorial misconduct.

Cotton also assigns that his trial counsel was ineffective in (5) failing to withdraw due to a conflict of interest, (6) failing to call Lindsey Redinbaugh as a witness, (7) failing to request a mistrial when Labno testified at trial after having been declared unavailable and had his deposition read into the record, (8) failing to object to improper questioning by the State and instances of prosecutorial misconduct during closing argument, (9) failing to cross-examine Dr. Erin Linde, and (10) offering the deposition of Faye at trial, as well as (11) issues raised by him during allocution at his sentencing hearing.

III. STANDARD OF REVIEW

[1] A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown, and an

appellate court will find such an abuse only where the denial caused the defendant substantial prejudice amounting to a miscarriage of justice.[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]

[3] Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. We determine as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance.[3]

IV. ANALYSIS

1. Motion to Sever Count IV and Court's Admission of Drug Evidence

(a) Additional Facts

About 1 month before trial, Cotton filed a motion to suppress regarding physical evidence obtained from him during a police interview, the shotgun used to kill Bare, and any evidence of his use of the shotgun, which the court overruled.

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[1] *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016).

[2] *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017).

[3] *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

Four days before trial, the State filed an amended information adding count IV, possession of a controlled substance (methamphetamine). That same day, Cotton filed a motion in limine and sought to preclude the State from adducing any evidence regarding the methamphetamine found inside Labno's apartment. Cotton's motion alleged that there was no reliable basis to conclude that the methamphetamine belonged to Cotton, so the introduction of that evidence would violate Neb. Evid. R. 104, 402, 403, and 404.

At the hearing, the police officer who executed the search warrant testified that police had discovered, in the northwest bedroom closet, two envelopes with Cotton's name on them and a medication bottle with Cotton's name on it. Additionally, he stated that a tin containing methamphetamine was also found in that closet. The district court found there was probable cause to believe that Cotton committed the crime of possession of methamphetamine and bound over the charge for trial.

Also at the hearing, Cotton moved to sever count IV, arguing that it would allow otherwise inadmissible evidence to be presented at trial. The court overruled both Cotton's motion in limine, to exclude drug evidence, and his motion to sever.

At trial, Cotton's counsel objected to an officer's testimony about the items recovered during the execution of the search warrant on Fourth Amendment grounds.

(b) Cotton Was Not Prejudiced by Joinder of Count IV

Cotton assigns that the court erred in overruling his motion to sever count IV from the amended information. He argues that count IV was not related or joinable to counts I, II, and III, because the murder and weapon charges were different in nature from the drug charge and could be proved without any reference to the drug charge. Cotton asserts that he was severely prejudiced by the joinder of count IV, because it permitted the State to admit propensity evidence of drug use

that the jury could not have otherwise considered to attack his character.

[4] There is no constitutional right to a separate trial.[4] Instead, the joinder or separation of charges for trial is governed by Neb. Rev. Stat. § 29-2002 (Reissue 2016), which states, in relevant part:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> . . . .
>
> (3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses in an indictment, information, or complaint . . . the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

Under § 29-2002, whether offenses were properly joined involves a two-stage analysis: (1) whether the offenses were related and joinable, under subsection (1), and (2) whether the joinder was prejudicial to the defendant, under subsection (3).[5] There is a strong presumption against severing properly joined counts under § 29-2002(3).[6]

[5] We have stated that § 29-2002(1) is similar to the federal rule for joinder, found in Fed. R. Crim. P. 8(a) and (b); so, federal case law is instructive to our application § 29-2002(1).[7] Thus, we review a trial court's determination on the joinability

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[4] *State v. Stevens*, 290 Neb. 460, 860 N.W.2d 717 (2015).

[5] See *Henry, supra* note 1.

[6] *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014).

[7] See *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013).

of offenses, under § 29-2002(1), de novo.[8] However, a misjoinder of offenses is subject to a harmless error review and will not be reversed unless it resulted in prejudice.[9]

[6] Accordingly, while subsections (1) and (3) of § 29-2002 "present different questions, it is clear that there is no error under either [subsection] if joinder was not prejudicial."[10] Therefore, a denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown, and an appellate court will find such an abuse only where the denial caused the defendant substantial prejudice amounting to a miscarriage of justice.[11] A defendant opposing joinder of charges has the burden of proving prejudice.[12]

[7,8] To prevail on a severance argument, a defendant must show compelling, specific, and actual prejudice from the court's refusal to grant the motion to sever.[13] Severe prejudice occurs when a defendant is deprived of an appreciable chance for an acquittal, a chance that the defendant would have had in a severed trial.[14] However, prejudice is not shown if evidence of one charge would have been admissible in a separate trial of another charge.[15]

Here, we need not consider whether count IV was properly joined with the other counts, because Cotton cannot show any prejudice from the joinder. At trial, Cotton presented self-defense as an affirmative defense. To successfully assert

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[8] See, *U.S. v. Zimny*, 873 F.3d 38 (1st Cir. 2017); *U.S. v. Litwok*, 678 F.3d 208 (2d Cir. 2012); *U.S. v. Colonna*, 360 F.3d 1169 (10th Cir. 2004), *overruled on other grounds, U.S. v. Little*, 829 F.3d 1177 (10th Cir. 2016).

[9] See, e.g., *Zimny, supra* note 8.

[10] *U.S. v. Prigge*, 830 F.3d 1094, 1098 (9th Cir. 2016), *cert. denied* 580 U.S. 1080, 137 S. Ct. 697, 196 L. Ed. 2d 573 (2017). See *Foster, supra* 7.

[11] *Henry, supra* note 1.

[12] *Id.*

[13] *Stevens, supra* note 4.

[14] *Foster, supra* note 7.

[15] *Stevens, supra* note 4.

a claim of self-defense, one must have a reasonable and good faith belief in the necessity of using such force.[16] Thus, whether Cotton was under the influence of alcohol or drugs at the time of the shooting was relevant to determining if he had a reasonable subjective belief that his use of force was necessary.

Accordingly, the evidence of count IV would have been admissible at trial even if the count would have been severed from the amended information. Therefore, this assignment of error is without merit.

(c) Cotton Waived Right to Object to Lawfulness of Seizure of Methamphetamine

Cotton argues that the court erred in denying his motion to suppress, because the State exceeded the search warrant—limited to firearms, companion equipment, and ammunition—when it seized the methamphetamine from Labno's apartment.

The State contends that this assignment of error is not properly before this court, because Cotton's motion to suppress made no mention of methamphetamine or drug paraphernalia and he never filed an additional motion to suppress or expanded his initial motion.

Neb. Rev. Stat. § 29-822 (Reissue 2016) provides, in relevant part, the following:

> Any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence. The motion shall be filed in the district court where a felony is charged and may be made at any time after the information or indictment is filed, and must be filed at least ten days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown. . . . Unless claims of unlawful search and seizure

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[16] *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

> are raised by motion before trial as herein provided, all objections to use of the property as evidence on the ground that it was obtained by an unlawful search and seizure shall be deemed waived; *Provided,* that the court may entertain such motions to suppress after the commencement of trial where the defendant is surprised by the possession of such evidence by the state, and also may in its discretion then entertain the motion where the defendant was not aware of the grounds for the motion before commencement of the trial.

[9,10] A suppression hearing is preparatory, because it relates to auxiliary issues not immediately relevant to the question of guilt and is held in anticipation of certain evidence being introduced at a forthcoming trial.[17] It is the intention of § 29-822 that motions to suppress evidence are to be ruled on and finally determined before trial, unless the motion is within the exceptions contained in the statute.[18] Accordingly, absent an exception, a failure to move for the suppression of evidence seized unlawfully waives the objection.[19]

As the State argues, Cotton's motion to suppress did not make any mention of the methamphetamine or other drugs and drug paraphernalia seized during the search of Labno's apartment. While Cotton would have had cause to file a new motion to suppress or amend his previous motion less than 10 days prior to trial, as a response to the State's amended information, he did not do so. Instead, he filed a motion in limine to exclude methamphetamine evidence on the basis of evidence rules 104, 402, 403, and 404—not Fourth Amendment grounds. While he did make a Fourth Amendment objection to the evidence at trial, he did not make a motion to suppress and the court would have had no basis to apply the

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[17] *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014), citing Wayne R. LaFave et al., Criminal Procedure § 10.1 (5th ed. 2009).

[18] *Piper, supra* note 17.

[19] *State v. Howell*, 188 Neb. 687, 199 N.W.2d 21 (1972).

statutory exception for surprise when the objection concerned the exact evidence which was the subject of Cotton's motion in limine.

We conclude that Cotton waived his right to object to the seizure's lawfulness by failing to move for the suppression of the evidence. Thus, this assignment of error is without merit.

2. Evidence Was Sufficient to Support Cotton's Conviction

Cotton argues that the evidence was insufficient as a matter of law to support a guilty verdict of first degree murder, because the State failed to prove that he acted with deliberate or premediated malice. Instead, he argues that the evidence clearly shows that he acted instinctively in self-defense.

The State argues that the jury was properly instructed on the elements of first degree murder, its burden, and Cotton's claim of self-defense. It argues that while the evidence supporting the conviction was disputed, we must view it in the light most favorable to the State, and that matters of weight and credibility are for the jury to decide.

[11] Pursuant to Neb. Rev. Stat. § 28-303 (Supp. 2017), a person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice. We have summarized the three elements which the State must prove beyond a reasonable doubt to obtain a conviction for first degree murder as follows: The defendant (1) killed another person, (2) did so purposely, and (3) did so with deliberate and premeditated malice.[20]

With respect to the element of "deliberate and premeditated malice," under § 28-303, our cases commonly look to the facts showing the planning of a murder and the manner in which the murder was carried out.[21] Specifically, the deliberation element means not suddenly or rashly, and requires the State to prove

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[20] *State v. Escamilla*, 291 Neb. 181, 864 N.W.2d 376 (2015).

[21] *Id.*

that the defendant considered the probable consequences of his act before committing it.[22]

[12-14] The premeditation element requires the State to prove that a defendant formed the intent to kill a victim without legal justification before doing so, but no particular length of time for premeditation is required.[23] It is sufficient if an intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.[24] The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.[25] Whether premeditation exists depends on numerous facts about how and what the defendant did prior to the actual killing which show he or she was engaged in activity directed toward the killing, that is, planning activity.[26] A question of premeditation is for the jury to decide.[27]

Burnette testified that after she and Bare returned to Bare's apartment, she heard Cotton say, "'I have a round in the gun and I'm going to use it.'" Then, she stated that when she looked outside during the altercation, she saw Bare holding a piece of wood, Labno by the porch, and Cotton sitting in a chair on the porch behind Labno with a shotgun pointed at Bare in his lap. While the altercation was between Labno and Bare initially, Burnette stated that Cotton became upset when their argument deescalated and that Cotton went into Labno's apartment. She testified that when Cotton reemerged from the apartment, he placed himself in between Labno and Bare, still with the gun. Bare then stepped toward Cotton and said, "[I]f

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[22] *State v. Braesch*, 292 Neb. 930, 874 N.W.2d 874 (2016).

[23] *Id.* See, also, *Escamilla, supra* note 20.

[24] *Braesch, supra* note 22.

[25] *Escamilla, supra* note 20.

[26] *Id.*

[27] *Id.*

you're going to hold the gun to me, then you better fucking shoot me," at which point Cotton shot Bare.

Cotton admitted to shooting Bare and to doing so purposefully. While Cotton presented a different version of events and claimed his actions were in self-defense, we must view the evidence in the light most favorable to the State. Based on Burnette's testimony, there was sufficient evidence for a jury to conclude that Cotton went outside with the shotgun and injected himself into the argument between Labno and Bare with deliberate and premeditated malice to kill Bare. Therefore, this assignment of error is without merit.

3. Ineffective Assistance of Counsel

[15] 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.[28]

[16] However, the fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[29] Such a claim may be resolved when the record on direct appeal is sufficient to either affirmatively prove or rebut the merits of the claim.[30] The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.[31]

[17] In the case of an argument presented for the purpose of avoiding procedural bar to a future postconviction proceeding, appellate counsel must present a claim with enough

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[28] *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017).

[29] *Id.*

[30] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[31] See *id.*

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.[32] A claim insufficiently stated is no different than a claim not stated at all.[33]

[18,19] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[34] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[35] To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[36] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[37] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[38] 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.[39]

(a) Cotton Waived Right to Counsel Free of Conflict of Interest

Cotton contends that his trial counsel was ineffective for failing to file a motion to withdraw, because his trial counsel

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[32] *State v. Mendez-Osorio, supra* note 2.

[33] *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

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

[35] *Burries, supra* note 3.

[36] *State v. Duncan*, 293 Neb. 359, 878 N.W.2d 363 (2016).

[37] See *Burries, supra* note 3.

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

[39] *Jedlicka, supra* note 28.

had a conflict of interest. He also asserts that his waiver of the conflict of interest was not effective, because it was not a signed writing and his trial counsel could not have given him detached advice when the conflict of interest was a personal conflict of Cotton's trial counsel.

The State argues that Cotton's affirmative waiver of his trial counsel's conflict of interest on the record was knowing and intelligent and that there was a strong presumption toward allowing Cotton to choose his own counsel, so the court did not err in accepting his waiver.

[20] The Sixth Amendment to the U.S. Constitution provides that a criminal defendant has a right to have the assistance of counsel for his or her defense. An essential part of that right is the defendant's ability to select the counsel of his or her choice.[40] In general, defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice.[41] Accordingly, because disqualification of a criminal defendant's chosen counsel raises problems of a constitutional dimension, it is a harsh remedy that should be invoked infrequently.[42]

The Sixth Amendment also recognizes a presumption in favor of the defendant's chosen counsel.[43] Among the reasons for this presumption are (1) a historic respect for the defendant's autonomy in crafting a defense, (2) the strategic importance of choice in ensuring vigorous advocacy, and (3) practical considerations of costs to the defendant and the judicial system if counsel of choice were wrongly denied.[44]

[21,22] But the right to effective assistance of counsel also entitles the accused to his or her counsel's undivided loyalties,

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[40] *State v. Kawa*, 270 Neb. 992, 708 N.W.2d 662 (2006), *overruled on other grounds, Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

free from conflicting interests.[45] In the absence of an objection, the court has a duty to inquire into a potential conflict of interest only when the trial court knows or reasonably should know that a particular conflict exists—which is not to be confused with a situation in which the trial court is aware of a vague, unspecified conflict of interest, such as that which inures in almost every instance of multiple representation.[46]

[23,24] A defendant can waive his or her right to assistance of counsel unhindered by a conflict of interest, provided that the waiver is knowing and intelligent, but a court is not required to accept a defendant's waiver in all circumstances.[47] The right to counsel of choice is not absolute. A trial court must recognize a presumption in favor of a defendant's counsel of choice, but that presumption may be overcome by a demonstration of actual conflict or a showing of a serious potential for conflict.[48] Disqualification in such cases is necessary, because when a defendant is represented by an attorney who has an actual or potentially serious conflict, the defendant may be deprived of effective assistance of counsel.[49]

[25] A defendant who raised no objection at trial must show that an actual conflict of interest existed and that the conflict adversely affected his or her lawyer's performance.[50] When an actual conflict exists, there is no need to show that the conflict resulted in actual prejudice to the defendant. If the defendant shows that his or her defense counsel faced a situation in which conflicting loyalties pointed in opposite

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[45] *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[46] *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006), citing *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981), and *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

[47] *Kawa, supra* note 40.

[48] *Id.*

[49] *Id.*

[50] *Edwards, supra* note 45.

directions and that his or her counsel acted for the other client's interests or the counsel's own personal interests and against the defendant's interests, prejudice is presumed.[51] A conflict of interest must be actual, rather than speculative or hypothetical, before a court can overturn a conviction because of ineffective assistance of counsel.[52]

Here, there was no motion to withdraw or motion to disqualify regarding Cotton's trial counsel. Nevertheless, upon being informed by the State of Cotton's trial counsel's potential ethical violations, the court fulfilled its duty to inquire into the potential conflict of interest. The issue was discussed by the parties' attorneys, and Cotton affirmatively waived the potential conflict of interests on the record. We first consider whether his waiver was effective. If Cotton's consent was effective, we then consider whether the court abused its discretion in accepting Cotton's waiver. If either of the preceding questions are answered in the negative, we must determine whether Cotton's trial counsel had an actual conflict of interest that adversely affected his representation of Cotton.

(i) Additional Facts

Lindsey Redinbaugh is the mother of Labno's children. Before trial, Cotton's trial counsel identified Redinbaugh as a witness, who would testify that Labno procured the shotgun used to kill Bare. Redinbaugh was served a subpoena on July 19, 2016, to appear and testify at Cotton's trial.

The State filed a motion in limine requesting to have Redinbaugh excluded as a witness or to allow the State to inquire on cross-examination regarding her employment with Cotton's trial counsel. The State also requested that the court advise Cotton of the potential conflict of interest resulting from his trial counsel's relationship with Redinbaugh.

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[51] See *id.*

[52] *Id.*

The State's motion in limine alleged the following facts: Redinbaugh was hired by Cotton's trial counsel on approximately July 22, 2016; Redinbaugh and Cotton's trial counsel had discussed Matthew Krisel's statements to law enforcement; on July 29, while Krisel was being deposed by Cotton's trial counsel, Redinbaugh sent Krisel two messages on social media accusing him of "'snitching'" and discouraging him from doing so; Redinbaugh was arrested that day for witness tampering, and her cell phone was seized; Cotton's counsel informed a deputy Douglas County Attorney that Redinbaugh's cell phone may contain attorney work product and that he intended to represent Redinbaugh on the tampering charges.

In the motion in limine, the State also expressed concerns that Cotton's attorney may have aided Redinbaugh in witness tampering and either inappropriately discussed this case with Redinbaugh or allowed her access to case material, in violation of discovery rules. Cotton's trial counsel's response to the motion in limine does not appear in the record.

At the hearing on the motion, in Cotton's presence, the State alleged that Cotton's trial counsel had requested that the parties stipulate to not calling Redinbaugh as a witness and stated that "the concern or the appearance of it is, is that [Cotton's trial counsel] is now getting out of calling a material witness on behalf [of Cotton] to save himself from any ethical problems." Cotton's trial counsel responded that he had informed the State he did not intend to call Redinbaugh at the deposition of Krisel based on trial strategy. Cotton's trial counsel also stated that he had conferred with counsel for discipline and Cotton and that he and Cotton believed that it was in Cotton's best interests for him to continue representing Cotton.

There were also two versions of a local newspaper article which concerned the situation between Cotton's trial counsel and Redinbaugh entered into evidence. The record does not establish that Cotton read the articles.

The court then questioned Cotton about the motion. Upon the court's inquiry, Cotton stated that he had read the State's motion in limine, had discussed it with his trial counsel, had been able to ask his trial counsel any questions that he had about the motion in limine, had read his trial counsel's response to the State's motion in limine, and understood the potential ethics violations the State had raised concerning his attorney and their implications. Then, the following colloquy between the court and Cotton occurred: "THE COURT: Okay. Do you choose to go forward with [your trial counsel] as your counsel? [Cotton]: I do. THE COURT: All right. And do you wish to go to trial today? [Cotton]: Yes, sir."

(ii) Cotton's Waiver Was Effective

[26,27] A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.[53] There is no formalistic litany required to establish that a waiver was knowingly and intelligently made; instead, when considering whether a defendant voluntarily, knowingly, and intelligently waived his or her right to counsel, we review the totality of the circumstances appearing in the record.[54] A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute.[55]

[28,29] In determining whether a defendant's waiver of a statutory or constitutional right was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.[56] Under a clearly erroneous standard of review,

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[53] *State v. Qualls*, 284 Neb. 929, 824 N.W.2d 362 (2012).

[54] See *id.*, citing *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009).

[55] *Id.*

[56] *Id.*

we do not reweigh the evidence, but we decide the ultimate question independent of the trial court's ruling.[57]

First, Cotton asserts that his waiver was per se ineffective, because it did not comply with Neb. Ct. R. of Prof. Cond. § 3-501.7(b)(4), which requires an attorney to obtain "informed consent, confirmed in writing" from a client when there is a concurrent conflict of interest.

The Nebraska Rules of Professional Conduct govern the ethical duties and restrictions of attorneys in Nebraska. Conversely, a defendant's right to counsel free of conflicting interests, and the waiver thereof, is governed by the state and federal Constitutions. Accordingly, while Cotton's trial counsel's alleged failure to obtain written consent may be relevant in disciplinary proceedings, it is not relevant to Cotton's waiver before the court.

Second, Cotton asserts that he could not effectively waive the conflict of interest, because his trial counsel's conflict was personal, which prevented him from giving detached advice.

Though it is conceivable that any advice from Cotton's trial counsel to Cotton concerning the waiver was tainted with self-interest, the record contains an extensive dialogue between Cotton and the court. Cotton admitted that he had personally reviewed the State's motion in limine and that he was in court during the hearing. Accordingly, Cotton was aware of the factual basis for the conflict of interest and the State's concerns about the impact that Cotton's trial counsel's conflicts might have on his defense. Cotton also stated that he was able to ask his counsel any questions he had about the situation. While it is possible that Cotton's trial counsel was not honest with Cotton, Cotton was aware of the situation and had reason to view his trial counsel's statements with skepticism. Nevertheless, Cotton affirmatively stated on the record that he

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[57] See, *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011); *Jacob North Printing Co. v. Mosley*, 279 Neb. 585, 779 N.W.2d 596 (2010), *overruled on other grounds, Heckman, supra* note 40.

wished to proceed to trial with his counsel. Therefore, we hold that Cotton made a knowing and intelligent waiver of the conflict of interest on the record.

(iii) Court Did Not Abuse Its Discretion in Accepting Cotton's Waiver

[30,31] When determining whether or not to disqualify a defense counsel, the court must balance two Sixth Amendment rights: (1) the defendant's right to be represented by counsel of choice and (2) his or her right to a defense conducted by an attorney who is free of conflicts of interest.[58] The U.S. Supreme Court has also recognized an independent interest of the courts in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.[59] Whether a conflict of interest justifies the disqualification of defense counsel is a matter committed to the discretion of the trial court.[60]

Here, where Cotton effectively waived his right to proceed with counsel free of any conflicts of interest, we begin by considering whether his trial counsel had an actual conflict of interest or a showing of a serious potential for conflict, which would be required to overcome the presumption in favor of Cotton's choice of counsel.

[32] We have broadly defined the phrase "actual conflict" to include any situation in which a defense attorney faces divided loyalties such that regard for one duty tends to lead to disregard of another.[61] An actual conflict may arise from concurrent representation, subsequent representation, or a personal conflict held by counsel.[62] Accordingly, if a defense counsel acts

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[58] *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001), *overruled on other grounds, Heckman, supra* note 40.

[59] *Id.*

[60] See *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

[61] *Edwards, supra* note 45.

[62] See, § 3-501.7; *McGuire, supra* note 60; *Edwards, supra* note 45.

or refrains from acting at trial in a manner that is inconsistent with the defendant's interests based on the preceding sources of conflicts, the defense counsel actively represents conflicting interests.[63]

[33,34] The seriousness of any potential conflict of interest depends on its likelihood and dimensions.[64] When weighing the interests at stake, courts generally give substantial weight to defense counsel's representations regarding conflicts of interest.[65]

Cotton's trial counsel had disclosed that the reason for calling Redinbaugh as a witness was to support Cotton's allegation that Labno, not himself, had acquired the shotgun used in the shooting and to attack Labno's credibility, who claimed he had not procured the gun. While Labno's testimony supported the State's theory of the case, the testimony of the State's primary witness—Burnette—would have been wholly unaffected by the source of the gun used in the shooting. Accordingly, the evidence presented to the trial court did not support a conclusion that the failure to call Redinbaugh was per se an actual conflict of interest.

However, the jury's determination of whether or not Cotton acted in self-defense was based solely on the credibility of Cotton and the witnesses to the shooting. In a case dependent on witness credibility, any witness that could strengthen the defendant's credibility and undermine a State witness' credibility could be in the defendant's interest to call. Accordingly, Cotton's trial counsel's decision not to call Redinbaugh, in light of the ethical violations by Cotton's trial counsel that the court determined she would be subject to cross-examination on, did support a conclusion that his actions represented a potential conflict of interest.

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[63] See *Edwards, supra* note 45.

[64] *Ehlers, supra* note 58, citing *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

[65] *Id.*

Nevertheless, we conclude that Cotton's trial counsel's potential conflict of interest was not a serious one. As mentioned above, the State's case rested primarily on the credibility of Burnette, not Labno. The trial court had no reason to believe that Redinbaugh would absolutely be called to testify at trial or that her testimony would have made a significant impact, especially in light of the defense's cell phone record evidence that also undermined Labno's testimony that he did not leave his apartment during the early morning of August 7, 2015. Further, Cotton's trial counsel stated that he had informed the State that Redinbaugh would not be called as a witness, based on trial strategy, before the issue of witness tampering arose, which the State did not dispute.

Because of the substantial weight that Cotton's trial counsel was entitled to on this testimony, the evidence presented to the court did not support a finding that Cotton's trial counsel's potential conflict of interest was serious. Accordingly, the presumption in favor of Cotton's right to choose his own counsel after waiving the conflict of interest could not be overcome. Therefore, the court did not abuse its discretion in accepting Cotton's waiver of the conflict of interest. This assignment of error is without merit.

(b) Cotton Cannot Show Prejudice From His Trial Counsel's Decision Not to Call Redinbaugh as Witness

Related to the preceding section, Cotton argues that his trial counsel was ineffective for failing to call Redinbaugh as a witness. Again, he alleges that she would have testified that Labno left his apartment prior to the shooting to procure the shotgun used to shoot Bare. He argues that he was prejudiced because the testimony would have supported his credibility and undermined Labno's credibility, which was essential because his claim of self-defense hinged on who brought the shotgun into the apartment.

The State argues that the only material fact in dispute is whether Cotton acted in self-defense, and the fact of who brought the shotgun to the house had no bearing on that fact.

As discussed above, while witness credibility was paramount to determining whether or not Cotton acted in self-defense, the State's case rested primarily on Burnette's testimony of the shooting, not Labno's. As Cotton argues, his claim of self-defense is largely based on who brought the gun into the apartment during the dispute with Bare. However, as the State argues, whether Cotton or Labno procured the gun is largely irrelevant to who possessed the gun at the time of the shooting. Burnette's testimony established that Cotton possessed the gun before any altercation with Bare began and maintained possession of the gun until Cotton ultimately shot Bare.

Accordingly, assuming without deciding that Cotton's trial counsel's decision to not have Redinbaugh provide the testimony Cotton alleges at trial was deficient, Cotton cannot prove a reasonable probability that the outcome of the proceedings would have been different if Redinbaugh had testified as alleged. Because Cotton cannot show that he was prejudiced by his trial counsel's failure to call Redinbaugh as a witness, this assignment of error is without merit.

(c) Cotton Waived Right to Request Mistrial Regarding Labno's Testimony

Cotton contends that his trial counsel was ineffective for failing to request a mistrial when Labno appeared at trial after being declared unavailable and having a portion of his deposition read into the record. He asserts that his trial counsel effectively admitted deficient performance on the record by expressing uncertainty on how to proceed. Cotton also asserts that his decision not to request a mistrial was invalid because of his trial counsel's admission. He argues that he was prejudiced, because Labno's testimony received undue influence by being presented to the jury twice and the State had the opportunity to corroborate Labno's deposition testimony.

The State argues that Cotton's trial counsel's performance was not defective but, instead, represented legitimate trial strategy. Further, it contends that Cotton cannot complain that his counsel did not request a mistrial, because Cotton consented to Labno's testimony.

(i) Additional Facts

On the fourth day of trial, the State informed the court that it had subpoenaed Labno to testify but that he had failed to appear. Accordingly, it requested that Labno be declared an unavailable witness and asked that it be allowed to read his deposition into evidence.

In support of the request, the State asked the court to take judicial notice of the subpoena issued to Labno; offered the court's bench warrant for Labno, issued when he failed to appear on the first day of trial; and offered a copy of Labno's criminal record file, showing that the Omaha Police Department's homicide unit made two unsuccessful attempts to locate Labno pursuant to the court's bench warrant. The attorney appointed to represent Labno in the case testified that he had spoken with Labno earlier that day and that Labno indicated he would be present to testify at trial. However, he stated that he had heard nothing further from Labno and was currently unable to reach him.

The district court found that the State made a prima facie showing that Labno was unavailable and allowed the State to read Labno's deposition into the record. Then, with seven pages of the deposition left, the State informed the court that it had just received a note indicating that Labno had arrived at the courthouse.

The State proposed that Labno's deposition be stricken with an accompanying instruction to the jury or, alternatively, that they continue with the deposition and not have Labno testify. However, the State ultimately decided to defer to the defense's decision with how to proceed.

Cotton's trial counsel initially indicated that he was unsure of the legal stance of the case at that point and was not sure how to proceed. Cotton's trial counsel then reasoned that the two options were to allow Labno to be declared available and be permitted to testify or to move to strike Labno's deposition testimony and move for a mistrial because the jury would not be able to disregard the deposition testimony. The court then determined that the State could proceed with Labno's live testimony, without striking the deposition, and stated that it would not declare a mistrial, but told Cotton's trial counsel that he could still object after conferring with Cotton.

After conferring with Cotton, Cotton decided to proceed with calling Labno without objection. The court then questioned Cotton further on whether he consented to proceeding without objection. Cotton stated that he had been in the courtroom while the situation was discussed and then the situation was again relayed to him. At that point, the court presented Cotton with the following question: "Do you . . . want a mistrial or do we want to keep going and allow . . . Labno to take the stand and start from the beginning?" Cotton stated that he understood the question, and then his trial counsel stated that they wished to proceed. Nothing in the record indicated that Cotton disagreed with his trial counsel's final confirmation.

The jury was brought back in, and the court informed it that Labno had just arrived to testify. The court informed the jury that Labno would now take the stand and that while the information might be repetitive, it was its job to decipher and deal with that information.

(ii) Analysis

[35] A mistrial is properly granted in a criminal case where an event occurs during the course of 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.[66] The defendant must prove that the alleged error

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[66] *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

actually prejudiced him or her, rather than creating only the possibility of prejudice.[67]

We reject Cotton's assertion that his trial counsel's statements on the record constituted an admission of deficient performance. While Cotton's trial counsel initially expressed that he was unfamiliar with how to proceed in this novel situation, the record shows that he had a clear grasp of the situation and the basis for a mistrial. His statements on the record indicate that his decision of whether to proceed with Labno's live testimony or move to strike Labno's deposition testimony and request a mistrial was based on trial strategy, rather than deficient performance. Accordingly, the record is insufficient to determine whether such strategy itself amounted to a deficient performance.

[36] Nevertheless, such an examination is unnecessary, because Cotton personally consented to proceeding with Labno's live testimony. A defendant has a fundamental constitutional right to a fair trial.[68] Accordingly, the principles required to waive such a right, as discussed above, apply with full force here. The record shows that Cotton admitted listening to the full discussion of the situation and each attorney's and the court's proposition of how to proceed and the legal basis supporting the decision. He also had the opportunity to confer with his trial counsel on how to proceed. Even though his trial counsel may not have understood the exact basis for moving for a mistrial or to strike Labno's deposition testimony, the record shows, as mentioned above, that his trial counsel understood the basis for a mistrial and that it was an option here.

[37] Cotton stated affirmatively on the record that he understood that he was being asked whether he wanted a mistrial or to allow Labno to provide live testimony. While it was Cotton's trial counsel who ultimately answered the question, as stated above, consent may be inferred by a defendant's

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[67] *Id.*

[68] See *State v. Johnson*, 298 Neb. 491, 904 N.W.2d 714 (2017).

actions.[69] Based on the circumstances here, Cotton's failure to protest his trial counsel's consent to proceed with live testimony was effective to provide consent to his trial counsel's statement. A defendant who has been fully informed of the constitutional right to testify may not acquiesce in his or her counsel's advice that he or she waive that right, and then later claim that he or she did not voluntarily waive such right.[70] Therefore, this assignment of error is without merit.

(d) Prosecutorial Misconduct

[38] When considering a claim of prosecutorial misconduct, we first consider whether the prosecutor's acts constitute misconduct.[71] A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.[72] But if we conclude that a prosecutor's acts were misconduct, we consider whether the misconduct prejudiced the defendant's right to a fair trial.[73] Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.[74] Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.[75]

(i) Prosecutor's Statements Regarding Burnette's Testimony in Closing Arguments

Cotton argues that the court erred in denying his motion for new trial based on prosecutorial misconduct. Cotton contends

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[69] See *Qualls, supra* note 53.

[70] See *State v. Rhodes*, 277 Neb. 316, 761 N.W.2d 907 (2009).

[71] See *Johnson, supra* note 68.

[72] *Id.*

[73] *State v. Gonzales*, 294 Neb. 627, 884 N.W.2d 102 (2016).

[74] *Id.*

[75] *Id.*

that the prosecutor's statement in his rebuttal closing argument—that Burnette did not testify that Bare was advancing toward Cotton when Cotton shot Bare—was improper, because the evidence showed otherwise. He also assigns error to his trial counsel's failure to object to the prosecutor's statement and his failure to request a mistrial, to the extent that his claim of prosecutorial misconduct is prejudiced. Cotton argues the prosecutor's statement prejudiced him by mischaracterizing a material fact when the State's case was not strong and by preventing his counsel from responding.

The State admits that the statement was not entirely accurate but argues that it did not amount to misconduct, because the evidence adduced from Burnette was conflicting. It also argues that Cotton was not prejudiced, because his attorney rebutted a similar statement made by the prosecutor in the initial closing argument, the prosecutor admitted in the rebuttal closing argument that he could be wrong about what Burnette said, and the jury was instructed that statements by the attorneys were not evidence.

a. Additional Facts

On direct examination, Burnette responded to a question by saying that "he" stepped forward and then Bare said, "If you're going to shoot me — if you're going to hold the gun to me, then you better fucking shoot me." However, in that answer, Burnette had referred to both Cotton and Bare, which made it unclear as to who had stepped forward. Later in her direct testimony, Burnette responded, "No," when asked, "Right before [Cotton] shot [Bare], did you see [Bare] make any motion or movement towards [Cotton]?" Then, on cross-examination, Burnette clarified that Bare did take a step toward Cotton a second or two before making his statement and that Bare was shot right after making the statement.

During closing arguments, the parties made the following respective comments about Burnette's testimony, regarding whether or not Bare had approached Cotton before being shot:

> [State's initial closing argument]: . . . But most importantly, what does [Labno] tell you about the actions of . . . Bare? That . . . Bare did not advance at him. Never. Never advanced to . . . Cotton, which is consistent with [the testimony of] Burnette. . . .
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> . . . .
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> [Cotton's closing argument]: [The prosecutor] says [Bare] didn't move forward. But really, on cross, it was brought out that [Bare] did move forward. In fact — and that's why I said even if you think everything [Burnette] did say was true, what [Burnette] said is that [Cotton] and [Bare] were about four to five feet from each other, well within striking distance. [Cotton] motioned, asked [Bare] to go into the apartment, and then [Bare] moved forward and said, If you have a gun you better use it, and that was all within one to two seconds of the shot.
>
> . . . .
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> [State's rebuttal argument]: . . . I completely disagree that . . . Burnette said [Bare] moved forward . . . . And if I'm wrong, I'm wrong. Labno didn't say it. Burnette didn't say that. But that's your responsibility. Go back [and] look at your notes. That's why you have them.

b. Cotton Failed to Preserve Issue of Prosecutorial Misconduct and Prosecutor's Statement Did Not Constitute Plain Error

[39] One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.[76] Accordingly, a party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.[77]

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[76] *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014).

[77] *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016).

While Cotton filed a motion for new trial after his conviction, he failed to preserve the issue of prosecutorial misconduct for appellate review, because he failed to object and make a timely motion for a mistrial.

[40] When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, we will review the record only for plain error.[78] 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.[79]

Based on our discussion in the following section, we conclude that the prosecutor's statement did not amount to plain error, because Cotton was not prejudiced to the extent that leaving it uncorrected would amount to a miscarriage of justice. Therefore, the trial court did not err in overruling Cotton's motion for new trial based on prosecutorial misconduct.

c. Cotton Cannot Show Prejudice by Trial Counsel's Failure to Object to Prosecutor's Statement

Before considering whether Cotton's trial counsel was deficient for failing to object to the prosecutor's statement, which would require a determination as to whether the prosecutor's statement amounted to prosecutorial misconduct, we consider whether Cotton was prejudiced by his trial counsel's failure to object.

As the State admits, the prosecutor's statement did mischaracterize the evidence adduced on cross-examination. However, directly after making the statement, the prosecutor admitted that he could potentially be wrong and that the members of the jury needed to refer to their notes to resolve the factual

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[78] *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

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

dispute. Further, as the State acknowledged, this statement responded to Cotton's trial counsel's response to a similar contention that the prosecutor made in its initial closing argument. This back-and-forth highlighted the importance of this fact and allowed each side to argue its position to the jury. The court instructed the jury that "[i]t is your duty to decide what the facts are" and that "[s]tatements, arguments, and questions of the lawyers for the state and [Cotton]" are not evidence.

[41] The purpose of jury instructions is to assure decisions that are consistent with the evidence and the law and to inform the jury clearly and succinctly of the role it is to play, the decisions it must make, and to assist and guide the jury in understanding the case and considering testimony.[80] Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.[81]

We reject Cotton's argument that the prosecutor's statement went unanswered and had the effect of misleading the jury on a material fact. Instead, both sides were able to discuss the factual issue and the jury was instructed that the attorneys' statements were not evidence and that it was the jury's duty to decide factual matters, which the jury presumably followed. Accordingly, we do not believe the prosecutor's statement undermines the confidence in the jury's decision. Therefore, this assignment of error is without merit.

(ii) Prosecutor's Statements About Credibility in Closing Argument Did Not Constitute Misconduct

Cotton argues that his trial counsel provided ineffective assistance by failing to object to prosecutorial misconduct in the State's closing argument regarding Cotton and his trial counsel's credibility. He argues his trial counsel was deficient, because the prosecution's characterization that Cotton

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[80] *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016).

[81] *State v. Lester*, 295 Neb. 878, 898 N.W.2d 299 (2017).

and his trial counsel had fabricated Cotton's testimony was a personal opinion that amounted to misconduct. Cotton argues that he was prejudiced because the prosecutor's statements are accorded weight by a jury and they undercut his theory of self-defense that relied on his credibility.

The State argues that the statements were an acceptable attack on Cotton's credibility.

a. Additional Facts

During his initial closing argument, the prosecutor began by discussing the jury instructions. Regarding jury instruction No. 22, he stated the following:

> Instruction No. 22, is the sole — you guys are the credibility — or the sole judges of a witness's credibility. The conduct and demeanor of the witness while testifying. Was . . . Burnette appropriate as she sat in this chair and told you what happened August 6th into August 7th, 2015? Did it look like it was staged? Was it scripted? Okay? How about the sources of information, including the opportunity for seeing or knowing the things about which the witness testified. . . . [Y]ou know from the testimony through . . . Burnette and . . . Labno specifically, they didn't have this entire binder. They weren't privy to everybody's statements. They didn't review depositions of every single witness, and they sure didn't sit in and listen to every single witness the State put on when we presented our case. . . . And that's important why? Because who has had everything from the day — from August of 2015, who has had everything? . . . Cotton has seen every single thing that I have. . . . How about the reasonableness or unreasonableness of the testimony of the witness? . . . Burnette, again, did it make sense? Was it corroborated by other evidence — physical evidence? Was it corroborated, more importantly, by other witnesses? . . . Labno, or — or was it just so unbelievable . . . .

Then, while discussing Cotton's testimony throughout his initial closing argument, the prosecutor stated at three points that Cotton's testimony seemed scripted. Cotton identified the first of these statements as prosecutorial misconduct. The statement, including the surroundings statements, is as follows:

> Keep in min[d], he's had everything, everything the State has, for a year almost, to sit and review it. All the depositions, police reports, videos of the interviews, and he sat through all of this. . . .
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> . . . .
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> . . . He sat through all of this trial with every single witness right there in that chair. When I sat here and listened to [Cotton's] statement, I paid attention to his demeanor, and I hope you did, too. Because I thought it was unreasonable what he was talking about. It almost felt like it was a script. The defense attorney . . . : I know this is emotional for you right now, [Cotton] — and it was, Oh, cue the quivering lip. It was — there were times when [Cotton] would look at [his attorney] almost as like, What are you asking? Stay on script.

Cotton's trial counsel followed up on this during his closing argument with the ensuing statements:

> Now, on Friday we all saw . . . Cotton sit here. We saw him speak from his heart and tell his account. And you know what I think we saw is that that wasn't scripted. I think what we saw is that was the opposite of scripted. I couldn't — he didn't want to just answer my questions. What he wanted to do was elaborate and elaborate and elaborate. He wanted to fill in every detail that you didn't have, even if it was inconsistent with some of the witnesses. I think it's totally obvious that the last thing . . . Cotton did was think, What am I going to say, how I'm go to go tailor it to everyone, how am I going to convince people that I have a story that makes sense that fits just enough. I think you could see that's not what he was doing.

> . . . .
> . . . There's no evidence that . . . Cotton had conspired to develop his script, besides the fact that he's sitting here. Other people had reviewed their depositions, as well.
> . . . .
> . . . I don't want you to listen to the county attorney trying to force it down your throats that . . . Cotton cannot be trusted for the sole reason that he sat here in the trial and heard other people testify.

b. Analysis

[42,43] Public prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial.[82] Because prosecutors are held to a high standard for a wide range of duties, the term "prosecutorial misconduct" cannot be neatly defined.[83] Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.[84] While a prosecutor should prosecute with earnestness and vigor and may strike hard blows, he is not at liberty to strike foul ones.[85]

[44] A prosecutor must base his or her argument on the evidence introduced at trial rather than on matters not in evidence.[86] When a prosecutor's comments rest on reasonably drawn inferences from the evidence, he or she is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense.[87] These

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[82] *Gonzales, supra* note 73.

[83] *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015).

[84] *Id.*

[85] *Gonzales, supra* note 73.

[86] *Johnson, supra* note 68.

[87] *Nolan, supra* note 83.

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.[88]

The State compares the prosecutor's comments in closing to those in *State v. Jacob*[89] and *State v. Custer*.[90] In both *Custer* and *Jacob*, we reviewed comments by prosecutors to determine if they had made improper statements on the defendants' invocation of their right to remain silent between the time they were arrested and trial.

In *Custer*, we relied on our holding in *Jacob* by equating the statements in the case to those considered in *Jacob*. We summarized the relevant statements in *Jacob*, during closing arguments, as "before the defendant testified at trial, he '"had five years to think of his answers, five years to run through all of this. Five years to prepare"' and that he had '"sat through this trial and heard every witness and every question."'"[91] Further, we stated:

> We characterized the State's remarks in *Jacob* as commenting on the defendant's credibility and as implying that "in evaluating the credibility of [the defendant's] testimony, the jury should consider that [the defendant] had the benefit of first hearing all the witnesses' testimony and had 5 years to prepare his testimony."[92]

In both cases, we concluded that the prosecutor's statements commented only on the defendant's credibility and were not an impermissible commentary on the defendant's silence. Accordingly, the prosecutor's comments in this case discussing Cotton's access to the State's evidence in

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[88] *Id.*

[89] *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), *abrogated on other grounds, Nolan, supra* note 83.

[90] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

[91] *Id.* at 111, 871 N.W.2d at 261, quoting *Jacob, supra* note 89.

[92] *Id.*, citing and quoting *Jacob, supra* note 89.

testifying were not misconduct, because they concerned only Cotton's credibility.

The prosecutor's comments in this case, however, did not stop at merely attacking Cotton's credibility based on his access to the State's evidence. Instead, the prosecutor took his comments in closing one step further by stating that Cotton seemed to use his access to the State's evidence to script his testimony and, further still, implying that Cotton's trial counsel took part in the scripting.

In *State v. Barfield*,[93] we held that the prosecutor's characterization of the defendant as a "'monster'" and strong "insinuat[ion] that defense lawyers are all liars" constituted misconduct.[94] We found such statements to be an impermissible personal expression of the defendant's culpability and implication that it is the job of defense attorneys to mislead juries, which "'denigrate[s] the legal profession in the eyes of the jury and, consequently, the public at large.'"[95]

Then, in *State v. Dubray*,[96] we also held a prosecutor's statements to be misconduct when he "characterized defense counsel as 'walking on the graves of these two people' and arguing that the victims 'deserved to die.'" We reasoned that these statements were not as bad as calling defense attorneys liars, as in *Barfield*, but were directed at defense counsel personally and not at his arguments.

[45] However, in *State v. Nolan*,[97] we differentiated a prosecutor's statements from those in *Barfield* and *Dubray* by recognizing that "'a distinction exists between arguing that a defense strategy is intended to distract jurors from what

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[93] *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[94] *Id.* at 512, 514, 723 N.W.2d at 313, 314.

[95] *Id.* at 514, 723 N.W.2d at 314, quoting *U.S. v. Linn*, 31 F.3d 987 (10th Cir. 1994).

[96] *Dubray, supra* note 78, 289 Neb. at 228, 854 N.W.2d at 605.

[97] *Nolan, supra* note 83, 292 Neb. at 135, 870 N.W.2d at 822.

the evidence shows, which is not misconduct, and arguing that a defense counsel is deceitful, which is misconduct.'" There, we held that a prosecutor's "statements during closing arguments that the defense counsel was going to use 'smoke screens and mirrors' to point out inconsistencies in the evidence" were not improper, because they were distracting rather than deceitful.[98]

Here, in the context of the prosecutor's entire closing argument and Cotton's trial counsel's response, the prosecutor's references to Cotton's testimony as being "scripted" appears to be more of an imprecise substitute for lacking genuineness than an implication of perjury.

The prosecutor began by asking the jury to remember each witness' conduct and demeanor while testifying and consider if Burnette's testimony appeared "scripted" or "staged." Then the prosecutor juxtaposed Cotton's level of access to testimony and evidence in the case to that of the State's witnesses to highlight the differences in inconsistencies—asking the jury to consider whether witnesses' statements contained inconsistencies but were supported by other evidence or, instead, neatly explained away inconsistencies without corroboration. Throughout the rest of the closing, the prosecutor's references to Cotton's testimony being "scripted" also appear in the context of asking the jury to consider whether Cotton's emotions seemed genuine or his answers fit the facts too perfectly.

Cotton's trial counsel attempted to rebut the prosecutor's statements that Cotton's testimony was "scripted" by stating, instead, that Cotton spoke "from his heart" and did not "tailor" his testimony to be consistent with other witnesses. He also argued that Cotton was not any less reliable than other witnesses solely because he had access to testimony, because they could review their own depositions to ensure their statements were consistent.

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[98] *Id.*

While we recognize that the portion identified by Cotton could be viewed differently in another context and advise prosecutors to exercise precision, the prosecutor's statements, here, were a permissible spirited summation that Cotton's knowledge of the case could have allowed him to explain away inconsistencies and allowed his attorney to ask questions that presented him the opportunity to do so—not an implication of perjury. Thus, the prosecutor's statements concerning Cotton's testimony being "scripted" did not amount to misconduct that would support this assignment of ineffective assistance of counsel for failing to object.

[46] The more concerning statement made by the prosecutor is when he stated, in reference to Cotton's testimony, "I thought it was unreasonable what [Cotton] was talking about." The Nebraska Rules of Professional Conduct state 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."[99] In cases where the 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.[100]

In this instance, the prosecutor's comment appears to be stating his personal opinion as to the credibility of Cotton's testimony. As a result, the comment would be improper.

[47] Again, however, if we conclude that a prosecutor's acts were misconduct, we must determine whether the statement complained of was unfairly prejudicial. It is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[101]

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[99] Neb. Ct. R. of Prof. Cond. § 3-503.4(e).

[100] *Gonzales, supra* note 73.

[101] *McSwine, supra* note 80.

> Because the "average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed," "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."[102]

Nevertheless, whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.[103]

[48] In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, we consider the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.[104]

Here, the prosecutor's personal opinion, based on the nature of his position, certainly carried some weight with the jury. However, the prosecutor's comment was made within a broad discussion about the credibility of Cotton's testimony, rather than as a punctuated stand-alone declaration. Further, the prosecutor did not state that he believed Cotton was being untruthful and he did not call Cotton a liar. Thus, the weight that we accord to the comment is minimal. Also weighing in favor of finding prejudice are the facts that Cotton's trial counsel did not invite the error and that no specific curative instruction was provided. The general instructions that the attorney's statements were not evidence and that the jury is the sole judge of credibility, however, do substantially negate the impact of the related factor.

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[102] *Id.* at 584, 873 N.W.2d at 418.

[103] *McSwine, supra* note 80.

[104] *Id.*

On the other hand, the prosecutor's comment occurred only once in his closing argument and did not inundate the trial. Also, the evidence of Cotton's guilt was substantial. Cotton admitted that he shot and killed Bare. Burnette testified that she heard Cotton state that he had a round in the gun and was going to use it and that when Bare said, "[I]f you're going to hold the gun to me, then you better fucking shoot me," Cotton shot Bare. Labno testified that he was unsure if Bare advanced at Cotton, but he stated that Bare did not charge him and that just before the shooting, Bare said something like, "If you pull a gun, you better use it . . . ."

Because the statement was not exceedingly prejudicial or pervasive and the weight of the evidence supported the convictions, we find that the prosecutor's comment did not deprive Cotton of his right to a fair trial. Therefore, this assignment of error is without merit.

(iii) Cotton Cannot Show Prejudice From Trial Counsel's Failure to Object to Prosecutor's Asking Burnette Whether Bare Had Children

Cotton argues that his trial counsel was ineffective for failing to object to the prosecutor's asking Burnette if Bare had children. He argues that such questions were misconduct, because they were irrelevant to the case and served only to garner sympathy for the victim and excite the jurors' passions against him, which prejudiced him by harming his self-defense case.

The State argues that regardless of whether Cotton's counsel should have objected to the questions or whether the questions were improper, Cotton cannot show prejudice, because the testimony about Bare's having children was cumulative of Cotton's own testimony.

We agree with the State that Cotton cannot show any prejudice from the prosecutor's questions when Cotton also testified that Bare had three children. The evidence that Cotton

complains of was properly before the jury, so he cannot show that cumulative evidence of the same fact created a reasonable probability of a different outcome.[105] Therefore, this assignment of error is without merit.

(e) Trial Counsel's Decision to Introduce Faye's Deposition Cannot Be Resolved on Direct Appeal

Cotton argues that his trial counsel's performance was deficient for entering Faye's deposition into evidence, because it included harmful evidence that would otherwise have been inadmissible.

The State argues that Cotton's trial counsel's performance was not deficient, because the deposition included beneficial testimony, and that Cotton cannot show prejudice, because the harmful testimony he identified was cumulative.

The decision of whether to call a witness, or present a witness' deposition, is a matter of trial strategy. When the ineffective assistance of counsel at issue could involve trial strategy, we have generally found a trial record reviewed on direct appeal to be insufficient for adequate review, because it does not tell us the reasons defense counsel tried the case in a particular manner.[106] In this matter, we, too, find this assignment of error cannot be resolved on direct appeal; however, Cotton has made sufficient allegations of deficient conduct.

(f) Cotton Cannot Show Prejudice From Trial Counsel's Failure to Cross-Examine Dr. Erin Linde

Cotton argues that his trial counsel's performance was deficient, because he did not cross-examine Dr. Erin Linde, the forensic pathologist who performed the autopsy on Bare, about the methamphetamine, amphetamine, "THC," and fentanyl found in Bare's blood. He argues that he was prejudiced

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[105] See *State v. Reichert*, 242 Neb. 33, 492 N.W.2d 874 (1992).

[106] See *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013).

because his trial counsel's decision to not cross-examine Dr. Linde removed an opportunity to remind the jury of these facts.

Cotton's trial counsel elicited testimony from Burnette that she witnessed Bare injecting methamphetamine after they returned to Bare's mother's house on the morning of the shooting. On direct examination, Dr. Linde testified that as a result of Bare's blood transfusion after the shooting, she was able to test only Bare's heart for controlled substances and that the amount of drugs a person has taken or when they were taken cannot be determined by testing in the heart.

Cotton does not allege that his trial counsel could have elicited any additional, beneficial facts from Dr. Linde. Cotton's trial counsel's decision to not have Dr. Linde merely reiterate her testimony that Bare tested positive for certain controlled substances does not create a reasonable probability that the outcome of the proceedings would have been different, especially when his trial counsel did elicit stronger testimony on the subject from another witness. Therefore, this assignment of error is without merit.

(g) Additional Claims of Ineffective Assistance of Counsel

Cotton argues that his trial counsel was ineffective on four additional bases: (1) allowing an unlicensed attorney to participate in the trial and engage in the practice of law; (2) not having trial counsel's mother, a licensed attorney, sit second chair as trial counsel promised; (3) ineffectively selecting a jury; and (4) ineffectively failing to discover exculpatory evidence. Cotton further argues that while such claims cannot be resolved on the current record, he has sufficiently alleged deficient conduct.

The State agrees that the first two claims cannot be resolved on the present record, but that Cotton has made sufficient allegations of deficient conduct. However, the State argues that the second two claims were not raised with sufficient particularity.

At the sentencing hearing, Cotton stated that his trial counsel had promised him that the fees he paid to his trial counsel were to retain both his trial counsel and his trial counsel's mother, a licensed attorney, to be present at his trial. Cotton stated further that his trial counsel's mother was present at his initial meeting with his trial counsel. Cotton also stated that rather than his trial counsel's mother appearing at his trial, another individual, who was not a licensed attorney, sat second chair at his trial and participated in jury selection.

We agree with the parties that Cotton has stated his claims of ineffective assistance of counsel—regarding an unlicensed attorney participating in voir dire and his trial counsel's mother not sitting second chair at trial—with enough particularity to allege deficient conduct and for us to determine that an evidentiary hearing would be required to resolve the claims.

However, Cotton does not identify with specificity how his trial counsel was ineffective in selecting a jury or what exculpatory evidence he failed to discover. Such broad assertions are not sufficient to allege deficient conduct.[107]

V. CONCLUSION

Cotton's claim that there was insufficient evidence to support the verdicts is without merit. None of Cotton's claims of trial court error have merit. Cotton's motion for new trial for prosecutorial misconduct was properly denied. Any claim of ineffective assistance of counsel is either affirmatively disproved by the record, not sufficiently presented for our review, or not able to be reviewed on the record before us. Accordingly, Cotton's convictions are affirmed.

Affirmed.

Wright and Kelch, JJ., not participating.

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[107] See *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

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

State of Nebraska, appellee, v. William A. Epp, appellant.

910 N.W.2d 91

Filed April 20, 2018. No. S-17-297.

1. **Limitations of Actions.** If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law.
2. **Postconviction: Right to Counsel: Appeal and Error.** Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.
3. **Constitutional Law: Rules of the Supreme Court: Courts: Statutes.** Strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized.
4. **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.
5. **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 Gage County: Vicky L. Johnson, Judge. Affirmed.

William A. Epp, pro se.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Heavican, C.J., Miller-Lerman, and Stacy, JJ., and Luther and O'Gorman, District Judges.

Heavican, C.J.

NATURE OF CASE

This case presents an appeal from the dismissal of a motion for postconviction relief without an evidentiary hearing or the appointment of counsel. The district court dismissed the motion as filed outside the 1-year limitations period set forth in Neb. Rev. Stat. § 29-3001 (Reissue 2016). We affirm.

BACKGROUND

In 2007, William A. Epp was charged with robbery, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. The information also alleged that Epp was a habitual criminal. A jury convicted Epp of robbery and possession of a deadly weapon by a felon, but acquitted him of use of a deadly weapon to commit a felony. Epp was sentenced to 60 to 60 years' imprisonment on both his conviction for robbery and his conviction for possession of a deadly weapon by a felon. The court ordered the sentences to be served consecutively.

Epp appealed his convictions and sentences, which were affirmed by this court.[1] As pertinent here, we found in *State v. Epp*[2] that we did not need to address Epp's argument that Neb. Rev. Stat. § 25-1233 (Reissue 2016), which limits transportation of inmate witnesses, was unconstitutional, because the trial court did not err in finding that the inmate testimony Epp proffered was inadmissible hearsay. We also rejected Epp's argument that there was insufficient evidence supporting his conviction for possession of a deadly weapon by a felon. Finally, we rejected Epp's argument that the trial court had erred in admitting evidence supporting habitual

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

[2] *Id.*

criminal enhancement. Epp's sentences became final on October 27, 2009.

Epp filed a motion for postconviction relief on November 28, 2016, alleging four claims for relief. Epp alleged, first, that the 1-year period of limitation set forth in § 29-3001 violated the ex post facto clauses of the U.S. and Nebraska Constitutions. Second, Epp alleged that Neb. Rev. Stat. § 29-2221 (Reissue 2016) violates the Sixth Amendment right to an impartial jury by allowing a judge instead of a jury to find the existence of prior convictions. Third, Epp alleged there was insufficient evidence for his conviction of possession of a deadly weapon by a felon, which conviction was allegedly inconsistent with the jury's acquittal on the charge of use of a deadly weapon to commit a felony. Fourth, Epp alleged that § 25-1233 violated equal protection under the U.S. and Nebraska Constitutions.

The district court dismissed Epp's motion without an evidentiary hearing or the appointment of counsel. The court found that the postconviction motion was barred by the 1-year period of limitation set forth in § 29-3001(4)(e), which provides that the 1-year period will run from the date of August 27, 2011 (the effective date of the statute's enactment), if the other subsections do not apply. The court found no merit to Epp's argument that the limitations period was unconstitutional.

Alternatively to the court's conclusion that the motion was filed outside the 1-year limitations period, the court concluded that the allegations in the motion for postconviction relief either failed to state a claim that Epp's convictions were void or voidable, lacked merit as a matter of law, or were procedurally barred. Specifically, the court found that Epp's claim regarding the constitutionality of § 29-3001(4)(e) failed to allege a constitutional violation that would render his convictions void or voidable; thus, it did not present a valid claim for postconviction relief. The court concluded Epp's argument

regarding § 29-2221 had no merit and has been rejected by this court in *State v. Johnson*.[3] Lastly, the court found that Epp's claims challenging the constitutionality of § 25-1233 and the sufficiency of the evidence to support his conviction for felon in possession were litigated on direct appeal and, therefore, procedurally barred.

Epp appealed. We moved the appeal to our docket on our own motion, in accordance with this court's authority to regulate the caseloads of the appellate courts of this state.[4] Epp did not file notice that he was raising an issue involving the constitutionality of a statute as required by Neb. Ct. R. App. P. § 2-109(E) (rev. 2014).

ASSIGNMENTS OF ERROR

Epp assigns that the district court erred in failing to (1) grant an evidentiary hearing, (2) appoint counsel, and (3) grant postconviction relief.

STANDARD OF REVIEW

[1] If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law.[5]

[2] Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.[6]

ANALYSIS

Postconviction motions are subject to the limitations period set forth in § 29-3001(4), which states:

> 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:

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[3] *State v. Johnson*, 290 Neb. 369, 859 N.W.2d 877 (2015).

[4] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

[5] *State v. Huggins*, 291 Neb. 443, 866 N.W.2d 80 (2015).

[6] *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

(a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;

(b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;

(c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;

(d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review; or

(e) August 27, 2011.

The parties agree that subsections (4)(a) through (d) do not apply. Under the facts of this case, the latest date from which the 1-year limitations period runs is August 27, 2011, as set forth in § 29-3001(4)(e). Epp argues, however, that application of any provision of § 29-3001 violates the ex post facto clauses of the U.S. and Nebraska Constitutions.[7]

[3] Epp did not file notice as required by § 2-109(E). Section 2-109(E) requires that a party presenting a case involving the federal or state constitutionality of a statute must file and serve notice thereof with the Supreme Court Clerk by a separate written notice in a petition to bypass at the time of filing such party's brief. Strict compliance with § 2-109(E) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized.[8] Therefore, we do not address Epp's

[7] U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16.

[8] *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016).

claim that § 29-3001(4)(e) violates prohibitions against ex post facto laws. However, we note that we recently held in *State v. Amaya*[9] that § 29-3001 does not violate the ex post facto clauses of the U.S. and Nebraska Constitutions.

[4] There is no dispute that Epp's motion for postconviction relief, filed on November 28, 2016, was outside the 1-year limitations period set forth in § 29-3001(4)(e). Accordingly, the district court did not err in dismissing the motion as outside the limitations period without conducting an evidentiary hearing. 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.[10]

[5] For similar reasons, the district court did not err in denying Epp's motion for appointment of counsel. 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.[11] 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.[12] Epp's motion presented no justiciable issue of law or fact because it was barred by the limitations period set forth by § 29-3001(4)(e).

CONCLUSION

Because Epp's motion for postconviction relief was filed more than 1 year from August 27, 2011, it was untimely.[13] We

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[9] *State v. Amaya*, 298 Neb. 70, 902 N.W.2d 675 (2017).

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

[11] *State v. Custer*, 298 Neb. 279, 903 N.W.2d 911 (2017).

[12] *Id.*

[13] See § 29-3001(4)(e).

affirm the district court's dismissal of the motion without an evidentiary hearing or the appointment of counsel.

Affirmed.

Funke, J., participating on briefs.
Wright and Cassel, JJ., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Machelle Wynne, appellant, v. Menard, Inc., and Praetorian Insurance Company, its workers' compensation insurance carrier, appellees.

910 N.W.2d 96

Filed April 20, 2018. No. S-17-702.

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. **Pretrial Procedure: Proof: 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. The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
4. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Proof.** A 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 it is entitled to judgment as a matter of law. If the movant meets this burden, then the nonmovant must show the existence of a material issue of fact that prevents judgment as a matter of law.

6. **Summary Judgment: Evidence.** When the parties' evidence would support reasonable, contrary inferences on the issue for which a movant seeks summary judgment, it is an inappropriate remedy.
7. **Trial: Evidence.** Where reasonable minds could draw different conclusions from the facts presented, such presents a triable issue of material fact.
8. **Summary Judgment.** At the summary judgment stage, the trial court determines whether the parties are disputing a material issue of fact. It does not resolve the factual issues.
9. **Summary Judgment: Trial.** Summary judgment is an extreme remedy and should not be used to deprive a litigant of a formal trial if there is a genuine issue of material fact.

Appeal from the Workers' Compensation Court: Thomas E. Stine, Judge. Reversed and remanded for further proceedings.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellant.

Todd R. McWha, Terrance O. Waite, and Christopher A. Sievers, of Waite, McWha & Heng, for appellees.

Heavican, C.J., Miller-Lerman, Cassel, and Stacy, JJ., and Luther and O'Gorman, District Judges.

Heavican, C.J.

INTRODUCTION

Machelle Wynne suffered knee and shoulder injuries in two separate incidents that arose out of her employment with Menard, Inc. The Nebraska Workers' Compensation Court sustained Wynne's motion for summary judgment insofar as it awarded her benefits for two scheduled injuries, but denied her claim that she was permanently and totally disabled. Wynne appeals. We reverse, and remand for further proceedings.

BACKGROUND

Wynne was employed by Menard and worked at a Menard store in Scottsbluff, Nebraska. She was injured on the job on two different occasions—a knee injury suffered on September 25, 2013, and a shoulder injury suffered on July 8, 2014.

On August 7, 2015, the Workers' Compensation Court found that Wynne had been injured in the scope and course of her employment, that she had not reached maximum medical improvement, and that she was entitled to further medical treatment and temporary total disability payments until maximum medical improvement was reached.

Wynne later had rotator cuff surgery. The surgeon found that Wynne had reached maximum medical improvement as of October 24, 2016. A functional capacity evaluation (FCE) was conducted by Theresa Olson on December 1. The results of the FCE noted that Wynne should reach overhead and forward only occasionally; should not squat, crawl, or walk on uneven surfaces; and should engage in static standing, walking, kneeling, balancing, and climbing ladders or stairs infrequently. The FCE included no restrictions on sitting.

On February 8, 2017, Dr. Michelle Cheloha, Wynne's family practice physician, notified Wynne's attorney via a form provided by counsel that Wynne was restricted from sitting for more than 10 minutes at one time. The court-appointed vocational expert, Ted Stricklett, opined that if Wynne were restricted from sitting for more than 10 minutes, she would be considered permanently and totally disabled.

Also in the record is a report from Dr. Douglas Scott, a specialist in occupational medicine. Scott opined that Wynne could work within her restrictions for 8 hours a day, 5 days a week. Scott further opined that Wynne had no spinal injury affecting her ability to sit; thus, the sitting restriction imposed by Cheloha was not supported by the medical evidence or by a reasonable or factual assessment of Wynne's capability.

Stricklett later filed an amended report. That report indicated that based on Wynne's FCE and Scott's opinion, the sitting restriction imposed by Cheloha was unfounded.

During the course of discovery, Wynne served requests for admission on Menard. As relevant, those admissions and answers provided as follows:

> 2. Admit that [Wynne] has permanent restrictions from her on the job injuries:

a. as set out in Dr. Cheloha's letter of February 10, 2017, which is attached as Exhibit "B";

b. and as set out in her letter of December 22, 2016, which is attached as Exhibit "C".

ANSWER: Deny with regarding to Exhibit "B" because Dr. Cheloha does not indicate permanent; *Admit as set forth in Exhibit "C".*

3. Admit that Dr. Cheloha opines in her letter of February 10, 2017, that . . . Wynne is no longer able to be gainfully employed.

ANSWER: Admit.

. . . .

7. Admit that in [his] report of February 16, 2017, . . . Stricklett, the vocational rehabilitation counselor, opined that [Wynne] had a loss of earning capacity of 100% as set out in attached Exhibit "D".

ANSWER: Admit.

Wynne later filed a motion for summary judgment. The Workers' Compensation Court granted the motion as to Wynne's claim that she had reached maximum medical improvement and effectively denied the motion as to Wynne's allegation of a 100-percent loss of earning capacity. The court's order then went on to determine the percentage of extremity impairment and the amount of permanent disability benefits to which she was entitled. Wynne appeals the award.

ASSIGNMENTS OF ERROR

On appeal, Wynne assigns, restated and renumbered, that the Workers' Compensation Court erred in (1) ignoring the conclusive effect of an admission under Neb. Ct. R. Disc. § 6-336(b); (2) admitting exhibits 34, 36, 37, and 38; and (3) weighing the evidence in a summary judgment motion.

STANDARD OF REVIEW

[1] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in

excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[1]

[2] 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.[2]

[3] Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.[3] The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.[4]

[4] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[5]

ANALYSIS

Effect of Admission.

Wynne first assigns that Menard admitted, through its responses to her requests for admission, that she was permanently and totally disabled. Menard disagrees, contending it admitted that certain experts opined that Wynne was permanently and totally disabled, but that it did not admit the truth of those opinions.

The requests for admission as drafted by Wynne were specific insofar as they sought admissions with respect to

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[1] Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016).

[2] *Anderson v. EMCOR Group*, 298 Neb. 174, 903 N.W.2d 29 (2017).

[3] *Moreno v. City of Gering,* 293 Neb. 320, 878 N.W.2d 529 (2016).

[4] *Id.*

[5] *Cookson v. Ramge, ante* p. 128, 907 N.W.2d 296 (2018).

Cheloha's and Stricklett's opinions that would lead to the conclusion that Wynne was permanently and totally disabled. Notably, Wynne sought an admission that Cheloha had opined in a letter dated February 10, 2017, that Wynne had permanent restrictions due to her on-the-job injuries and was unable to be gainfully employed. Wynne further sought an admission that Stricklett had opined that Wynne had a 100-percent loss of earning capacity. In response, Menard admitted those statements, but noted that Cheloha did not term Wynne's restrictions as permanent.

We reject Wynne's attempt to characterize Menard's admissions as conclusive proof that Wynne was permanently and totally disabled. The requests were drafted in such a way that an admission was conclusive—not to the truth of the underlying statement, but only as to the fact that the opinions were given as set forth in the requests. There is no merit to Wynne's first assignment of error.

Grant of Summary Judgment.

Wynne next assigns that the trial court erred in denying her motion for summary judgment as to her allegation that she was permanently and totally disabled. Related to this argument is Wynne's contention that the trial court erred in admitting exhibits 34, 36, 37, and 38.

[5] A 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 it is entitled to judgment as a matter of law. If the movant meets this burden, then the nonmovant must show the existence of a material issue of fact that prevents judgment as a matter of law.[6]

[6-9] When the parties' evidence would support reasonable, contrary inferences on the issue for which a movant seeks summary judgment, it is an inappropriate remedy.[7] As we

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[6] *C.E. v. Prairie Fields Family Medicine*, 287 Neb. 667, 844 N.W.2d 56 (2014).

[7] *Id.*

have stated many times, where reasonable minds could draw different conclusions from the facts presented, such presents a triable issue of material fact.[8] At the summary judgment stage, the trial court determines whether the parties are disputing a material issue of fact. It does not resolve the factual issues.[9] Summary judgment is an extreme remedy and should not be used to deprive a litigant of a formal trial if there is a genuine issue of material fact.[10]

This case presents unusual facts. Wynne's motion did not state the basis upon which she sought summary judgment. The motion alleged that Wynne "is entitled to a summary judgment as a matter of law as to the nature and extent of her injuries and her resultant disability." However, the only basis for such a judgment argued at the hearing on the motion was Wynne's theory that she was permanently and totally disabled. Wynne's motion was granted, but on a theory not advanced by Wynne at that hearing. Thus, Wynne was the moving party but, as to her preferred theory, she was the losing party in that summary judgment was not granted finding her to be permanently and totally disabled.

Related to the larger question of the trial court's disposition of her summary judgment motion, Wynne contends that certain exhibits containing unsworn statements were inadmissible. Specifically, Wynne argues that exhibit 34, a letter from Olson, the occupational therapist who conducted Wynne's FCE; exhibit 36, a rebuttal loss of earning capacity report; exhibit 37, a letter from Stricklett amending his earlier loss of earning capacity report; and exhibit 38, the FCE report, are all inadmissible.

The parties assert that the issue of the admissibility of these exhibits presents a conflict between Neb. Rev. Stat. § 48-168 (Reissue 2010) and Workers' Comp. Ct. R. of Proc.

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[8] See *id.*

[9] *Id.*

[10] *Id.*

10 (2011). Section 48-168(1) provides that the "Nebraska Workers' Compensation Court shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure." Rule 10 discusses this relaxation of the rules of evidence and further directs litigants to Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 2016), which provide the general procedure to follow when summary judgment is sought. Wynne's argument that the exhibits in question are inadmissible is based on § 25-1332, which provides in part that "[t]he evidence that may be received on a motion for summary judgment includes depositions, answers to interrogatories, admissions, stipulations, and affidavits."

With this background in mind, we turn to Wynne's contentions on appeal.

Wynne offered Cheloha's and Stricklett's opinions that she was permanently and totally disabled. These opinions are reflected in exhibit 31, attachments to Wynne's requests for admissions; exhibit 33, Cheloha's deposition; and exhibit 36, Stricklett's loss of earning capacity report. In response to Wynne's motion, Menard offered exhibits 34 and 38, the opinion of Olson, and exhibit 35, the opinion of Scott, as well as exhibit 37, the opinion of Stricklett in which he revised his opinion in light of the results of Olson's FCE finding that Wynne was not permanently and totally disabled.

As an initial matter, we note that exhibit 36, Stricklett's loss of earning capacity report, was offered by Wynne, yet that exhibit contains unsworn statements which, under Wynne's logic, would be inadmissible.

But we need not decide the issue of the admissibility of these exhibits, because any admission would, on these facts, have been harmless. Wynne offered exhibits 31 and 33 in support of her contention that she was permanently and totally disabled; this evidence was sufficient to meet her burden of a prima facie claim for purposes of summary judgment. In response, Menard offered an affidavit from Scott acknowledging his attached report. In that report, Scott opined that

Wynne was not permanently and totally disabled. This was sufficient to create a triable issue of material fact and prevent judgment as a matter of law.

In this case, though, the trial court weighed the relative merits of this evidence and concluded that Wynne was entitled to benefits for her scheduled member injuries, but was not permanently and totally disabled. The court erred in so finding, as it is not the role of a court in a summary judgment matter to resolve factual disputes.[11]

> At the summary judgment stage, the trial court determines whether the parties are disputing a material issue of fact. It does not resolve the factual issues. Summary judgment is an extreme remedy and should not be used to deprive a litigant of a formal trial if there is a genuine issue of material fact.[12]

Accordingly, we reverse the grant of summary judgment as to the scheduled member injury and the rejection of Wynne's claim of permanent and total disability, and remand the cause for further proceedings.

CONCLUSION

The compensation court erred in weighing the evidence with respect to Wynne's motion for summary judgment. Accordingly, we reverse the entry of summary judgment and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

Funke, J., participating on briefs.

Wright, J., not participating.

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[11] See *id.*

[12] *Id.* at 675, 844 N.W.2d at 63.

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

Wallace R. McCullough, appellant, v. Michelle A. McCullough, appellee.

910 N.W.2d 515

Filed April 26, 2018. Nos. S-16-1086, S-16-1187, S-17-037.

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. **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.
3. **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.
4. **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.
5. **Judges: Recusal: Appeal and Error.** A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
6. **Contempt: Final Orders.** An order of contempt in a postjudgment proceeding to enforce a previous final judgment is properly classified as a final order.
7. **Contempt.** Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party.

8. **Courts: Jurisdiction: Divorce: Contempt.** A court's continuing jurisdiction over a dissolution decree includes the power to provide equitable relief in a contempt proceeding.
9. **Contempt: Courts: Equity.** Contempt proceedings may both compel obedience to orders and administer the remedies to which the court has found the parties to be entitled. Where a situation exists that is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.
10. **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. If it is impossible to comply with the order of the court, the failure to comply is not willful.
11. **Words and Phrases: Appeal and Error.** Willfulness is a factual determination to be reviewed for clear error.
12. **Contempt: Proof: Evidence: Presumptions.** Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and convincing evidence and without any presumptions.
13. **Contempt: Costs: Attorney Fees.** Costs, including reasonable attorney fees, can be awarded in a contempt proceeding.
14. **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.

Appeals from the District Court for Sarpy County: Daniel E. Bryan, Jr., Judge. Judgments in Nos. S-16-1086 and S-17-037 affirmed. Appeal in No. S-16-1187 dismissed.

William D. Gilner for appellant.

Edith T. Peebles and Tosha Rae D. Heavican, of Brodkey, Peebles, Belmont & Line, L.L.P., for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

In these three consolidated appeals, Wallace R. McCullough appeals orders entered by the district court for Sarpy County

in the proceeding for the dissolution of his marriage to Michelle A. McCullough. Wallace appeals, inter alia, an order of contempt for failing to make childcare and property division equalization payments, an order of contempt for failing to pay child support, and an order setting the amount of a supersedeas bond. We dismiss the appeal of the order regarding the amount of the supersedeas bond, and we affirm the district court's orders in the two other appeals.

STATEMENT OF FACTS

On March 22, 2010, the district court for Sarpy County entered a decree dissolving Wallace and Michelle's marriage. In the decree of dissolution, the district court ordered, inter alia, that legal and physical custody of the couple's children be awarded to Michelle, subject to Wallace's parenting time; that Wallace pay Michelle child support of $3,005 per month; that Wallace pay a share of childcare expenses incurred by Michelle; and that Wallace pay Michelle $552,124.89 to equalize the property division, payable at a rate of $50,000 per year plus interest until paid in full.

On June 12, 2012, Michelle filed a complaint for modification of the decree of dissolution. She requested, inter alia, that Wallace's parenting time be supervised and that proceeds from the sale of certain property be reassigned to her. On July 30, Wallace filed an answer and a counterclaim in which he requested, inter alia, that he be awarded sole custody of the children. On August 6, Michelle filed an answer to Wallace's counterclaim in which she requested the counterclaim be dismissed. On August 7, Wallace filed an amended answer and counterclaim in which he further requested, inter alia, a change in his child support obligation based on a change in income and that he be given credit for amounts totaling $268,400 that he alleged should be treated as having been paid toward the property settlement. On January 21, 2014, Wallace filed another amended answer and counterclaim in which he made additional allegations and requests.

On June 8, 2016, Michelle filed a verified complaint for contempt in which she alleged that Wallace had failed to pay child support, childcare expenses, and property equalization payments required under the decree of dissolution. The district court entered an order on June 13 for Wallace to show cause why he should not be held in contempt based on Michelle's complaint. Wallace entered a denial, and the court set a final hearing on the matter.

After the hearing on Michelle's complaint for contempt, the district court entered an order on September 30, 2016. In the order, the court stated that Wallace had asked to continue the contempt proceedings with regard to child support payments on the basis that the amended counterclaim he had filed on January 21, 2014, in which he sought a reduction of his child support obligation, was still pending. The court noted that Wallace had not prosecuted that counterclaim; nevertheless, the court granted a continuance of the portion of the contempt proceeding that pertained to child support. The court scheduled a trial for December 8, 2016, on Wallace's amended answer and counterclaim, as well as on Michelle's June 12, 2012, complaint for modification. The court stated that it would consider the child support portion of the complaint for contempt at the December 8 trial. The court further stated that on February 21, 2014, it had ordered Wallace to undergo an evaluation in connection with his request for modification of the children's custody; the court ordered Wallace to submit the completed evaluation by October 17, 2016.

In addition to the foregoing, the September 30, 2016, order also stated that the court had heard testimony regarding the remaining portions of Michelle's contempt allegations against Wallace. The court then found Wallace to be in willful and contumacious violation of the decree of dissolution in two respects: (1) He had failed to pay required childcare expenses totaling $5,031.23, and (2) he had failed to pay property equalization installments, with interest, totaling $317,314.99. The court ordered Wallace to pay Michelle's attorney fees totaling

$3,317.51. The court stated that the sums Wallace owed to Michelle totaled $325,663.73. The court set up a purge plan pursuant to which it ordered Wallace to pay $750 per month to the clerk of the court commencing October 1 and continuing on the first day of each month until the amount was paid in full. The court ordered that if Wallace failed to make a payment on or before the first day of the month, he would be jailed for 15 days but would be released if he remedied the deficit.

Wallace filed a motion for a new hearing or reconsideration of the September 30, 2016, order. On November 4, the district court denied the motion.

On November 17, 2016, Wallace filed a notice of appeal in which he stated his intent to appeal the September 30 and November 4 orders. That appeal is docketed as case No. S-16-1086.

On November 18, 2016, the district court held a hearing to consider a motion by Michelle to dismiss part of Wallace's counterclaim for modification of the decree of dissolution. Michelle argued that the counterclaim should be dismissed because Wallace had failed to comply with the court's February 21, 2014, order to undergo an evaluation and that he had failed to submit such evaluation by October 17, 2016, as required in the court's September 30 order. At the hearing, Wallace admitted the evaluation had not been completed, but he asserted that he had been confused as to the date by which the evaluation was to be submitted and that he had an evaluation scheduled for an unspecified date in December. Wallace further argued that because he had filed a notice of appeal on November 17 with regard to the court's September 30 and November 4 orders, all proceedings in this matter, including those issues set for trial on December 8, should be stayed pending the appeal.

On November 28, 2016, the court entered an order ruling on matters addressed at the November 18 hearing. The court stated that the September 30 order "dealt solely with

the limited issues of contempt dealing with child care and property equalization." The court stated that although issues regarding contempt related to child support were to be heard on December 8, it had "separated the . . . issues on contempt." The court assumed that the September 30 order was a final order for purposes of appeal, and it determined that "pending applications for modifications [of the decree of dissolution] or motions to dismiss portions of such applications are stayed pending the appeal." However, the court determined that it retained jurisdiction to enforce the September 30 contempt order, because Wallace had not asked the court to set a supersedeas bond, and it further determined that Michelle's "pending contempt action for enforcement of this Court's child support order is not stayed without posting a supersedeas bond."

On November 29, 2016, Wallace filed a motion to set a supersedeas bond pursuant to Neb. Rev. Stat. § 25-1916 (Reissue 2016). On November 30, the district court entered an order with respect to the supersedeas bond. At a hearing on the supersedeas bond, Wallace's attorney had argued that at the earlier September 14 contempt hearing, Wallace had testified that "he didn't have any assets or income at the present time" and that his net worth was less than $10,000. Wallace requested that "the bond amount be set at 50 percent of that amount." In its November 30 order, the court specifically rejected Wallace's request that the bond amount be set based on 50 percent of "personal assets which total less than $10,000.00." The court instead set a bond of $45,000 and stated that it had determined such amount based on the monthly purge payment Wallace was required to make pursuant to the September 30 contempt order, the monthly child support he was required to pay pursuant to the decree of dissolution, and the amount of time the court estimated the appeal of the September 30 order would take. The court stated that the hearing set for December 8 would "take place as scheduled unless or until [Wallace] posts bond with the Clerk of the District Court of Sarpy County."

On December 5, 2016, Wallace filed a notice of appeal in which he stated his intent to appeal the November 28 and November 30 orders. That appeal is docketed as case No. S-16-1187.

On December 8, 2016, the court held a hearing and entered an order ruling on Michelle's complaint for contempt with regard to child support. The court found Wallace to be in willful contempt of the portion of the decree of dissolution that required him to pay child support of $3,005 per month. The court ordered Wallace to be subject to a purge plan pursuant to which he would pay Michelle $2,000 of back child support per month, in addition to the $3,005 per month child support he was already required to pay, beginning January 1, 2017, and continuing the first of each month until back child support was paid in full. The court ordered that if Wallace failed to pay the required child support and the additional back child support on the first of each month, he would be "incarcerated no more than thirty (30) days each month." The court entered a separate money judgment against Wallace and in favor of Michelle for attorney fees and costs of $3,131.75.

On December 30, 2016, Wallace filed a pleading in which he made three motions. The pleading included the following motions: (1) a motion for the judge to recuse himself, (2) a motion to set aside or reconsider the December 8 order of contempt, and (3) a "motion for judgment" in his favor on his amended counterclaim filed January 21, 2014.

With regard to the motion for recusal, Wallace alleged that on October 7, 2016, the judge had signed an arrest warrant against Wallace on the basis that on October 1, Wallace had failed to make the purge payment required under the September 30 order. Wallace alleged that the judge issued the warrant despite knowing that Wallace had attempted to make the payment on September 30 but that his check had been returned by the clerk of the district court because the clerk had not yet received the purge order. The record indicates that Michelle filed an application for the arrest warrant on

October 6, that the arrest warrant was signed by the judge on October 7 but was not filed until October 11, that the court signed an order recalling the arrest warrant on October 12, and that the recall order was filed on October 13.

With regard to the "motion for judgment" on his counterclaim, Wallace alleged that although the court on November 30, 2016, had granted Michele leave to file an answer to his January 21, 2014, counterclaim out of time, she had not filed an answer as of December 30, 2016, and that therefore, he was entitled to judgment in his favor on his counterclaim.

On January 6, 2017, the court entered an order in which it denied Wallace's motion to recuse and his motion to set aside or reconsider the December 8, 2016, order. The court also stated that it was "without jurisdiction to hear [Wallace's] Motion for Judgment on the Pleadings with respect to the September 30, 2016 Order" and that Wallace's "Motion for Judgment on the Pleadings is denied with respect to the December 8, 2016 Order."

The court in the January 6, 2017, order did not explicitly refer to Wallace's January 21, 2014, amended counterclaim for modification, upon which Wallace sought judgment on the pleadings in his December 30, 2016, motion. We note in this regard that as discussed above, in the November 28 order, the court had stated that "pending applications for modifications [of the decree of dissolution] or motions to dismiss portions of such applications are stayed pending the appeal" of the September 30 contempt order.

On January 9, 2017, Wallace filed a notice of appeal in which he stated his intent to appeal the December 8, 2016, and January 6, 2017, orders. That appeal is docketed as case No. S-17-037.

We moved Wallace's three appeals to our docket and consolidated them. To summarize, Wallace's three appeals are: (1) case No. S-16-1086, in which he appeals the September 30, 2016, order finding him in contempt for failing to pay childcare and property equalization payments required under

the decree of dissolution, and the November 4 order overruling his motion for a new hearing or a reconsideration of the September 30 order; (2) case No. S-16-1187, in which he appeals the November 28 order finding, inter alia, that enforcement of the September 30 order was not stayed pending appeal, and the November 30 order setting a supersedeas bond of $45,000; and (3) case No. S-17-037, in which he appeals the December 8 order finding him in contempt for failing to pay child support required under the decree of dissolution, and the January 6, 2017, order overruling his motion to recuse and his motion to set aside or reconsider the December 8, 2016, order.

ASSIGNMENTS OF ERROR

In case No. S-16-1086, Wallace claims that the district court abused its discretion when it found him in contempt for failing to pay childcare and property equalization payments required under the decree of dissolution. He argues that he could not be in contempt, because (1) his complaint for modification of the decree was still pending and (2) the judgment went dormant when Michelle failed to execute on it and the judgment had not been revived. He also claims that because he should not have been found to be in contempt, the court abused its discretion when it awarded attorney fees to Michelle.

In case No. S-16-1187, Wallace claims that the district court abused its discretion when it set a supersedeas bond of $45,000. He argues that under § 25-1916, the amount of the supersedeas bond is limited to 50 percent of his net worth, and he asserts his net worth to be less than $10,000. Michelle asserts in her reply that an order setting the amount of a supersedeas bond is not an appealable order.

In case No. S-17-037, Wallace claims that the district court abused its discretion when it (1) found him in contempt of the child support provisions of the decree of dissolution when his complaint for modification of child support was still pending, (2) overruled his motion for recusal, (3) overruled his

"motion for judgment" on his counterclaim for modification of the decree of dissolution, and (4) awarded attorney fees to Michelle.

STANDARDS 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. *State on behalf of Mariah B. & Renee B. v. Kyle B.*, 298 Neb. 759, 906 N.W.2d 17 (2018).

[2,3] A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion. *In re Estate of Forgey*, 298 Neb. 865, 906 N.W.2d 618 (2018). 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*.

[4] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Ginger Cove Common Area Co. v. Wiekhorst*, 296 Neb. 416, 893 N.W.2d 467 (2017).

[5] A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. *Kalkowski v. Nebraska Nat. Trails Museum Found.*, 290 Neb. 798, 862 N.W.2d 294 (2015).

ANALYSIS

Relevant Nebraska Jurisprudence Regarding Contempt.

[6] We note first that in *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved*

on other grounds, Hossaini v. Vaelizadeh, 283 Neb. 369, 808 N.W.2d 867 (2012), we held that under Nebraska law, an order of contempt in a postjudgment proceeding to enforce a previous final judgment is properly classified as a final order. In the terms of Neb. Rev. Stat. § 25-1902 (Reissue 2016), a contempt order affects a substantial right and is made upon a summary application in an action after judgment. By the reasoning in *Smeal Fire Apparatus Co. v. Kreikemeier*, both the contempt order in case No. S-16-1086, which order relates to the property equalization and childcare expense portions of the decree of dissolution, and the contempt order in case No. S-17-037, which order relates to the child support portions of the decree of dissolution, are final, appealable orders.

[7-9] Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party. *Martin v. Martin*, 294 Neb. 106, 881 N.W.2d 174 (2016). A court's continuing jurisdiction over a dissolution decree includes the power to provide equitable relief in a contempt proceeding. *Id*. Contempt proceedings may both compel obedience to orders and administer the remedies to which the court has found the parties to be entitled. *Id*. Where a situation exists that is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation. *Id*.

[10-12] Civil contempt requires willful disobedience as an essential element. *State on behalf of Mariah B. & Renee B. v. Kyle B.*, 298 Neb. 759, 906 N.W.2d 17 (2018). "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order. *Id*. If it is impossible to comply with the order of the court, the failure to comply is not willful. *Id*. Willfulness is a factual determination to be reviewed for clear error. *Id*. Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and convincing evidence and without any presumptions. *Id*.

Case No. S-16-1086: District Court Did Not Err When It Found Wallace to Be in Contempt of the Decree With Regard to Equalization Payments and Childcare Expenses or When It Awarded Attorney Fees to Michelle.

In case No. S-16-1086, Wallace claims that the district court abused its discretion when it found him in contempt for failing to pay childcare and property equalization payments required under the decree of dissolution and when it awarded attorney fees to Michelle. We find no merit to these assignments of error.

In case No. S-16-1086, Wallace contends that the district court could not have found him to be in willful contempt. We note first that Wallace does not dispute that he failed to make the payments required under the decree of dissolution entered in 2010. Instead, he basically argues that such failure cannot form the basis for a finding of willful contempt, because he had reason to think he was not required to make the payments. He first notes that the court had not yet ruled on his counterclaim for modification of the decree, and he argues that if the court were to rule in his favor and modify the decree, he might no longer owe the sums he has not paid. As an alternative argument, Wallace claims that Michelle let the money judgments from the decree of dissolution go dormant and that therefore, he was not obligated to pay the judgments. We find both arguments to be without merit.

Wallace claims first that he could not be found to be in willful contempt while his counterclaim for modification of the decree of dissolution was still pending. He argues that if his counterclaim were successful, he would no longer owe the amounts required under the decree of dissolution, and he reasons that he was not required to pay those amounts until the counterclaim was decided by the court. Wallace points to no authority to the effect that an application for modification of a decree of dissolution suspends the judgment and associated payments. To the contrary, we have ruled that under the proper

circumstances, modification of a decree of dissolution may be made retroactive and a credit or judgment may be given to compensate for overpayments made during the pendency of a modification action. See *Johnson v. Johnson*, 290 Neb. 838, 862 N.W.2d 740 (2015). However, unless and until a modification order is made by the court, the decree of dissolution remains a valid judgment and payment obligations under the decree remain in force. We conclude that the pendency of Wallace's counterclaim for modification did not prevent the district court from finding that Wallace was in willful contempt of the obligations imposed on him by the decree of dissolution.

Wallace alternatively claims that he could not be found to be in willful contempt with respect to the equalization payment, because Michelle failed to execute on the judgment within 5 years as required by Neb. Rev. Stat. § 25-1515 (Reissue 2016), and that therefore, the judgment had gone dormant. Wallace recognizes that specific exceptions exist for alimony and child support, and therefore, he does not make this same argument in connection with his appeal in case No. S-17-037 discussed below. However, he argues that there is no exception from the operation of § 25-1515 for the property equalization payments that were ordered in the decree of dissolution.

The district court rejected Wallace's assertion that Michelle failed to execute on the property equalization judgment, and the record supports that determination. The decree of dissolution was filed on March 22, 2010, and the record indicates that after entry of the decree, Michelle made attempts to collect sums due her under the decree. Such efforts included a contempt proceeding in 2011 and a motion Michelle filed in 2012 which resulted in an order filed by the court on August 15, 2012, which, inter alia, required proceeds from a sale of property to be applied to equalization payments. Michelle filed the present contempt proceeding on June 8, 2016, so there does not appear to have been a 5-year period in which Michelle failed to attempt to execute on the judgment. We therefore

conclude that the district court did not err when it rejected Wallace's argument that he could not be found in willful contempt because Michelle purportedly allowed the judgment to go dormant.

[13] Finally, regarding the award of attorney fees in case No. S-16-1086, we note first that costs, including reasonable attorney fees, can be awarded in a contempt proceeding. *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012). Wallace does not assert that Michelle failed to prove her fees or that the amount was unreasonable. Instead, his sole argument is that attorney fees should not have been awarded, because he should not have been found to be in contempt of the decree of dissolution. Because we have concluded above that the court did not err when it found Wallace to be in contempt, we further conclude that the court did not abuse its discretion when it awarded attorney fees to Michelle.

Having rejected Wallace's assignments of error in case No. S-16-1086, we affirm the September 30, 2016, order finding Wallace to be in contempt and awarding attorney fees. We also affirm the November 4 order overruling Wallace's motion for reconsideration.

Case No. S-16-1187: Order Setting Amount of Supersedeas Bond Was Not Separately Appealable, and Issues Regarding Supersedeas Bond Are Moot Following Disposition of Appeal of Order Sought to Be Stayed.

In case No. S-16-1187, Wallace claims that the district court abused its discretion when it set a supersedeas bond of $45,000. He argues that under § 25-1916, the amount of the supersedeas bond is limited to 50 percent of his net worth, and he asserts his net worth to be less than $10,000. We determine that the order setting the amount of the supersedeas bond was not an appealable order in its own right and that,

although issues regarding the supersedeas bond might have been considered in connection with the appeal of the underlying contempt order in case No. S-16-1086, such issues are moot because of our resolution of that appeal.

[14] 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. *Ginger Cove Common Area Co. v. Wiekhorst*, 296 Neb. 416, 893 N.W.2d 467 (2017). Michelle asserts that the court's November 30, 2016, order setting the amount of the supersedeas bond is not an appealable order. Michelle relies on *Green v. Morse*, 57 Neb. 798, 78 N.W. 395 (1899), in which this court held that an order fixing the amount of a supersedeas bond was not appealable, because it did not affect a substantial right. Michelle also cites *Waite v. City of Omaha*, 263 Neb. 589, 594-95, 641 N.W.2d 351, 355 (2002), in which we said, "The effect of a supersedeas bond is to either maintain an order in force or prevent the execution of an order until a case is finally heard and determined, but not to make the underlying order, if otherwise nonfinal, into a final and appealable order."

We read these cases, and others not recited here, as standing for the proposition that an order ruling on a request for a supersedeas bond is not in itself an appealable order and that a request for a supersedeas bond to stay execution of an otherwise nonfinal order does not convert that underlying order into an appealable order. However, the appellate courts in this state have considered issues regarding the setting of a supersedeas bond when the underlying order sought to be stayed by the bond was an appealable order. See, *Buffalo County v. Kizzier*, 250 Neb. 180, 548 N.W.2d 757 (1996); *The Exchange Bank v. Mid-Nebraska Computer Services, Inc.*, 188 Neb. 673, 199 N.W.2d 5 (1972). See, also, *Edwards v. Edwards*, 16 Neb. App. 297, 744 N.W.2d 243 (2008); *World Radio Lab. v. Coopers & Lybrand*, 2 Neb. App. 747, 514 N.W.2d 351 (1994) (determining that appellate court had jurisdiction to hear and determine appellee's motion to increase supersedeas

bond). The procedure in those cases was not to file a separate appeal of the supersedeas bond order, as Wallace did in this case, but instead to raise the issue in the appeal from the underlying order. In some cases, this has been done by filing a motion asking the appellate court to change the amount set by the lower court. See *Folgers Architects v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (2001) (stating that during pendency of appeal, both parties filed motions relating to supersedeas deposits made by appellant), and *World Radio Lab. v. Coopers & Lybrand, supra* (examining cases which discuss procedures available to test sufficiency of supersedeas bond and concluding that appellate court has jurisdiction to hear and determine appellee's motion to increase supersedeas bond). In other cases, the supersedeas issue has been raised by assigning error to the lower court's ruling on a request to set a supersedeas bond. See *Buffalo County v. Kizzier, supra*. See, also, *Edwards v. Edwards, supra*.

In the present case, Wallace did not use the procedures just described and instead chose to separately appeal the order setting the amount of the supersedeas bond. Because that order is not separately appealable, we conclude that the appeal in case No. S-16-1187 must be dismissed for lack of jurisdiction.

Our precedent indicates that Wallace could have raised issues regarding the supersedeas bond in case No. S-16-1086, the appeal of the order he sought to have stayed. However, Wallace did not file a motion in the supersedeas case, case No. S-16-1086, requesting a change in the amount of the supersedeas bond, and therefore, there was not a reason for this court to consider that issue in case No. S-16-1086 prior to considering the merits of that appeal. Furthermore, if we were to treat Wallace's assignment of error in case No. S-16-1187 claiming the bond was excessive as though it had been an assignment of error in case No. S-16-1086, the issue is now moot because of our resolution of case No. S-16-1086 affirming the contempt order Wallace sought to stay.

In this respect, we note *Buffalo County v. Kizzier, supra*, in which we considered an assignment of error regarding a district court's refusal to set the amount of a supersedeas bond. The district court determined that the appellant's request to set a supersedeas bond was untimely, because although it was filed within 30 days from the overruling of a motion for new trial, it was filed more than 30 days after the entry of the decree to which the motion for new trial was directed. We disagreed with the district court's conclusion that the request was untimely, and we determined as a matter of law that when a timely motion for new trial is filed, the ruling on the motion for new trial becomes the final, appealable order, and that under § 25-1916, a supersedeas bond must be filed within 30 days of the ruling on the motion for new trial rather than within 30 days of the order to which the motion for new trial was directed. We concluded therefore that the district court erred in refusing to set the amount of a supersedeas bond for the appellant, but we noted that the error was "an error, however, which is moot at this point." *Buffalo County v. Kizzier*, 250 Neb. 180, 190, 548 N.W.2d 757, 764 (1996). See, also, *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994) (stating that because we affirmed underlying order, we did not need to consider assignment of error regarding lower court's refusal to set supersedeas bond); *Anderson v. Anderson*, 5 Neb. App. 22, 554 N.W.2d 177 (1996) (with reversal of underlying order which modified decree of dissolution, supersedeas bond issue became moot).

In the present case, Wallace claims that the court abused its discretion when it set a supersedeas bond of $45,000. He argues that under § 25-1916, the amount of the supersedeas bond is limited to 50 percent of his net worth, and he asserts his net worth to be less than $10,000. Wallace is correct that as a matter of law, under § 25-1916, the supersedeas bond could not be set at an amount exceeding 50 percent of his net worth. However, it is apparent in this case that the district court did not err as a matter of law by misinterpreting § 25-1916, and

instead, the court rejected Wallace's assertion that his net worth was less than $10,000 and made a finding of fact that his net worth was such that the bond of $45,000 did not exceed 50 percent of his net worth. Unlike *Buffalo County v. Kizzier, supra*, there is no question of law at issue here with regard to the setting of the supersedeas bond that we need to address. Instead, the issue raised by Wallace's assignment of error is the court's finding of fact regarding Wallace's net worth. Because we have resolved the appeal the order sought to be stayed, the setting of the supersedeas bond is a moot issue at this point, and we need not review the district court's finding of fact.

For completeness and to dispel potential confusion, we distinguish the supersedeas bond in this dissolution proceeding from supersedeas bonds in probate cases. As the Nebraska Court of Appeals stated in *In re Estate of Sehi*, 17 Neb. App. 697, 772 N.W.2d 103 (2009), in an ordinary appeal from a judgment in a case originating in the district court, the appellant may choose whether to seek a supersedeas bond, but in appeals from probate cases, the law in some instances imposes a mandatory requirement of supersedeas. In this dissolution proceeding, however, Wallace had the option whether or not to seek a supersedeas bond, and therefore, the standards that govern the supersedeas bond in this case do not necessarily apply to the mandatory supersedeas bonds required under probate statutes.

For the reasons explained above, we dismiss the appeal in case No. S-16-1187 for lack of jurisdiction, and we need not consider issues regarding the setting of the supersedeas bond.

Case No. S-17-037: District Court Did Not Err When It Found Wallace to Be in Contempt of the Decree With Regard to Child Support, Nor Did It Err in Its Other Rulings.

In case No. S-17-037, Wallace claims that the district court abused its discretion when it (1) found him in contempt of the

child support provisions of the decree of dissolution when his complaint for modification of child support was still pending, (2) overruled his motion for recusal, (3) overruled his "motion for judgment" on his counterclaim for modification of the decree of dissolution, and (4) awarded attorney fees to Michelle. We conclude that these assignments of error are without merit.

Regarding the finding of contempt and the award of attorney fees, our analysis in this appeal is similar to that in case No. S-16-1086 above. We note that in case No. S-17-037, Wallace does not argue, as he did in case No. S-16-1086, that the child support judgment was dormant; as noted above, he recognizes that child support is an exception to the operation of § 25-1515. Wallace does, however, argue that he should not have been found in willful contempt of the child support provisions of the decree of dissolution, because his application for modification of child support was still pending. As we discussed above, the fact that an application for modification was pending did not excuse Wallace from making payments required under the decree of dissolution. The original provisions of the decree of dissolution remained a valid judgment unless and until the court modified those provisions. We therefore reject Wallace's claim that the district court erred when it found him to be in contempt of the child support portions of the decree of dissolution.

Similar to his argument in case No. S-16-1086, Wallace's sole argument with regard to the attorney fees awarded to Michelle in this appeal is that fees should not have been awarded, because he should not have been found to be in contempt. As we concluded in case No. S-16-1086, we conclude in this appeal that because the court did not err when it found Wallace in contempt of the child support provisions of the decree of dissolution, it also did not abuse its discretion when it awarded attorney fees to Michelle.

Regarding the motion for recusal, Wallace argues that the district court judge was biased against him. He asserts that

such bias was evident from the fact that the judge had signed the arrest warrant against Wallace for failure to make a purge payment, even though the judge had been informed that Wallace had attempted to make the payment, but the clerk of the court had returned Wallace's check to him. Although we recognize these unfortunate set of facts, we nevertheless determine that the record in this case does not establish bias or prejudice as a matter of law. From our examination, the record is not entirely clear when the judge learned from the clerk that Wallace had attempted to make the purge payment; however, the record clearly indicates that the day after the arrest warrant was filed, the judge signed an order recalling the arrest warrant. The record indicates that the judge acted in a timely manner to correct any error in the issuing of the arrest warrant, and therefore, this incident does not show partiality or bias on the part of the judge. We reject Wallace's claim that the court abused its discretion when it overruled the motion to recuse.

Finally, Wallace claims the district court erred when it overruled his "motion for judgment" on his counterclaim for modification of the decree of dissolution. Michelle contends that an order overruling a "motion for judgment" is not an appealable order. Whether or not such an order is appealable, we note that it does not appear that the district court ruled on Wallace's "motion for judgment" on the modification. To the contrary, the court's only references in the January 6, 2017, order to a "motion for judgment" were its statement that it was "without jurisdiction to hear [Wallace's] Motion for Judgment on the Pleadings with respect to the September 30, 2016 Order" and that Wallace's "Motion for Judgment on the Pleadings is denied with respect to the December 8, 2016 Order." Further, we note that in an order filed on November 28, 2016, the court stated that because Wallace had appealed the contempt order filed on September 30, "pending applications for modifications [of the decree of dissolution] or motions to dismiss portions of such applications are stayed pending the appeal." Therefore, it

appears that at the time it entered the January 6, 2017, order, the district court was of the understanding that the modification proceeding was stayed, and it therefore did not rule on Wallace's "motion for judgment" with respect to the modification. Because the district court did not rule on the "motion for judgment" on the modification, we cannot review such a ruling even if such a motion were proper and such a ruling were appealable. Furthermore, to the extent Wallace's "motion for judgment" related to the contempt proceedings, we have stated that rather than a civil action, a contempt proceeding is a "summary application after judgment." *Sickler v. Sickler*, 293 Neb. 521, 540, 878 N.W.2d 549, 564 (2016). Therefore, a "motion for judgment" is not a recognized filing in a contempt proceeding. We therefore reject Wallace's assignment of error regarding his "motion for judgment."

Having rejected Wallace's assignments of error in case No. S-17-037, we affirm the December 8, 2016, and January 6, 2017, orders.

CONCLUSION

In the contempt cases, cases Nos. S-16-1086 and S-17-037, we reject Wallace's assignments of error and affirm the orders appealed. Because of our disposition in case No. S-16-1086 of the order sought to be stayed by the supersedeas bond, issues raised by Wallace in case No. S-16-1187 regarding the setting of the amount of the supersedeas bond are now moot. In any event, in case No. S-16-1187, we conclude that the order setting the amount of a supersedeas bond was not separately appealable, and we dismiss the appeal for lack of jurisdiction.

Judgments in Nos. S-16-1086 and S-17-037 affirmed.
Appeal in No. S-16-1187 dismissed.

Wright and Kelch, JJ., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Patrick Robinson, appellant, v. Morrill County School District #63 and Morrill County Board of Education, appellees.

910 N.W.2d 752

Filed April 26, 2018. No. S-17-216.

1. **Schools and School Districts: Termination of Employment: Teacher Contracts: Evidence: Appeal and Error.** The standard of review in an error proceeding from an order of a school board terminating the contract of employment of a certificated employee is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. In this context, evidence is sufficient as a matter of law if a judge could not, were the trial to a jury, direct a verdict.
2. **Statutes: Judgments: Appeal and Error.** To the extent the assignments of error on appeal present issues of statutory interpretation or issues of law, an appellate court reaches an independent conclusion irrespective of the decision made by the court below.
3. **Schools and School Districts: Attorneys at Law.** Neb. Rev. Stat. § 79-513 (Reissue 2014) expressly authorizes school boards to hire legal counsel when it deems it necessary or advisable.
4. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
5. **Constitutional Law: Due Process.** When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.

6. **Judges: Juries: Administrative Law: Presumptions: Proof.** As a general rule, decisionmakers are presumed to be impartial and unbiased; the burden of showing otherwise rests on the party making the assertion.
7. **Schools and School Districts: Teacher Contracts: Evidence.** A school board can consider all relevant conduct when determining whether to cancel a contract.
8. **Teacher Contracts: Termination of Employment: Words and Phrases.** For purposes of cancellation of an employment contract under Neb. Rev. Stat. § 79-827 (Reissue 2014), "incompetency," as defined by Neb. Rev. Stat. § 79-824(4)(a) (Reissue 2014), includes "demonstrated deficiencies or shortcomings in knowledge of subject matter or teaching or administrative skills."
9. **Teacher Contracts: Words and Phrases.** Teacher incompetency is not measured in a vacuum or against a standard of perfection but, instead, must be measured against the standard required of others performing the same or similar duties.
10. **Teacher Contracts: Termination of Employment: Words and Phrases.** For purposes of cancellation of an employment contract under Neb. Rev. Stat. § 79-827 (Reissue 2014), "neglect of duty" generally requires evidence of something more than occasional neglect. Evidence that a particular duty was not competently performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination.
11. ____: ____: ____. For purposes of cancellation of an employment contract under Neb. Rev. Stat. § 79-827 (Reissue 2014), "unprofessional conduct" must be conduct directly related to the fitness of the employee to act in his or her professional capacity.
12. ____: ____: ____. For purposes of cancellation of an employment contract under Neb. Rev. Stat. § 79-827 (Reissue 2014), "insubordination" is the absence of subordination or submission, resistance to or defiance of authority, refusal to obey orders, refractoriness, or disobedience.
13. **Courts: Appeal and Error.** In an error proceeding, issues not presented to the district court are not preserved for appellate review.

Appeal from the District Court for Morrill County: Leo P. Dobrovolny, Judge. Affirmed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Steven W. Olsen and John L. Selzer, of Simmons Olsen Law Firm, P.C., for appellees.

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

Per Curiam.

A school board canceled the contract of a certificated employee after holding a formal hearing. The employee filed a petition in error in the district court, which affirmed the cancellation.[1] The employee now appeals, raising various issues regarding notice and due process in addition to challenging the merits of the cancellation. We affirm.

I. FACTS

In the fall of 2013, Patrick Robinson was hired as the curriculum and assessment coordinator at Bridgeport Public Schools pursuant to a contract with the Bridgeport Public Schools Board of Education (school board).[2] In February 2015, Robinson was notified his contract was being canceled. He requested and received a hearing before the school board, and the following evidence was adduced.

1. Veterans Day Incident

In November 2013, the community of Bridgeport, Nebraska, held a Veterans Day celebration at the school on a nonschool day. A portion of the parking lot was reserved for veterans attending the celebration. Robinson, who served in Iraq with the U.S. Army, came to the school that day to work and parked in the veterans' parking area. A teacher, and later an administrator, approached him and asked him to move his car, explaining the intent was to reserve the parking spaces for older or disabled veterans who would have difficulty with mobility. Robinson became angry and refused to move his

[1] See Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 2016).

[2] See Neb. Rev. Stat. §§ 79-101 and 79-818 (Reissue 2014).

car. Robinson generally felt he was treated unfairly during the incident.

2. December 2013 Incident With Student

In December 2013, two teachers at Bridgeport observed an eighth grade student standing at her locker, laughing. When they asked what she was laughing about, the student told them Robinson had left a funny note in her locker. She told the teachers she thought Robinson was very funny and said "we game or do something together." The teachers thought it was odd that Robinson had accessed the student's locker. They understood the student's comment to relate to some sort of online gaming activity and were concerned that Robinson and the student may be involved in an inappropriate relationship. The teachers informed a school administrator of the incident and their concerns, which was a reporting procedure that conformed with school policy.

An administrator investigated the incident by questioning the student, her parents, and Robinson, and determined there was no inappropriate conduct. Robinson received a letter from the administration on January 16, 2014, stating the incident had been investigated and no wrongdoing was found.

3. Fellow Teacher Breach of Confidentiality

Before Robinson received the January 16, 2014, letter reporting no wrongdoing had been found, one of the reporting teachers told the athletic director about the locker incident. The athletic director then told Robinson that two teachers had reported him, and Robinson understood the teachers had accused him of grooming a student for a sexual relationship. Robinson informed administrators about the reporting teacher's breach of confidentiality. The administration conducted an investigation and reprimanded the teacher for telling the athletic director about the report. The written report of this investigation was dated March 6, 2014, and reiterated that

Robinson had not engaged in an inappropriate relationship with a student. The report also stated the superintendent had investigated and had found there was no harassment directed toward Robinson after the December 2013 incident.

4. Robinson's General Conduct

Beginning in January 2014, Robinson started refusing to come out of his office at school to meet or interact with other staff members. Robinson was upset about the allegations and the administration's response. Robinson believed school employees continued to talk about the incident and perpetrate the rumor that he was a sexual predator. He felt his reputation had been tarnished and did not think the administration had acted to stop the rumors or protect his reputation.

Robinson complained to both the teachers' union and the Department of Education about the administration's failure to protect him from what he perceived as continued accusations after the December 2013 incident. He informed others that the principal had harassed and disparaged him and should be fired. He told a school board member that the superintendent should "back off" from evaluating him. In early January 2014, Robinson received emails from other school employees asking general questions about the school's curriculum and interpreted the emails as attacks on his decisionmaking ability and competence. In February 2014, Robinson was told by administrators as part of his employee evaluation that he needed to start interacting with fellow staff members.

At Robinson's request, he met with the school board in February 2014 to discuss the concerns he had with the school administration. After the meeting, Robinson gave a written summary of his complaints to an attorney the school board hired to investigate the matter. Robinson subsequently refused to meet with this attorney.

Chuck Lambert took over as superintendent at Bridgeport in June 2014, while the situation with Robinson was ongoing. Lambert met with Robinson in June and told him he would look into his complaints, but asked Robinson to view the new

administration as a clean slate and an opportunity to work to move forward. An attorney representing the school board sent a letter to Robinson's attorney in July addressing Robinson's continuing concerns about the December investigation and stating the school district found no wrongdoing and considered the matter closed.

When classes started in the fall of 2014, Robinson continued to seclude himself in his office. He avoided interacting with school staff except through email. At least once in August 2014, Robinson perceived a communication relating generally to school business as a personal attack on him. Robinson testified at the hearing that he considered his work environment hostile, because he never received an apology after the December 2013 incident and did not think he had been told he was cleared of any wrongdoing over the incident with the student.

5. August 28, 2014, Union Meeting

On August 28, 2014, after the school term had started, the teachers' union held a meeting at the community center in Bridgeport. The meeting was called by legal representatives of the union, and its general purpose was to inform members of the union that Robinson had filed a complaint against the union, alleging failure to provide representation. At this meeting, the union explained how Robinson's complaint would be addressed and warned the members not to engage in any type of retaliatory action toward Robinson. Robinson was not invited to the meeting, but was aware it had been scheduled. He asked another Bridgeport teacher to attend the meeting, hide a tape recorder in her backpack, and record the meeting for him. She did so.

Robinson listened to the recording the next day and was upset by what he heard. Generally, the recording demonstrated that although the meeting was intended as an informational session and an opportunity for counsel to give general legal advice to union members, various attendees made unflattering

comments about Robinson. Several noted they were afraid of him, and one expressed fear that Robinson might bring a gun to school. One referred to Robinson as a "creep." Another said he was not a "normal, stable-minded person." When the attendees were advised to let the administration know if Robinson made a threatening comment, one stated, "But I think that's how this all got started." Another attendee warned everyone to avoid the athletic director, explaining that the athletic director was "on [Robinson's] side."

The day after the union meeting, the Bridgeport principal sent Robinson an email asking if Robinson could meet with him and several teachers to review some new curriculum. Robinson perceived the email as a threat, apparently because he thought the curriculum meeting would be attended by some of the same teachers who made unflattering comments about him at the union meeting. Robinson forwarded the principal's email to Lambert, the superintendent. Robinson informed Lambert that he perceived the proposed meeting as an attempt to make him uncomfortable by forcing him to face his accusers, and he declined to attend unless Lambert ordered him to do so. Robinson also forwarded Lambert an email he received from an administrator requesting some staff training and informed Lambert he did not wish to meet with a certain staff member because she was the leader of a "lynch mob" against him. Additionally, Robinson emailed Lambert to inform him that, because of what had been said about him at the union meeting, he would not attend any athletic events involving the school.

On Monday, September 1, 2014, Robinson emailed Lambert and requested that Lambert have a school district representative contact Robinson's attorney. The next day, Robinson sent Lambert a reply to an email that was 6 months old and related to the school safety plan. Robinson's reply pointed out that the plan contained various spelling errors. Lambert responded by thanking Robinson for the input but asking why Robinson was responding to such an old email. After sending Lambert two

additional emails generally indicating that he thought Lambert was attacking him, Robinson went home sick.

6. Meeting With Superintendent

Lambert did not know about the August 28, 2014, union meeting until after it occurred. Once he received the emails from Robinson on August 29 and September 1 and 2, Lambert was concerned about Robinson's behavior, so he went to Robinson's office to talk with him. Robinson tape recorded the conversation without Lambert's knowledge. During this conversation, Lambert asked Robinson, "Do you see that your struggle with the past is affecting you now?" And, "Do you understand that the feelings that you have . . . will make it really tough for us to function and get to where we need to be?" Robinson responded, "Yes, I get that completely." The record shows that during 2013 and 2014, Robinson also tape recorded other meetings with school employees without their knowledge or consent.

On September 4, 2014, Lambert gave Robinson a letter informing him he was being suspended with pay. The letter referenced Robinson's inability to work collaboratively with other school personnel.

In February 2015, Lambert notified Robinson that the school was canceling his contract. Robinson requested and received a hearing before the school board.[3] After the hearing, the school board voted unanimously to cancel his contract. Robinson filed a petition in error in the Morrill County District Court,[4] which affirmed. He filed this timely appeal, which we moved to our docket on our own motion.

II. ASSIGNMENTS OF ERROR

Robinson assigns, restated and consolidated, that the district court erred in finding (1) notice of the school board hearing

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[3] See Neb. Rev. Stat. § 79-827(2) (Reissue 2014).

[4] See Neb. Rev. Stat. § 79-833 (Reissue 2014).

was proper, (2) Robinson's due process rights were not violated prior to his suspension, (3) the school board's use of a hearing officer was proper, (4) evidence of Robinson's conduct during a previous contract period was properly received to support terminating the present contract, (5) the school board did not improperly rely on documents not received in evidence, and (6) there was sufficient evidence to establish a lack of professionalism and insubordination.

III. STANDARD OF REVIEW

[1] The standard of review in an error proceeding from an order of a school board terminating the contract of employment of a certificated employee is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.[5] In this context, evidence is sufficient as a matter of law if a judge could not, were the trial to a jury, direct a verdict.[6]

[2] To the extent the assignments of error on appeal present issues of statutory interpretation or issues of law, we reach an independent conclusion irrespective of the decision made by the court below.[7]

IV. ANALYSIS

1. Notice of March 6, 2015, Meeting Was Proper

Robinson received advance written notification of a March 6, 2015, hearing on whether to cancel his employment contract,[8] and he was present and represented by counsel at the hearing. Robinson does not dispute that he had actual notice

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[5] See *McQuinn v. Douglas Cty. Sch. Dist. No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2000).

[6] *Id.*

[7] See *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

[8] See Neb. Rev. Stat. § 79-832(1) (Reissue 2014).

of the hearing, but he argues the school board failed to give "[d]ue and proper notice of the hearing" "in accordance with the Open Meetings Act" as required by § 79-832(2).

The Open Meetings Act requires "reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes."[9] The record shows that on February 24, 2015, the school board posted notice of the March 6 meeting at three local Bridgeport establishments: "Sonny's Super Foods," "Jack & Jill," and "Prairie Winds Community Center." This method of notice was used by the board and recorded in its minutes at least 21 times between January 14, 2013, and February 9, 2015. Board minutes also show that on other occasions, the board published notice of meetings in the local newspaper. As between these two methods of notice, the record shows the board published notice in the newspaper approximately 60 percent of the time and posted notice at local establishments approximately 40 percent of the time.

The district court found notice was given in accordance with law. Robinson argues the meeting notice was improper because (1) the customary practice of the board was notice by publication and (2) the minutes of the March 6, 2015, meeting did not reflect how notice was given. We reject each of these arguments.

The record shows the board gave notice of the March 6, 2015, meeting using a method it had used regularly over the 2 preceding years. We conclude this was "reasonable advance publicized notice . . . by a method designated by [the board]."[10] As for Robinson's argument that the method of notice was not properly recorded in the minutes of the March 6, 2015, meeting, we find any such omission to be irrelevant. The intent of the notice requirement is to adequately notify the public, in advance of the meeting, when and where the meeting will take

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[9] Neb. Rev. Stat. § 84-1411(1) (Reissue 2014).

[10] § 84-1411(1).

place,[11] and the record shows this was accomplished. This court has never held that the failure to record the particular method of notice used nullifies actual notice properly given, and we decline to do so here. To the contrary, in a related context, we held in *Schauer v. Grooms*[12] that even though a designated method of service was not formally set forth in the minutes as such, § 84-1411(1) is satisfied by evidence from which one could "discern, through the minutes of past meetings, a customary and consistent method of notifying the public."[13]

Here, the record shows the method used to provide public notice of the March 6, 2015, meeting was used by the board and recorded in its minutes at least 21 times between January 14, 2013, and February 9, 2015. It further shows both Robinson and members of the public were given reasonable advanced notice of and attended the meeting. The district court did not err in finding that notice was given in accordance with the law.

2. Use of Hearing Officer Not Improper

The school board hired an attorney—referred to by the parties as a "hearing officer"—to preside over Robinson's hearing.[14] Robinson objected to this procedure, arguing the use of a hearing officer was not statutorily authorized.

Nebraska statutes allow a Class IV or Class V school district to use a hearing officer when the issue of termination of a certificated employee is determined.[15] These statutes require the parties to select the hearing officer and authorize the hearing officer to actually conduct the hearing and serve as the fact finder who makes recommendations to the board for its

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[11] See *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

[12] *Id.*

[13] *Id.* at 443, 786 N.W.2d at 924.

[14] See, generally, Neb. Rev. Stat. § 79-513 (Reissue 2014).

[15] Neb. Rev. Stat. §§ 79-840 to 79-842 (Reissue 2014).

final decision.[16] Bridgeport is not a Class IV or Class V school district, and thus, Robinson is correct that the use of a hearing officer was not authorized by these statutes. We conclude, however, that the attorney hired by the school board was not the sort of hearing officer referenced in these statutes and that the procedure used was not improper.

After Robinson objected to the use of a hearing officer, the attorney representing the school administrators in the hearing explained that the attorney hired by the school board was not acting in the capacity of a "hearing officer" statutorily authorized for Class IV and Class V school districts, but instead was presiding over the proceedings, a role that was "extremely helpful" to the school board, which lacked "legal training." The hearing officer himself explained on the record that it was "customary" for school boards to seek outside counsel to help conduct hearings in similar situations. He noted that his role was to "see that this hearing is conducted fairly and efficiently and in a manner consistent with Nebraska law" and emphasized that it was the board's duty "to determine what the facts are." Indeed, the hearing officer expressly stated, "I have no involvement in the ultimate determination made by the [b]oard. My role is to conduct the hearing and then assist the [b]oard through the process."

Whether characterized generally as a "hearing officer" or more precisely as counsel hired by the school board, we find no error in the school board's retention and use of counsel to conduct and oversee the hearing on behalf of the board. The board hired an attorney to preside over the hearing, rule on objections, and receive the evidence to be considered by the board. This attorney did not function as the fact finder and thus was not the type of hearing officer statutorily authorized for Class IV and Class V school districts.

[3] Both Robinson and the administration were represented at the hearing by counsel, and the school board hired

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[16] *Id.*

an attorney to preside over the proceedings. Section 79-513 expressly authorizes the board to hire legal counsel when it deems it "necessary or advisable," and no party directs us to a statute, regulation, or practice that prohibits the procedure followed here. We reject Robinson's invitation to adopt a blanket rule that precludes school boards from employing counsel to help the board conduct hearings of this nature.

3. Decisionmaker Was Impartial

[4-6] Robinson also argues his procedural due process rights were violated because the school board was not impartial. The concept of due process embodies the notion of fundamental fairness and defies precise definition.[17] But "'"'"the central meaning of procedural due process [is] clear: 'Parties whose rights are to be affected are entitled to be heard . . . .'"'"'[18] Thus, we have said:

> "When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker."[19]

Robinson argues the board was not an impartial decisionmaker for several reasons, which we discuss in turn. Prior to doing so, we note that as a general rule, decisionmakers are presumed to be impartial and unbiased; the

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[17] *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016).

[18] *Id.* at 165, 887 N.W.2d at 512.

[19] *Id.* at 165, 887 N.W.2d at 513.

burden of showing otherwise rests on the party making the assertion.[20]

(a) Prior Knowledge

Robinson asserts the board was not impartial, because it knew of the issues related to Robinson's contract prior to the hearing. The record does indicate that board members had some prior knowledge of the December 2013 incident with the student and Robinson's resulting allegations that his reputation was not being protected by the administration. However, this is only because Robinson himself requested a meeting with the board in the early part of 2014 to present his complaints. The record shows that beyond this communication, the board had no other information about Robinson's work performance, because the administration followed protocol and did not discuss confidential employee matters with the board. Moreover, when questioned on the record by the hearing officer and Robinson's counsel prior to the receipt of the evidence, each board member affirmatively stated he or she would base a decision "solely on the evidence received as a part of this hearing and exclude anything [he or she] may have heard or read about this matter prior to the hearing." On this record, Robinson failed to show the board's impartiality was affected by prior knowledge.

(b) Hearing Officer's Participation

Robinson also claims the board was not impartial because, he asserts, the hearing officer "participat[ed] in the deliberations."[21] Robinson suggests there is circumstantial support for his assertion because (1) when referencing the board's decision to go into closed session to deliberate, the hearing officer used the collective term "we" when referring to the board, and

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[20] *Schweiker v. McClure*, 456 U.S. 188, 102 S. Ct. 1665, 72 L. Ed. 2d 1 (1982).

[21] Brief for appellant at 26.

(2) the hearing officer was present with the board during the closed session.

As noted, at the commencement of the hearing, Robinson questioned the hearing officer's role and the hearing officer explained that his role was limited to conducting the hearing and advising the board throughout the process, and he would have "no involvement in the ultimate determination made by the [b]oard." Moreover, before receiving evidence, the hearing officer instructed the board on its role as the fact finder and told the board what it could and could not consider in making its decision. As part of that instruction, the hearing officer admonished the board, "Do not take anything I say or do as expressing my opinion as to how this case should come out or how you should resolve any issue of fact."

On this record, the hearing officer's reference to "we" and his presence with the board during closed session are insufficient to show the board was not an impartial decisionmaker.

(c) Consideration of Documents Not Received

Robinson also argues the board was not impartial because it considered matters outside the record during its deliberation. Before addressing this argument, we provide some additional background.

Prior to the hearing, counsel for the administration prepared binders containing each proposed exhibit. The binders were distributed to each board member immediately before the hearing commenced. The board was instructed not to look at any exhibit until it was offered and received, and this procedure was followed by both counsel during the hearing. The record shows that before deliberations, in the presence of counsel and Robinson, any exhibit in the binders that had not been received into evidence was removed at the direction of the hearing officer and left on a table in the hearing room to be recycled. It appears the hearing officer kept an original binder with all exhibits in order to preserve them for the record.

The record shows that approximately 50 exhibits were included in the binders but not received at the hearing. However, the only exhibit Robinson specifically contends the board improperly considered is exhibit 108. That exhibit is a February 26, 2015, letter sent to Robinson and his counsel by the administration's attorney. The letter recited the allegations against Robinson and provided a detailed summary of the exhibits and testimony the administration expected to adduce at the hearing. Exhibit 108 was admitted at the hearing, but only for the limited purpose of showing the administration had complied with statutory notice requirements.[22] And at the conclusion of the evidence, the hearing officer directed each board member to remove exhibit 108 from his or her binder, along with the other exhibits that had not been received.

Robinson argues the board's ultimate factual findings supporting the decision to cancel his contract were similar to the information contained in exhibit 108, and he speculates this could only have happened if the board members kept a copy of exhibit 108 in their binders or the hearing officer's copy was used in deliberations.

While there is similarity between the substantive content of exhibit 108 and the board's ultimate factual findings, that is not surprising. Exhibit 108 was the administration's prehearing disclosure of the alleged grounds for cancellation, the reasons supporting cancellation, and a summary of the anticipated exhibits and testimony of each witness. In other words, exhibit 108 laid out in detail what the administration intended to prove at the hearing. The board's findings after the hearing tracked with the issues and evidence presented, and reflected what it determined the administration had proved. Rather than suggesting reliance on materials outside the record, the board's findings merely reflect that the administration carried its burden of proof.

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[22] See § 79-832.

On the record before us, Robinson has not shown the board's impartiality was affected by exhibit 108. Robinson does not argue why inclusion of any of the other 50 exhibits in the binders during the hearing was prejudicial to him, and we therefore do not address any of the other exhibits.[23]

(d) Motion for Closed Session

After all parties had presented their evidence to the school board, the hearing officer informed the board that it could move to conduct its deliberations in closed session. A board member so moved, the motion was seconded, and on a roll call vote, all members of the board affirmatively voted to deliberate in closed session. The hearing officer then stated on the record that the board was going into closed session at 7:44 p.m. in a nearby conference room for its deliberations. Robinson did not object to the closed session or the process followed by the board, but did ask that the court reporter remain in the hearing room in case "the board members . . . end up having a question that needs to have discussion." At 10:36 p.m., the board reconvened in open session and announced on the record its proposed findings of fact and proposed decision.

On appeal, Robinson argues the motion to go into closed session did not comply with the Open Meetings Act.[24] The school board relies on this court's decision in *McQuinn v. Douglas Cty. Sch. Dist. No. 66*[25] to argue that § 84-1410, which sets out the procedure for public bodies to hold closed sessions, has no application here, because the school board was acting in a judicial function and not as a public body.

We do not address either argument, because Robinson's failure to object to the closed session or to challenge the

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[23] See, *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015); *Obad v. State*, 277 Neb. 866, 766 N.W.2d 89 (2009).

[24] See Neb. Rev. Stat. § 84-1410 (Reissue 2014).

[25] *McQuinn, supra* note 5.

procedure followed in connection therewith, effectively waived the argument he seeks to present on appeal. This assignment of error is without merit.

4. Evidence of Conduct in Prior Contract Period Admissible

During the hearing, Robinson repeatedly objected to the admission of any evidence related to his conduct outside the time period from August 13 through September 4, 2014. He argued this was the only relevant time period, because the issue was whether his current contract, effective August 13, should be canceled, and he was suspended on September 4. The hearing officer overruled each of these objections, reasoning the board was not prohibited from considering conduct from a prior contract period in determining whether the current contract should be canceled.

[7] Our prior case law demonstrates that a school board can consider all relevant conduct when determining whether to cancel a contract. In *Hollingsworth v. Board of Education*,[26] we reversed the district court's judgment affirming a school board's termination of a tenured teacher's contract. In doing so, we referenced evidence related to the teacher's entire 2½-year teaching career at the school and did not limit our analysis to only the year prior to the termination. We applied a similar analysis in *Schulz v. Board of Education*.[27]

Here, evidence related to the incidents that occurred during the prior contract period—particularly the December 2013 incident involving the student—was intertwined with Robinson's conduct thereafter and his deteriorating job performance. As such, the evidence was necessary to understanding and evaluating the reason for Robinson's continued inability to work collaboratively with his fellow school

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[26] *Hollingsworth v. Board of Education*, 208 Neb. 350, 303 N.W.2d 506 (1981).

[27] *Schulz v. Board of Education*, 210 Neb. 513, 315 N.W.2d 633 (1982).

employees and thus was relevant to determining whether his current contract should be canceled. We agree with the district court that there is no merit to Robinson's argument that this evidence was irrelevant and should have been excluded.

5. Sufficient Evidence to Support Canceling Contract

Pursuant to § 79-827, the contract of any certificated employee may be canceled by a majority of the members of the school board during the school year for, among other things, incompetency,[28] neglect of duty,[29] unprofessional conduct,[30] or insubordination.[31] The board canceled Robinson's contract after finding he had acted in an unprofessional manner, neglected his duties, been insubordinate, and not acted in a competent manner.

Robinson argues there was insufficient evidence in the record to support the cancellation of his contract. The district court found there was sufficient evidence as a matter of law to support the board's decision. We agree with the district court.

(a) Incompetency and Neglect of Duty

[8,9] "Incompetency," in the context of this case, includes "demonstrated deficiencies or shortcomings in knowledge of subject matter or teaching or administrative skills."[32] We have held that teacher incompetency is not measured in a vacuum or against a standard of perfection but, instead, must

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[28] § 79-827(1)(d).

[29] § 79-827(1)(e).

[30] § 79-827(1)(f).

[31] § 79-827(1)(g).

[32] Neb. Rev. Stat. § 79-824(4)(a) (Reissue 2014). Accord *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997).

be measured against the standard required of others performing the same or similar duties.[33]

Robinson was the curriculum coordinator. There was considerable evidence demonstrating his shortcomings in administering his coordinator duties. For example, he refused to attend meetings with staff and administration. He refused to leave his office, even after being directed to stop secluding himself. And he refused to work collaboratively with staff and administration on curriculum and testing issues.

[10] "Neglect of duty" is not defined in the applicable statute, but our cases have recognized that, generally, there must be evidence of something more than occasional neglect. "'Evidence that a particular duty was not competently performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination.'"[34]

The record contains sufficient relevant evidence showing more than just occasional incompetence or neglect of a particular duty. Lambert testified that after Robinson was suspended, Lambert discovered significant discrepancies related to curriculum orders made by Robinson that had to be rectified. Specifically, Robinson had lied about certain purchases for the curriculum and had exchanged inappropriate and unprofessional emails with a district curriculum vendor. On this record, the evidence of incompetency and neglect of duty was sufficient to support the board's decision.

(b) Lack of Professionalism and Insubordination

[11,12] "Unprofessional conduct" is not defined in the applicable statute, but we have explained that it must be

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[33] *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985).

[34] *Boss, supra* note 32, 251 Neb. at 676, 559 N.W.2d at 453, quoting *Sanders v. Board of Education*, 200 Neb. 282, 263 N.W.2d 461 (1978).

conduct directly related to the fitness of the employee to act in his or her professional capacity.[35] "[I]nsubordination" is defined as the "absence of subordination or submission; resistance to or defiance of authority; refusal to obey orders; refractoriness, [or] disobedience."[36]

The evidence demonstrating Robinson's lack of professionalism and insubordination in the workplace was substantial. Summarized, the evidence showed that as the result of real or perceived slights, Robinson grew increasingly antagonistic toward other teachers and the administration. Despite encouragement from the administration to start fresh, Robinson perpetuated past conflicts, refused to come out of his office, refused to attend meetings to discuss curriculum, and refused to interact or collaborate with other teachers. He secretly tape recorded conversations with school staff, including Lambert, and responded with hostility to discussions regarding his job performance or curriculum. Robinson commented that he may "go nuclear" and that other employees should not "pick a fight" with him.

All of this conduct resulted in a dysfunctional working environment. Robinson admitted he lacked a functional relationship with at least eight members of the Bridgeport staff, which he also admitted was unprofessional. In addition, Lambert testified that professional conduct required an ability to respond to criticism in a healthy way and to develop working relationships with colleagues; the record shows Robinson did neither. Robinson's refusal to come out of his office and attend meetings to discuss curriculum can fairly be characterized as insubordinate behavior.

We conclude there was sufficient evidence as a matter of law to support the board's finding that Robinson's conduct was unprofessional and insubordinate.

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[35] See, *Daily v. Board of Ed. of Morrill Cty.*, 256 Neb. 73, 588 N.W.2d 813 (1999); *Boss, supra* note 32.

[36] "Insubordination," Oxford English Dictionary Online, http://www.oed.com/view/Entry/97185 (last visited April 12, 2018).

6. Presuspension Error Not Preserved

[13] Robinson contends the school violated his due process rights when it suspended him with pay in September 2014. His petition in error enumerated 32 assignments of error, but there was no error assigned to suspending him with pay. As such, the issue was not before the district court in the error proceeding and has not been preserved for appellate review.[37]

V. CONCLUSION

For the foregoing reasons, we affirm the decision of the district court affirming the board's cancellation of Robinson's contract.

Affirmed.

Wright and Kelch, JJ., not participating.

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[37] See *McQuinn, supra* note 5 (error not asserted in petition in error not preserved for appellate review).

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

State of Nebraska, appellee, v. Shawn A. McGuire, appellant.

910 N.W.2d 144

Filed April 26, 2018. No. S-17-257.

1. **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 factual findings unless they are clearly erroneous.
2. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
3. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
4. **Effectiveness of Counsel: Appeal and Error.** 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 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 conclusion.
5. ____: ____. When a defendant's trial counsel is different from his or her appellate counsel, all issues of ineffective assistance of trial counsel that are known to the defendant or are apparent from the record must be raised on direct appeal. If the issues are not raised, they are procedurally barred.
6. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
7. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v.*

Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.

8. **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 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).
9. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
10. **Trial: Effectiveness of Counsel: Presumptions: Appeal and Error.** In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
11. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed.

A. Michael Bianchi for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Heavican, C.J., Miller-Lerman, Stacy, and Funke, JJ., and Colborn and Samson, District Judges.

Colborn, District Judge.

INTRODUCTION

Shawn A. McGuire appeals from the denial of his motion for postconviction relief following an evidentiary hearing. He claims the district court erred in failing to find that his trial and appellate counsel were ineffective and in failing to make rulings on certain claims raised in his postconviction motion. He also claims his postconviction counsel provided ineffective assistance at the evidentiary hearing. For the reasons set forth below, we affirm the judgment of the district court.

BACKGROUND

Following a jury trial, McGuire was found guilty of second degree murder under a theory of aiding and abetting, use of a deadly weapon to commit a felony, and criminal conspiracy to unlawfully possess and deliver a controlled substance. The convictions were based on his involvement with a cocaine exchange that resulted in the murder of Cesar Sanchez-Gonzales (Sanchez) by Robert Nave. McGuire is currently serving a combined sentence of 105 to 125 years in prison.

Trial Evidence

On October 22, 2010, a law enforcement task force was conducting surveillance on an expected drug deal at an automobile repair shop (auto shop) in South Omaha, Nebraska. The auto shop was run by Sanchez, who was an informant for the task force. The supplier, Cesar Ayala-Martinez, had agreed to sell 1½ kilograms of cocaine to Sanchez in exchange for $40,500. Sanchez was then going to sell the cocaine to McGuire. McGuire had purchased cocaine from Sanchez in a similar manner a few weeks prior to this date.

The evidence showed that McGuire arrived at the auto shop driving a white Chrysler Sebring and was seen conversing with the occupants of a white Nissan. Abdul Vann, Kim Thomas, and Nave were also present outside the auto shop. Sometime after McGuire entered the auto shop, a member of the task force observed Nave put his hood over his head, pull a handgun from his waistband, and proceed into the auto shop. As soon as Nave entered, McGuire almost instantaneously exited.

Ayala-Martinez testified that within seconds of McGuire's exiting, Nave entered the office with his gun drawn. Sanchez pulled a revolver out of his desk drawer and was attempting to open the chamber. Before Sanchez could raise his weapon, Nave shot Sanchez two or three times. Nave then pointed the gun at Ayala-Martinez and asked for the cocaine. Ayala-Martinez pointed to the cocaine, and Nave ran out with

it. Sanchez later died due to the gunshot wounds inflicted by Nave.

The task force observed Nave and Thomas running from the building. They both ran straight to the Sebring, where McGuire was waiting in the driver's seat. McGuire sped off at a high rate of speed. Members of the task force pursued the vehicle, which crashed head on into a pickup truck shortly thereafter. After a short foot pursuit, all three occupants of the Sebring were apprehended.

A search of McGuire revealed a roll of cash with $20 and $50 bills on the outside and regular paper on the inside, making the cash roll appear to contain a larger amount of cash. Officers also found the keys to the Sebring, an electronic ignition key for a Nissan, and approximately $3,800 in cash.

A search of the white Nissan revealed a yellow sporting goods store bag containing a box of "CCI" ammunition with 10 rounds missing, a pair of black gloves, and packaging material for black duct tape. On the driver's side of the Sebring, 10 live rounds of ammunition were found, marked "9mm CCI Luger." Inside the Sebring, officers located black duct tape consistent with the packaging found in the Nissan.

Officers also found four handguns inside the Sebring, including a Smith & Wesson 9-mm pistol. We note that our opinion on direct appeal[1] incorrectly stated that the handguns were found in the Nissan. The record reflects that they were found in the Sebring. A firearms expert testified that the bullet recovered from Sanchez' body was fired from the 9-mm Smith & Wesson. Each of the four casings found in the auto shop were also from the 9-mm Smith & Wesson.

The white Nissan was owned by a woman who testified that she was dating McGuire and had allowed him to borrow her car on the date in question. The previous night, she had gone to a sporting goods store to purchase bullets for the shooting range. She had placed the ammunition, which was in

[1] See *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

a yellow bag, in her garage and did not realize it was missing until after she was questioned by investigators.

Direct Appeal

Following his convictions, McGuire obtained new counsel and appealed. He assigned, as relevant to this postconviction proceeding, that the district court erred in refusing to give his proposed jury instruction, which added "'not upon a sudden quarrel'" to the language of the second degree murder instruction.[2] We agreed on direct appeal that the instruction given by the district court was an incorrect statement of the law in that it did not require the jury to consider whether Nave killed Sanchez upon a sudden quarrel, which could have reduced McGuire's conviction to manslaughter. However, we found that this error did not result in prejudice to McGuire, because there was no evidence at trial upon which a jury could reasonably conclude that Sanchez was killed as a result of a sudden quarrel. We affirmed McGuire's convictions and sentences in all respects.[3]

Postconviction Proceedings

On February 6, 2015, McGuire filed a timely motion for postconviction relief, alleging that his trial counsel was ineffective in (1) failing to properly advise McGuire regarding his right to testify at trial, (2) failing to depose certain witnesses prior to trial, (3) failing to call certain witnesses at trial, (4) failing to investigate and question investigators about the existence of gunshot residue on accomplices, (5) failing to properly cross-examine one of the task force members concerning McGuire's presence and affiliation with accomplices just prior to the shooting, (6) failing to cross-examine Ayala-Martinez regarding where Nave pointed the gun when he entered the auto shop, (7) failing to challenge the admission into evidence of the 9-mm ammunition found in the Nissan,

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[2] *Id*. at 504, 837 N.W.2d at 780.

[3] See *State v. McGuire, supra* note 1.

and (8) failing to provide discovery materials to McGuire, which prevented him from assisting in his own defense. He further alleged that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness in all of these respects.

An evidentiary hearing was held in the district court, during which the depositions of McGuire and his trial counsel were entered into evidence. Following the hearing, the district court issued a written order denying McGuire's postconviction motion. It found that appellate counsel was not ineffective for failing to raise the various claims of ineffective assistance of trial counsel because trial counsel was not ineffective. McGuire now appeals from that order.

ASSIGNMENTS OF ERROR

McGuire claims the district court erred in failing to find that his trial and appellate counsel were ineffective, and in failing to rule on certain claims raised in his postconviction motion. More specifically, he claims (1) trial counsel was ineffective in (a) failing to properly examine Ayala-Martinez about where Nave pointed his gun prior to shooting Sanchez, (b) failing to call certain witnesses who would have provided testimony confirming McGuire's ignorance of the plan to rob Sanchez of the cocaine, and (c) improperly advising McGuire about his rights to testify and to remain silent; (2) appellate counsel was ineffective for failing to raise trial counsel's failure to elicit testimony of a sudden quarrel; and (3) the district court failed to rule on his claims regarding (a) trial counsel's failure to object to the admission into evidence of the 9-mm ammunition and (b) trial counsel's failure to question or investigate the presence of gunshot residue on accomplices. Finally, McGuire claims that his postconviction counsel was ineffective for failing to present adequate evidence at the postconviction hearing to substantiate his claims, thereby depriving him of his state and federal constitutional rights to due process of law.

STANDARD OF REVIEW

[1] 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 factual findings unless they are clearly erroneous.[4]

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[5] When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.[6]

[3,4] A claim that defense counsel provided ineffective assistance presents 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 questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[9] an appellate court reviews such legal determinations independently of the lower court's conclusion.[10]

ANALYSIS

Ineffective Assistance of Trial Counsel

[5] McGuire's first three assignments of error allege that the district court erred in failing to find that his trial counsel was ineffective in certain respects. The State submits that these claims are procedurally barred, because they could have been

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[4] *State v. Glass*, 298 Neb. 598, 905 N.W.2d 265 (2018).

[5] *State v. Ross*, 296 Neb. 923, 899 N.W.2d 209 (2017).

[6] *Id.*

[7] *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017).

[8] *Id.*

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

[10] *State v. Alarcon-Chavez, supra* note 7.

raised on direct appeal and were not. When a defendant's trial counsel is different from his or her appellate counsel, all issues of ineffective assistance of trial counsel that are known to the defendant or are apparent from the record must be raised on direct appeal.[11] If the issues are not raised, they are procedurally barred.[12]

[6] Although McGuire's postconviction motion asserts layered claims of ineffective assistance of trial and appellate counsel, we agree that the underlying claims pertaining to trial counsel are procedurally barred, because McGuire had new counsel on direct appeal and did not raise his claims of ineffective assistance of trial counsel at that time.[13] In order to present the merits of those claims to this court, McGuire was required to assign and argue that appellate counsel was ineffective for failing to assert trial counsel's ineffectiveness in those respects. He failed to do so for his first three assignments of error, and as a result, those claims are not properly before this court. 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.[14]

Ineffective Assistance of Appellate Counsel

McGuire's fourth assignment of error alleges that the district court erred in failing to find that appellate counsel was ineffective for failing to raise trial counsel's failure to elicit evidence of a sudden quarrel at trial. He asserts that appellate counsel challenged the second degree murder instruction on the basis that it did not include the sudden quarrel language, which we agreed was erroneous on direct appeal but found to be harmless due to the absence of any evidence in the

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[11] *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016).

[12] *Id.*

[13] See *id.*

[14] *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015).

record of a sudden quarrel. McGuire argues that trial counsel could have elicited such evidence through a proper cross-examination of Ayala-Martinez.

At trial, Ayala-Martinez testified that Nave entered the auto shop, pointed the gun at Sanchez, and shot him two to three times. However, McGuire claims that Ayala-Martinez had previously testified at Nave's trial that Nave initially pointed the gun at Ayala-Martinez but quickly turned the gun on Sanchez when he saw Sanchez attempting to load a revolver. McGuire argues that this was evidence of a sudden quarrel that provoked Nave to shoot Sanchez, but was not elicited at trial. McGuire argues that if appellate counsel had raised trial counsel's ineffectiveness in this regard, McGuire would have received a new trial on direct appeal.

[7] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[15] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[16]

[8] 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 at whether trial counsel was ineffective under the *Strickland v. Washington* test.[17] If trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue.[18] Much like claims of ineffective assistance of trial counsel, the defendant must show that *but for* counsel's failure to raise the claim, there is a reasonable probability that the outcome would have been different.[19]

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[15] *Strickland v. Washington, supra* note 9.

[16] *State v. Glass, supra* note 4.

[17] *State v. Dubray, supra* note 11.

[18] *Id.*

[19] *Id.*

We find that trial counsel's decision not to elicit testimony of a sudden quarrel was a reasonable strategic decision. In his deposition, trial counsel testified that he believed the best defense for McGuire was to convince the jury that although McGuire was there to participate in a drug deal, there was no evidence that he had agreed to participate in the robbery, or even had knowledge that Nave was going to commit a robbery. In other words, the best case scenario for McGuire was that he would be found guilty of the drug offense, but not guilty of felony murder or any other homicide-related charges.

Given this trial strategy, trial counsel explained that he did not believe it was effective to "out of one side of your mouth say, there's no plan, no agreement, no robbery, therefore he's not guilty of first degree murder; and then say, on the other hand, it could also be a manslaughter." He testified that he thought he would lose credibility with the jury if he tried to argue both theories. He chose to attack the felony murder allegations, because if he could convince the jury that there was no plan or agreement for the robbery, then he would be found not guilty on all the homicide charges.

[9,10] Trial counsel is afforded due deference to formulate trial strategy and tactics.[20] An appellate court does not second-guess strategic decisions made by trial counsel, so long as those decisions are reasonable.[21] In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.[22] We conclude that trial counsel's failure to adduce evidence of a sudden quarrel was a reasonable strategic decision, and therefore, it does not constitute deficient performance. Because trial counsel was not ineffective, McGuire was not prejudiced by appellate counsel's failure to raise this issue on direct appeal.

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

[21] See *State v. Alarcon-Chavez, supra* note 7.

[22] *State v. Williams, supra* note 20.

Failure to Make Findings or Rulings

McGuire's fifth assignment of error alleges that the district court erred by failing to make requisite findings or rulings on his claims that (1) trial counsel failed to object to the admission into evidence of the 9-mm ammunition found in the Nissan and (2) trial counsel failed to investigate the presence of gunshot residue on accomplices. He argues that under Neb. Rev. Stat. § 29-3001(2) (Reissue 2016), the district court is required to make findings of fact and conclusions of law with regard to all issues raised in the motion when an evidentiary hearing is granted.

We first note that McGuire's appellate brief provides no argument in support of the second part of this assignment of error regarding trial counsel's failure to investigate the presence of gunshot residue on accomplices. 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.[23] Because it was not argued, we will not address that portion of the assigned error.

[11] Regarding trial counsel's failure to object to the 9-mm ammunition found in the Nissan, McGuire argues that it was unduly prejudicial under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), and that trial counsel should have moved to exclude it on that basis. Under rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[24] Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party; only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.[25]

Trial counsel testified that he did not object to the ammunition, because any such objection would have certainly been

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[23] *State v. Cook, supra* note 14.

[24] *State v. Chauncey*, 295 Neb. 453, 890 N.W.2d 453 (2017).

[25] See *id.*

overruled. We agree. The probative value of the 9-mm ammunition found in the Nissan was substantial. A firearms expert determined that the four casings found in the auto shop and the bullet recovered from Sanchez' body were all fired from a 9-mm Smith & Wesson, which was found inside the Sebring that McGuire was driving as he fled from the scene. The discovery of the 9-mm ammunition in the Nissan directly linked McGuire to the robbery conspiracy, given the evidence that the Nissan belonged to McGuire's girlfriend and she had allowed him to borrow it on the date in question. We conclude the challenged evidence was extremely probative, and we do not see any tendency for it to suggest a decision by the jury on an improper basis.

Finally, while we agree that trial courts are required to make findings of fact and conclusions of law following an evidentiary hearing, we find it unnecessary to remand the cause for further findings here. The purpose of requiring factual findings and conclusions of law is to facilitate appellate review and permit us to reach all assigned errors.[26] Because it is clear that this claim has no merit, there is no need to remand the matter for further findings.

Ineffective Assistance of Postconviction Counsel

In his final assignment of error, McGuire asserts that his postconviction counsel was ineffective for failing to present adequate evidence at the postconviction hearing to substantiate his claims, thereby depriving McGuire of his state and federal constitutional rights to due process of law. McGuire acknowledges that there is no constitutional right to effective assistance of counsel at postconviction proceedings.[27] However, he argues that he was denied due process of law because his counsel failed to meet the standard required under Neb. Rev. Stat.

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[26] See *State v. Harris*, 294 Neb. 766, 884 N.W.2d 710 (2016).

[27] See *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

§ 29-3004 (Reissue 2016), which provides that "[t]he district court may appoint not to exceed two attorneys to represent the prisoners in all [postconviction] proceedings" and that "[t]he attorney or attorneys shall be competent and shall provide effective counsel."

Assuming without deciding that there is a statutory right to competent and effective postconviction counsel that may be enforced on appeal from a postconviction proceeding, we find that the plain language of the statute applies only to attorneys appointed by the district court. Here, McGuire's counsel acknowledged at oral argument that McGuire's first postconviction counsel, whom he now claims was ineffective, was not appointed by the district court, but was privately retained by McGuire. Thus, the statutory directive that postconviction attorneys appointed by the district court shall be competent and effective does not apply here.

Furthermore, even if the statute did apply, we find no merit to this assigned error, because the claims asserted in McGuire's postconviction proceeding, even if proved, would not entitle him to any relief. Therefore, McGuire was not prejudiced by postconviction counsel's failure to present evidence to substantiate those claims.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court.

Affirmed.

Wright and Cassel, 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. Rosario Betancourt-Garcia, appellant.

910 N.W.2d 164

Filed April 26, 2018. No. S-17-690.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing 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. `____: ____. An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.
3. **DNA Testing.** The DNA Testing Act is a limited remedy providing inmates an opportunity to obtain DNA testing in order to establish innocence after a conviction.
4. ____. Under Neb. Rev. Stat. § 29-4120(1)(b) (Reissue 2016), biological material does not fall within the purview of the DNA Testing Act unless it is in the actual or constructive possession or control of the State or others.
5. **Constitutional Law: DNA Testing.** A constitutional challenge to the destruction of evidence is outside the purview of the DNA Testing Act.

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

Danielle L. Myers-Noelle, of Jewell & Collins, and Brad J. Montag, of Egley, Fullner, Montag & Hockabout, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, and Stacy, JJ., and Moore, Chief Judge, and Arterburn, Judge, and Doyle, District Judge.

Stacy, J.

Rosario Betancourt-Garcia (Betancourt) was convicted in 2015 of kidnapping, use of a firearm to commit kidnapping, and conspiracy to commit kidnapping. We affirmed all of his convictions and two of his sentences on direct appeal.[1] In 2017, Betancourt filed a motion for forensic DNA testing pursuant to Nebraska's DNA Testing Act.[2] After conducting a hearing, the district court denied the motion, finding the items Betancourt wanted to test were no longer in the possession of the State and had been destroyed before the motion for DNA testing was filed.[3] Betancourt appeals, and we affirm.

FACTS

Background

On November 15, 2003, officers of the Madison Police Department responded to a call and found Pedro Jesus Rayon-Piza (Pedro) bound and gagged. Duct tape was wrapped around Pedro's face, ankles, and wrists.[4] A "'shoestring type cord'" was tied around his ankles and wrists. Pedro appeared "'terrified'" and told officers that Betancourt and another man had kidnapped him and threatened to kill him.[5] The two men left Pedro bound and gagged in a shed, telling him they were going to return with Pedro's brother and then kill them both. Pedro managed to escape and seek help before Betancourt and the other man returned.

The Madison Police Department conducted an immediate search for Betancourt, but did not find him. Two days later, arrest warrants were issued for Betancourt and the other suspect, and the State filed an information in county court,

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[1] *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016).

[2] Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2016).

[3] See § 29-4120(1)(b), (3), and (4).

[4] *State v. Betancourt-Garcia, supra* note 1, 295 Neb. at 176, 887 N.W.2d at 304.

[5] *Id.*

charging Betancourt with kidnapping and use of a deadly weapon to commit a felony.

Approximately 6 months later, in May 2004, Texas authorities arrested Betancourt in Plano, Texas, based on the Nebraska warrant. Betancourt signed a waiver of extradition, and the Madison County sheriff's office dispatched transport personnel to bring Betancourt back to Nebraska. While the transport personnel were en route to Texas, they learned Betancourt had mistakenly been transferred by authorities in Texas to the custody of federal "'immigration services.'"[6] Betancourt was subsequently deported to Mexico.

Roughly 9 years later, on July 1, 2013, Texas authorities arrested Betancourt again, and he was extradited to Nebraska. The case against Betancourt was bound over to district court, and the State ultimately filed an amended information charging Betancourt with kidnapping, use of a deadly weapon to commit a felony, and conspiracy to commit kidnapping. Betancourt pled not guilty to all three counts, and a jury trial was held.

At trial, Pedro testified that Betancourt was one of the two men who had kidnapped him, threatened to kill him, and left him bound and gagged in the shed. The other man involved in the kidnapping also testified at trial and admitted that he and Betancourt threatened Pedro with guns, took him to the shed, and left him there while they looked for Pedro's brother.

At trial, the court received without objection several photographs of the crime scene, including the shed from which Pedro had escaped. Some of the photographs depicted items in the shed, including a pair of black tennis shoes with white laces. There were also photographs of Pedro after the duct tape had been removed, and adhesive residue was visible on his face, wrists, and ankles. The police chief testified that some of the duct tape had been collected at the scene and kept in the evidence room for several years. But sometime prior to

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[6] *Id.* at 174, 887 N.W.2d at 303.

Betancourt's rearrest in 2013, the mayor of Madison, Nebraska, wanted the evidence room cleaned, so officers checked to "verify where this case was" and then "disposed of" the physical evidence in Betancourt's case.

The jury convicted Betancourt on all charges. In December 2016, we affirmed his convictions on direct appeal, but remanded for resentencing on the conspiracy conviction.[7]

Motion for DNA Testing

On February 27, 2017, Betancourt filed a motion for forensic DNA testing, seeking to have items of physical evidence, including the duct tape, the black tennis shoes, and the shoe laces, tested for DNA evidence. The motion alleged Pedro had falsely, or mistakenly, identified Betancourt as the perpetrator and further alleged that DNA testing could result in exculpatory evidence if Betancourt's DNA was not found on any of the physical evidence.

The district court held a hearing on the motion June 16, 2017. Both the police chief for the city of Madison and a deputy sheriff for Madison County testified that the physical evidence related to Betancourt's case had been destroyed before trial.

The police chief testified that sometime in 2010, he destroyed all the physical evidence related to Betancourt's case as part of an initiative to clean out the evidence locker and get rid of evidence from "old cases." At the time the evidence was destroyed, Betancourt had been deported, the charges against him had been pending for 7 years, and his whereabouts were unknown. According to the police chief, the destruction of evidence was not done to frustrate Betancourt's defense.

The deputy sheriff testified that after Betancourt was rearrested in 2013 and extradited to Nebraska, he attempted to locate the physical evidence related to Betancourt's case. He located a compact disc that contained various photographs

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[7] *State v. Betancourt-Garcia, supra* note 1.

of the physical evidence, but otherwise determined the physical evidence had been destroyed. Like the police chief, he testified that the evidence was not destroyed in an effort to harm or frustrate Betancourt's defense.

During the evidentiary hearing on Betancourt's motion for DNA testing, Betancourt argued, among other things, that his due process rights had been violated by the State's destruction of the evidence. The district court asked Betancourt why due process was a relevant issue under the DNA Testing Act, but Betancourt did not directly answer that question. At the end of the hearing, the court announced from the bench that it was basing its decision on "the evidence and the narrow scope of the statute regarding DNA testing." It overruled the motion for DNA testing, finding that the physical evidence Betancourt wanted to test had been destroyed before the motion for testing had been filed. Betancourt filed this timely appeal.

ASSIGNMENTS OF ERROR

Betancourt assigns the district court erred in finding the State did not destroy evidence in bad faith and in violation of his due process rights under the U.S. Constitution.

STANDARD OF REVIEW

[1,2] A motion for DNA testing 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.[8] An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.[9]

ANALYSIS

DNA Testing Act

[3] Nebraska enacted the DNA Testing Act in 2001. It is a limited remedy providing inmates an opportunity to obtain

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

[9] See *id.*

DNA testing in order to establish innocence after a conviction.[10] Pursuant to the act, a person in custody takes the first step toward obtaining possible relief by filing a motion in the court that entered the judgment requesting forensic DNA testing of biological material.[11] The type of biological material subject to testing under the act is identified in § 29-4120(1). A person in custody can only request forensic DNA testing of biological material that

> (a) Is related to the investigation or prosecution that resulted in such judgment;
>
> (b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and
>
> (c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.[12]

Here, Betancourt's motion identified the following material he wanted to have tested: two black shoes with white laces, two pieces of duct tape, two pieces of "shoe lace type cord," saliva from the duct tape, and all clothing of Pedro taken into evidence. The motion did not indicate that the evidence at issue had been destroyed before trial. To the contrary, the motion specifically stated that "police reports show this evidence still exist[s] in Madison County." The motion also alleged that the evidence had been "collected by law enforcement as part of the investig[a]tion" and had "remained in State custody ever since."

Under the DNA Testing Act, notice of a motion seeking forensic DNA testing must be served on the county attorney of

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[10] See, § 29-4117; *State v. Pratt*, 287 Neb. 455, 842 N.W.2d 800 (2014).

[11] *State v. Pratt, supra* note 10.

[12] § 29-4120(1).

the county in which the prosecution was held.[13] Upon receiving notice, the county attorney must take steps to ensure that any "remaining biological material that was secured by the state or a political subdivision in connection with the case" is preserved pending completion of any proceedings under the act.[14] The county attorney also is required to submit an inventory of all evidence that was secured by the State or a political subdivision in connection with the case.[15] If evidence is intentionally destroyed after notice of a motion for DNA testing is received, a court may impose appropriate sanctions, including criminal contempt.[16] The record before us does not contain the inventory of evidence prepared by the county attorney, but neither party suggests there was a failure to submit such a document in response to Betancourt's motion.

Under the DNA Testing Act, the court has discretion to either consider the motion on affidavits or hold a hearing,[17] after which it "shall order DNA testing" upon a determination that

> (a)(i) the biological material was not previously subjected to DNA testing or (ii) the biological material was tested previously, but current technology could provide a reasonable likelihood of more accurate and probative results, (b) the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and (c) such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.[18]

In this case, the district court held a hearing, and the uncontroverted testimony established that the biological material

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[13] § 29-4120(2).

[14] § 29-4120(3).

[15] § 29-4120(4).

[16] *Id.*

[17] § 29-4120(5).

[18] *Id.*

Betancourt wanted to have tested was not in the actual or constructive possession or control of the state when Betancourt filed his motion. The police chief had disposed of the material while cleaning out the evidence room several years before Betancourt's convictions, and at a point in time when Betancourt was absconded from Nebraska and not incarcerated in connection with this case.

Based on this evidence, we find no error in the district court's factual findings that the biological material Betancourt wanted tested no longer existed and the related finding that no evidence had been destroyed after Betancourt's motion was filed. And given these factual findings, we find no abuse of discretion in denying relief under the DNA Testing Act.

[4] At the time Betancourt filed his motion, the material sought to be tested did not fall within the purview of the DNA Testing Act, because it was not in the actual or constructive possession or control of the State or others, as required by § 29-4120(1)(b). And although the DNA Testing Act provides that "state agencies and political subdivisions shall preserve any biological material secured in connection with a criminal case for such period of time as any person remains incarcerated in connection with that case,"[19] the evidence was uncontroverted that the biological material at issue was destroyed before Betancourt's trial and convictions and during a time period in which Betancourt was absconded from Nebraska and not incarcerated in connection with the case.

The district court correctly overruled Betancourt's motion for DNA testing. To the extent Betancourt assigns error to the contrary, the assignment is without merit.

Due Process Claim

Betancourt assigns and argues on appeal that the evidence destroyed before his trial was "materially exculpatory"[20] and

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[19] § 29-4125(1).

[20] Brief for appellant at 11.

that therefore, the State's destruction of it violated his right to due process of law.[21] The district court's ruling did not address Betancourt's due process argument, and for good reason. It was not properly before the court.

[5] Betancourt limited his motion to requesting DNA testing under the DNA Testing Act. His motion did not challenge the destruction of evidence at all and, instead, affirmatively alleged the evidence he wanted tested was still in the State's custody. The motion did not raise any sort of constitutional due process challenge based on the destruction of evidence. And in any event, a constitutional challenge to the destruction of evidence is outside the purview of the DNA Testing Act. On this record, the district court correctly declined to address Betancourt's due process arguments.

CONCLUSION

For the foregoing reasons, the order of the district court overruling the motion for DNA testing is affirmed.

Affirmed.

Wright and Funke, JJ., not participating.

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[21] See *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

Nebraska Supreme Court
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In re Interest of Josue G., a child under 18 years of age. State of Nebraska, appellee, v. Josue G., appellant.

910 N.W.2d 159

Filed April 26, 2018. No. S-17-812.

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. **Juvenile Courts: Statutes: Jurisdiction.** A juvenile court is a statutorily created court of limited and special jurisdiction, and it has only the authority which the statutes confer on it.
3. **Juvenile Courts: Probation and Parole: Pleadings.** Neb. Rev. Stat. § 43-286(5) (Reissue 2016) authorizes a juvenile court to change an existing disposition of probation, but its power to do so is premised upon the existence of an appropriate motion and upon its compliance with the specified procedures.
4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the Separate Juvenile Court of Douglas County: Elizabeth G. Crnkovich, Judge. Vacated and remanded.

Thomas C. Riley, Douglas County Public Defender, Ryan T. Locke, and Katie L. Jadlowski for appellant.

No appearance for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Derr and Urbom, District Judges.

Cassel, J.

INTRODUCTION

After a juvenile on probation pursuant to a previous adjudication allegedly committed a new offense, the State moved to revoke probation. But when the juvenile entered a denial to the new charge, the State withdrew its motion. Nonetheless, the separate juvenile court of Douglas County extended the term of probation and imposed additional community service. Because the court did not follow applicable statutory procedures and thereby exceeded its statutory authority, we vacate the order, and remand the cause to the juvenile court for further proceedings consistent with this opinion.

BACKGROUND

The juvenile court adjudicated Josue G. under Neb. Rev. Stat. § 43-247(1) (Reissue 2016). On September 27, 2016, the court entered a dispositional order, placing Josue on probation for 4 months. Among other things, it ordered Josue to complete 20 hours of community service.

On January 24, 2017, the State moved to revoke Josue's probation based on alleged violations of probationary terms. The juvenile court found that the terms of Josue's probation should not automatically terminate. A February 28 order stated that the State withdrew its motion to revoke probation and that the parties agreed Josue would abide by the court's previous orders, except as therein modified. The court extended Josue's probation for 6 months.

On May 11, 2017, the State again moved to revoke Josue's probation. The motion alleged that Josue had incurred a new law violation, used marijuana, and failed to attend educational programming.

On July 5, 2017, the juvenile court held a hearing on the motion to revoke probation and an arraignment on a new charge. After Josue entered a denial to the new charge, the court asked how the State wished to proceed on its motion to revoke. The following colloquy occurred:

> [The State]: Your Honor, the State is going to withdraw its motion.
>
> THE COURT: You are. Even though we have a new charge? You are not going to talk to [counsel for Josue] or anything? Huh.
>
> All right. It is your right. Motion withdrawn.
>
> What do you wish to do next then? Did you wish to have me review the matter?
>
> [The State]: Yes, Your Honor.
>
> THE COURT: I see. All right.

The court then heard from an individual associated with probation and ascertained that counsel for the parties agreed Josue should continue with his therapy. The court also engaged in a discussion with Josue during which it told him he needed to perform volunteer work.

On July 7, 2017, the juvenile court entered an order titled "Violation of Probation Hearing/Motion Is Withdrawn/Order." After reciting that the motion to revoke probation was withdrawn, the order stated in part:

> The Court finds that . . . Josue . . . must do community service until actively employed, AND IT IS SO ORDERED.
>
> IT IS FURTHER ORDERED that based on the filing of the Motion to Revoke Probation and additional charges pending pursuant to JV 17 892, the terms and conditions of probation shall not automatically terminate on August 28, 2017 . . . .
>
> IT IS FURTHER ORDERED that the previous orders of this Court remain in full force and effect, except as modified herein, AND IT IS SO ORDERED.
>
> IT IS FURTHER ORDERED that the probation review hearing will be held on **December 5, 2017 at 9:45 a.m.** unless application is made for a hearing prior thereto.

Josue filed a timely appeal, and we moved the case to our docket.[1]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

ASSIGNMENT OF ERROR

Josue assigns that the juvenile court violated his due process rights by extending his probation and making further dispositional orders without a hearing.

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]

ANALYSIS

[2] Josue argues that the juvenile court did not follow statutory procedures when it extended his probation and ordered community service. We first recall that a juvenile court is a statutorily created court of limited and special jurisdiction, and it has only the authority which the statutes confer on it.[3] Thus, we look to the authority conferred by statute. Josue relies upon a specific statute, and because the State did not file a brief in this appeal, there is no suggestion that any other statute authorized the juvenile court's order.

[3] Neb. Rev. Stat. § 43-286(5) (Reissue 2016) authorizes a juvenile court to change an existing disposition of probation, but its power to do so is premised upon the existence of an appropriate motion and upon its compliance with the specified procedures. We have previously emphasized the importance of complying with the procedures under § 43-286(5), because a juvenile is entitled to procedural protections, including the right to confront and cross-examine adverse witnesses.[4]

Section 43-286(5)(b) provides:

> When a juvenile is placed on probation or under the supervision of the court for conduct under subdivision (1), (2), (3)(b), or (4) of section 43-247 and it is alleged

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[2] *In re Interest of Dana H., ante* p. 197, 907 N.W.2d 730 (2018).

[3] See *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

[4] See *In re Interest of Alan L.*, 294 Neb. 261, 882 N.W.2d 682 (2016).

that the juvenile has violated a term of probation or supervision or that the juvenile has violated an order of the court, *a motion to revoke probation or supervision or to change the disposition may be filed and proceedings held* as follows:

(i) The motion shall set forth specific factual allegations of the alleged violations and a copy of such motion shall be served on all persons required to be served by sections 43-262 to 43-267;

(ii) *The juvenile shall be entitled to a hearing before the court to determine the validity of the allegations. At such hearing the juvenile shall be entitled to those rights relating to counsel provided by section 43-272 and those rights relating to detention provided by sections 43-254 to 43-256. The juvenile shall also be entitled to speak and present documents, witnesses, or other evidence on his or her own behalf. He or she may confront persons who have given adverse information concerning the alleged violations, may cross-examine such persons, and may show that he or she did not violate the conditions of his or her probation or supervision or an order of the court or, if he or she did, that mitigating circumstances suggest that the violation does not warrant revocation of probation or supervision or a change of disposition. The hearing shall be held within a reasonable time after the juvenile is taken into custody*;

(iii) [authorizing hearing to be conducted in an informal manner];

(iv) [providing for a preliminary hearing when the juvenile is confined, detained, or otherwise significantly deprived of his or her liberty];

(v) *If the juvenile is found by the court to have violated the terms of his or her probation or supervision or an order of the court, the court may modify the terms and conditions of the probation, supervision, or other court order, extend the period of probation, supervision, or other court order, or enter any order of disposition that*

> *could have been made at the time the original order was entered*; and
>
> (vi) In cases when the court revokes probation, supervision, or other court order, it shall enter a written statement as to the evidence relied on and the reasons for revocation.

(Emphasis supplied.)

Under § 43-286(5)(b), a juvenile's disposition may not be changed in the absence of a motion to revoke probation or supervision or to change the disposition. Although the State filed such a motion, it withdrew the motion before it was heard. Thus, there was no hearing as contemplated in § 43-286(5)(b)(ii) to establish whether Josue violated a term of his probation, supervision, or court order. And without such a hearing, there could be no finding by the juvenile court under § 43-286(5)(b)(v) that Josue violated a term of his probation or an order of the court. Because there was no motion to revoke probation, the juvenile court lacked authority to extend Josue's probation and order that he engage in community service until employed.

For the sake of completeness, we note that § 43-286 was amended with an effective date of August 24, 2017.[5] However, the amendments do not diminish the statutory prerequisites to a juvenile court's authority to modify the terms and conditions of probation, extend the period of probation, or enter a different order of disposition. And we are aware that another statute was amended, with the same effective date, to authorize a juvenile court at any time during probation to "reduce or eliminate any of the conditions imposed on the juvenile."[6] But, obviously, that provision does not authorize an extension of the length of probation or an increase in the terms of probation.

The conclusion that the statutory procedure in § 43-286 must be followed in order to change the terms of a juvenile's

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[5] See Neb. Rev. Stat. § 43-286 (Supp. 2017).

[6] Neb. Rev. Stat. § 43-286.01(10) (Supp. 2017).

existing disposition is amply supported by case law.[7] The Nebraska Court of Appeals recently discussed this case law in detail,[8] and we need not repeat that discussion here. Suffice it to say, both this court and the Court of Appeals have held that once a court has entered a disposition, it is plain error to change that disposition in the absence of compliance with the applicable statutory procedures.[9]

Because the juvenile court changed the preexisting disposition in the absence of an appropriate motion and without complying with the applicable statutory procedures, it exceeded its authority. We vacate the juvenile court's July 7, 2017, order.

[4] Josue also argues that the juvenile court violated his due process rights. We do not reach this argument. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[10] As discussed above, the court changed Josue's dispositional order in the absence of a motion and without a hearing to determine whether Josue violated a term of his probation or court order. Because the juvenile court exceeded its statutory authority, no further analysis is needed.

CONCLUSION

Because the juvenile court exceeded its statutory authority in changing the terms of Josue's probation, we vacate the juvenile court's July 7, 2017, order and remand the cause to the juvenile court for further proceedings consistent with this opinion.

Vacated and remanded.

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[7] See, *In re Interest of Alan L., supra* note 4; *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008); *In re Interest of Iyana P.*, 25 Neb. App. 439, 907 N.W.2d 333 (2018); *In re Interest of Torrey B.*, 6 Neb. App. 658, 577 N.W.2d 310 (1998).

[8] *In re Interest of Iyana P., supra* note 7.

[9] See, *In re Interest of Markice M., supra* note 7; *In re Interest of Torrey B., supra* note 7.

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

Nebraska Supreme Court
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State of Nebraska, appellee, v.
Victor Jensen, appellant.
910 N.W.2d 155

Filed April 26, 2018. No. S-17-835.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Judgments: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. 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. But an appellate court independently reviews questions of law in appeals from the county court.
3. **Records: Appeal and Error.** An appellant has the responsibility to present a record that permits appellate review of the issue assigned as error.

Appeal from the District Court for Burt County, John E. Samson, Judge, on appeal thereto from the County Court for Burt County, C. Matthew Samuelson, Judge. Judgment of District Court affirmed.

Victor Jensen, pro se.

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

Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Harder and Noakes, District Judges.

Cassel, J.

INTRODUCTION

Victor Jensen had been allowed to proceed in forma pauperis (IFP) at various times throughout the pendency of his criminal case, which commenced in 2011. In 2016, he sought to have the county "pay" or waive his probation fees and court costs. The county court denied the request, and the district court affirmed. Because Jensen did not present evidence as to his financial condition at the time of the hearing on his motion and the record is inadequate to show that the county court erred in not waiving the court costs, we affirm the district court's decision.

BACKGROUND

Proceedings in County Court

In 2014, the county court convicted Jensen of certain crimes. It imposed a jail sentence, ordered Jensen to pay $3,000 in fines and $39.85 in costs, sentenced him to 24 months' probation, and ordered him to pay $600 in probation fees. After Jensen's appeals were resolved and jurisdiction returned to the county court, Jensen apparently filed a motion on May 25, 2016, seeking payment of four items, including probation fees and court costs. This motion is not in our record, but it is referred to in a county court order.

On December 20, 2016, and January 24, 2017, the county court evidently held hearings. Our bill of exceptions does not contain a verbatim transcription of those hearings; instead, it includes exhibits offered at the December 2016 hearing. According to a subsequent order of the county court, it received the exhibits. Many of the exhibits were poverty affidavits and filings to proceed IFP at various times during the pendency of the case and appeals therefrom. The evidence contained a July 2012 financial affidavit and order permitting Jensen to proceed IFP and directing that costs not already paid as of that date be paid by the county. It contained a January 2013 affidavit of poverty and order sustaining Jensen's motion to appeal IFP to

this court. The evidence also contained an August 2014 poverty affidavit and order by the county court allowing Jensen to prosecute an appeal IFP to the district court. And the evidence reflects that a February 2015 order granted Jensen's request to proceed IFP on appeal.

On January 24, 2017, the county court entered a journal entry and order concerning the motion for fees. As relevant to this appeal, the court denied Jensen's requests for a $600 payment for probation fees. The court also denied Jensen's request for $39.85 in court costs, stating that the court "believes this amount was not included in the District Court's Order to proceed [IFP]."

Proceedings in District Court

Jensen appealed to the district court. In a statement of errors, he claimed that the county court erred by denying "waver/payment of probation fees" and by not "wavering/paying all court costs."

During a hearing on Jensen's appeal, Jensen directed the court to a 2012 order granting his affidavit and application to proceed IFP. The court observed that the order and financial affidavit predated the county court order at issue by 4½ years. The court inquired whether there was any evidence "more current that would show [Jensen was] still indigent back in January of 2017." Jensen confirmed that there was no new financial affidavit at the time of that hearing. The district court affirmed the county court's order.

Jensen filed a timely appeal, and we moved the case to our docket.[1]

ASSIGNMENTS OF ERROR

Jensen assigns that the district court erred in (1) using January 24, 2017, to determine his indigency; (2) not finding him to be indigent; (3) finding insufficient evidence to

[1] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

require the county to pay his probation fees; and (4) finding insufficient evidence to require the county to waive or pay his court costs.

STANDARD OF REVIEW

[1] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.[2]

[2] Both the district court and a higher appellate court generally review appeals from the county court for error 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 neither arbitrary, capricious, nor unreasonable. But an appellate court independently reviews questions of law in appeals from the county court.[3]

ANALYSIS

Jensen argues that the district court erred in using the date of January 24, 2017, to determine whether he was indigent and in finding that he was not indigent. Jensen mischaracterizes the district court's actions.

The district court, acting as an intermediate court of appeal, was limited in its review to an examination of the record for error or abuse of discretion.[4] Thus, it was compelled to review the record before the county court at the time of its January 24, 2017, order to determine whether the county court erred in denying Jensen's request for waiver of probation fees and costs. The district court made no finding that indigency was determined on that date or that Jensen was not indigent. Instead, the district court affirmed the county court's order concerning probation fees and court costs.

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[2] *State v. Todd*, 296 Neb. 424, 894 N.W.2d 255 (2017).

[3] *Id.*

[4] See *id.*

Jensen's brief directs us to two statutes, but they have not gone into effect. He argues that under Neb. Rev. Stat. §§ 29-2206 and 29-2208 (Supp. 2017), a sentencing judge does not need a separate hearing to determine indigency. But because those statutes have an operative date of July 1, 2019, they have no application here.

[3] Jensen failed to produce evidence to show indigency at the time his request was heard. An appellant has the responsibility to present a record that permits appellate review of the issue assigned as error.[5] Although Jensen produced financial affidavits and orders allowing him to proceed IFP at various times between 2012 and 2015, he supplied no evidence to show his financial condition at the time of the hearings in December 2016 and January 2017. It is Jensen's financial condition at the time his request was heard that is of importance. If, for instance, Jensen had recently become a millionaire, it would be preposterous to suggest that he should be excused from paying probation fees because he earlier had been a pauper. We note that our own court rule requires an application to proceed IFP and accompanying poverty affidavit to be executed no more than 45 days prior to the filing of the notice of appeal.[6] The stale financial affidavits and earlier orders allowing Jensen to proceed IFP are inadequate to show his financial condition at the time of the hearings.

For much the same reason, Jensen failed to demonstrate that his probation fee should be waived. Neb. Rev. Stat. § 29-2262.06(4) (Reissue 2016) states:

> The court shall waive payment of the monthly probation programming fees in whole or in part if after a hearing a determination is made that such payment would constitute an undue hardship on the offender due to limited income, employment or school status, or physical or mental handicap. Such waiver shall be in effect only during

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[5] See *State v. Lester*, 295 Neb. 878, 898 N.W.2d 299 (2017).

[6] See Neb. Ct. R. App. P. § 2-101(B)(4) (rev. 2015).

> the period of time that the probationer or participant in a non-probation-based program or service is unable to pay his or her monthly probation programming fee.

But the record before us contains no evidence that payment of the monthly probation fee would constitute an undue hardship on Jensen. Evidence that courts had previously allowed Jensen to proceed IFP simply has no bearing on whether he was unable to pay a monthly probation fee in January 2017.

The inadequate record also dooms Jensen's claim regarding court costs. He argues that because he had been allowed to proceed IFP, the county should pay or waive the court costs of $39.85. The parties agree that there is nothing to identify the costs. An order contains a notation of $31 for "Court Costs" and $8.85 for "Other." In denying Jensen's request, the county court stated that it believed those costs were not included in the district court's order to proceed IFP. Jensen has failed to present a record to demonstrate that the county court's conclusion was erroneous. Accordingly, the district court did not err in affirming the county court's order.

CONCLUSION

Because the record fails to demonstrate that payment of the monthly probation fee would constitute an undue hardship on Jensen or that the county should pay or waive $39.85 in court costs, the district court did not err in affirming the county court's denial of Jensen's requests to waive probation fees and court costs. We therefore affirm the district court's order affirming the order of the county court.

Affirmed.

Heavican, C.J., not participating.

Nebraska Supreme Court
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Nebraska Protective Services Unit, Inc., doing business as Fraternal Order of Police Lodge #88, appellant, v. State of Nebraska and Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees (NAPE/AFSCME), appellees.

910 N.W.2d 767

Filed April 26, 2018. No. S-17-916.

1. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Administrative Law: Appeal and Error.** A court accords deference to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.
3. **Commission of Industrial Relations: Administrative Law.** Under Neb. Rev. Stat. § 48-809 (Cum. Supp. 2016), the Commission of Industrial Relations promulgated the Rules of the Nebraska Commission of Industrial Relations 9 (rev. 2015) to govern the processes of decertifying the existing collective bargaining agent for a particular bargaining unit.
4. ____: ____. The Commission of Industrial Relations is an administrative agency empowered to perform a legislative function.
5. **Administrative Law.** Generally, for purposes of construction, a rule or order of an administrative agency is treated like a statute.
6. ____. Absent a statutory or regulatory indication to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
7. ____. A rule is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.

8. **Commission of Industrial Relations: Administrative Law: Labor and Labor Relations: Contracts: Pleadings: Time.** For each agreement, contract, or understanding subject to the Rules of the Nebraska Commission of Industrial Relations 9(II)(C)(1) (rev. 2015) and a statutory bargaining period, a particular party may file a petition only within the period that occurs earlier in its particular circumstances.
9. **Commission of Industrial Relations: Administrative Law: Public Officers and Employees: Pleadings: Time.** Public employee bargaining units, created pursuant to Neb. Rev. Stat. § 81-1369 et seq. (Reissue 2014), must file any petition, under the Rules of the Nebraska Commission of Industrial Relations 9(II)(C)(1) (rev. 2015), during the period preceding the commencement of the statutorily required bargaining period in § 81-1379.

Appeal from the Commission of Industrial Relations. Affirmed.

Gary L. Young and Thomas Fox, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellant.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellee Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees (NAPE/AFSCME).

No appearance for appellee State of Nebraska.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Derr and Urbom, District Judges.

Funke, J.

The appellant, Nebraska Protective Services Unit, Inc. (NPSU), doing business as Fraternal Order of Police Lodge #88, filed a petition with the Commission of Industrial Relations (CIR) requesting decertification of the certified collective bargaining agent for the protective service bargaining unit (PSBU) and certification of itself as PSBU's new collective bargaining agent. The CIR ruled the petition was not

timely filed, under CIR rule 9(II)(C)(1),[1] and dismissed the petition. We affirm.

BACKGROUND

The State Employees Collective Bargaining Act[2] created the PSBU to represent the State of Nebraska "institutional security personnel, including correctional officers, building security guards, and similar classes."[3]

The Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees (NAPE/AFSCME), has been the certified collective bargaining agent for the PSBU since a 1991 election. As PSBU's exclusive bargaining agent, NAPE/AFSCME is responsible for representing all PSBU employees in negotiating biennial collective bargaining agreements with the State of Nebraska, pursuant to § 81-1377(4).

The 2015-17 collective bargaining agreement between the State and PSBU was set to expire on June 30, 2017. In September 2016, NAPE/AFSCME, as PSBU's collective bargaining agent, and the State began negotiations for a 2017-19 collective bargaining agreement, pursuant to § 81-1379. Negotiations for the agreement were completed in January 2017, and the contract was subsequently ratified by a PSBU employees' vote and signed by representatives of both parties. The 2017-19 collective bargaining agreement had an effective date of July l, 2017.

In late August 2016, certain PSBU employees decided to attempt to decertify NAPE/AFSCME as PSBU's exclusive bargaining agent. In October, these PSBU employees formed NPSU to organize the decertification effort and affiliated the organization with the Fraternal Order of Police as Lodge #88.

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[1] See Rules of the Nebraska Commission of Industrial Relations 9(II)(C)(1) (rev. 2015).

[2] Neb. Rev. Stat. § 81-1369 et seq. (Reissue 2014).

[3] § 81-1373(1)(f).

On March 3, 2017, the NPSU filed a petition with the CIR, requesting a combination election to determine whether PSBU members wanted to (1) decertify NAPE/AFSCME as its bargaining unit and (2) certify NPSU as its new collective bargaining unit. The CIR clerk certified the signatures of 683 PSBU employees, or 43 percent of the total employees, supporting the election requested by NPSU.

The CIR determined that NPSU had made a sufficient showing of interest to warrant an election, but it ruled an election would not be held and dismissed the petition, because NPSU failed to comply with the timeframe expressly required by rule 9(II)(C)(1). The CIR specifically rejected NPSU's argument that a memorandum from CIR clerk Annette Hord, dated December 29, 1999 (Hord memo), interpreted rule 9(II)(C)(1) to permit public employee bargaining units to file within a later period, which NPSU had complied with.

NPSU filed a timely appeal to the Nebraska Court of Appeals, which was removed to this court by order of the clerk of the Supreme Court.[4]

ASSIGNMENTS OF ERROR

NPSU assigns, restated and consolidated, that the CIR erred in (1) finding that it did not timely file its petition, under rule 9(II)(C)(1); (2) not ordering an election to be held; and (3) dismissing its petition.

STANDARD OF REVIEW

Any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a

[4] See § 81-1387(3).

preponderance of the competent evidence on the record considered as a whole.[5]

[1,2] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[6] However, we accord deference to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.[7]

ANALYSIS

The Industrial Relations Act vests authority in the CIR to "determine questions of representation for purposes of collective bargaining for and on behalf of public employees"[8] but prohibits it from "order[ing] an election until it has determined that at least thirty percent of the employees in an appropriate unit have requested in writing that the [CIR] hold such an election."[9] Further, it provides that the CIR "may adopt all reasonable and proper regulations to govern its proceedings [and] the filing of pleadings."[10]

[3] Under this authority, the CIR promulgated rule 9 to govern the processes of decertifying the existing collective bargaining agent for a particular bargaining unit. Regarding the period that the decertification process must be initiated within, CIR's rule 9 provides:

> **II. Petitions Filed by an Employee, Employees, or a Labor Organization:**
>
> . . . .

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[5] § 81-1387(4).

[6] *In re Estate of Vollmann*, 296 Neb. 659, 896 N.W.2d 576 (2017).

[7] *Melanie M. v. Winterer*, 290 Neb. 764, 862 N.W.2d 76 (2015).

[8] Neb. Rev. Stat. § 48-838(1) (Cum. Supp. 2016). See, also, § 81-1372.

[9] § 48-838(3).

[10] Neb. Rev. Stat. § 48-809 (Cum. Supp. 2016).

> C. Such a petition may only be filed:
>
> 1. Between the one-hundred twentieth (120th) day and the sixtieth (60th) days preceding either;
>
> a. Termination of an existing agreement, contract or understanding, or
>
> b. Preceding commencement of a statutorily required bargaining period, whichever is earlier.

The State Employees Collective Bargaining Act mandates that "[a]ll contracts involving state employees and negotiated pursuant to the Industrial Relations Act or the State Employees Collective Bargaining Act shall cover a two-year period coinciding with the biennial state budget . . . ."[11] Further, the State Employees Collective Bargaining Act requires:

> The Chief Negotiator and any other employer-representative and the exclusive collective-bargaining agent shall commence negotiations on or prior to the second Wednesday in September of the year preceding the beginning of the contract period, except that the first negotiations commenced by any bargaining unit may commence after such September date in order to accommodate any unresolved representation proceedings. All negotiations shall be completed on or before March 15 of the following year.[12]

Both parties assert that rule 9(II)(C)(1) is unambiguous regarding the time in which a petition to decertify a collective bargaining agent may be filed.

NPSU contends that rule 9(II)(C)(1) permits it to choose to file its petition within either filing period. It contends that the disjunctive terms "either" and "or" mean that a party may choose between the two periods and that the phrase "whichever is earlier" does not restrict a party to a single period but, instead, simply requires a party to file its petition during the

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[11] § 81-1377(4).

[12] § 81-1379.

next available period after deciding to decertify the collective bargaining agent. It cites the Hord memo as interpreting the rule as such.

NAPE/AFSCME contends that the phrase "whichever is earlier" is a qualifying factor to the disjunctive terms that limit the filing options available to a particular bargaining unit based on its circumstances. It argues that we should defer to the CIR's interpretation, in this case, and that the Hord memo is not authoritative and not inconsistent with the CIR's interpretation.

[4-7] The CIR is an administrative agency empowered to perform a legislative function.[13] Generally, for purposes of construction, a rule or order of an administrative agency is treated like a statute.[14] Absent a statutory or regulatory indication to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.[15] A rule is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.[16] As mentioned above, we accord deference to an agency's interpretation of its own rules unless plainly erroneous or inconsistent.[17]

[8] We find that the language of rule 9(II)(C)(1) is not ambiguous or open to interpretation, and therefore, we do not consider the rules of construction suggested by the parties. As NPSU argues, "the word 'or', when used properly, is disjunctive."[18] Accordingly, rule 9(II)(C)(1) permits a petition

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[13] *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, 284 Neb. 109, 817 N.W.2d 250 (2012).

[14] *In re Petition of Golden Plains Servs. Transp.*, 297 Neb. 105, 898 N.W.2d 670 (2017).

[15] *Id.*

[16] See *id.*

[17] *Melanie M., supra* note 7.

[18] Brief for appellant at 20, citing *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011). See, also, *State v. Rask*, 294 Neb. 612, 883 N.W.2d 688 (2016).

to be filed within one of the two periods stated in the rule. However, as NAPE/AFSCME argues, the phrase "whichever is earlier" is an express qualifying factor that limits the option available to a particular party. Therefore, for each agreement, contract, or understanding subject to rule 9(II)(C)(1) and a statutory bargaining period, a particular party may file a petition only within the period that occurs earlier in its particular circumstances.

[9] In the case of public employee bargaining units, created pursuant to the State Employees Collective Bargaining Act, the only period available to file a petition is the period preceding the commencement of a statutorily required bargaining period. Unlike other bargaining units under the Industrial Relations Act, all public employee bargaining units are subject to the bargaining period under § 81-1379, which commences on the second Wednesday in September of the year preceding the beginning of the contract period.

This interpretation is consistent with the CIR's decision in this case. Accordingly, the CIR's decision was not contrary to law. In addition, as stated above, the CIR was specifically granted the authority to promulgate rule 9. Further, because the interpretation of rule 9 is a question of law, the other grounds for reversing its decision, under § 81-1387(4), do not apply.

We do not consider whether the Hord memo is an authoritative interpretation by the CIR, because we do not find its statements inconsistent with the plain meaning of the statute. The Hord memo stated, in relevant part, the following:

> [The CIR clerk has] included information regarding the rules that have been amended or added and a brief explanation of the reason for the change or addition.
>
> . . . .
>
> Rules 9C and 9G have been amended to allow entities that have statutorily required bargaining periods the option to file a petition for decertification, whether it be by the employer or by an employee, employees, or a

labor organization, in a time period between the 120th and 60th day preceding the commencement of that statutorily required bargaining period.

The use of the word "option" in the Hord memo did not indicate that a party could choose between the two options but merely conveyed that parties subject to a statutorily required bargaining period could now file a petition in a different period than the one that was previously available, i.e., "[b]etween the one-hundred twentieth (120th) day and the sixtieth (60th) days preceding [the t]ermination of an existing agreement, contract or understanding."[19] A party still retains the option to file no petition at all. Additionally, were we to read the Hord memo as NPSU suggests, it would not be entitled to deference based on its inconsistency with the inclusion of the phrase "whichever is earlier" in rule 9(II)(C)(1).

Because NPSU did not file its petition in the period required under rule 9(II)(C)(1), its petition was time barred. Therefore, the CIR did not err in denying NPSU's request for an election and dismissing the complaint.

CONCLUSION

For the reasons set forth herein, we affirm the judgment of the CIR.

Affirmed.

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[19] CIR rule 9(II)(C)(1)(a).

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

State of Nebraska, appellee, v. Kirk A. Botts, appellant.

910 N.W.2d 779

Filed May 4, 2018. No. S-16-985.

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 protection is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Trial: Investigative Stops: Warrantless Searches: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
3. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
4. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen, and such encounters are outside the realm of Fourth Amendment protection.
5. **Police Officers and Sheriffs: Search and Seizure.** A tier-two police-citizen encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning.
6. **Police Officers and Sheriffs: Search and Seizure: Arrests.** A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention.

7. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
8. **Criminal Law: Warrantless Searches: Probable Cause.** Probable cause to support a warrantless arrest exists only if law enforcement has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime. Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.
9. **Probable Cause: Appeal and Error.** An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.
10. **Police Officers and Sheriffs: Probable Cause.** In assessing probable cause, an officer's relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts.

Petition for further review from the Court of Appeals, Inbody, Pirtle, and Riedmann, 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.

Matthew K. Kosmicki, of Brennan & Nielsen Law Offices, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, and Funke, JJ., and Derr and Urbom, District Judges.

Heavican, C.J.

INTRODUCTION

We granted the State's petition seeking further review of the decision of the Nebraska Court of Appeals, remanding the cause with directions to vacate Kirk A. Botts' conviction and to dismiss the charge against him. We reverse the decision of the Court of Appeals and remand the cause with directions.

FACTUAL BACKGROUND

Botts was charged with possession of a deadly weapon by a prohibited person under Neb. Rev. Stat. § 28-1206 (Reissue 2016). Botts' motion to suppress was denied. Following a jury trial, Botts was convicted and eventually sentenced to 1 year's imprisonment and 1 year of postrelease supervision.

Botts appealed to the Court of Appeals, assigning that the district court erred in denying his motion to suppress. The Court of Appeals agreed, concluding there was not probable cause to arrest Botts and that the inventory search of his vehicle must be suppressed.

Facts Leading to Arrest and Search.

The Court of Appeals set forth the following facts in its opinion:

> Officer Jason Drager of the Lincoln Police Department testified that on March 10, 2016, around 2:30 a.m., he was driving back to the police station in his police cruiser. While driving, he saw a vehicle on a side street that was not moving and was partially blocking the roadway. The vehicle was situated at an angle, with the front end by the curb and the back end blocking part of the street. Drager thought maybe there had been an accident. He turned down the street and saw an individual standing by the driver's side of the vehicle. Drager turned on his cruiser's overhead lights, parked his cruiser behind the vehicle, and contacted the individual, later identified as Botts. He asked Botts "what was wrong," and Botts initially told Drager "to mind [his] own business." When Drager asked Botts again about what had happened, Botts told him "he was out of gas and was trying to push the vehicle to the side of the road." Drager testified that he did not recall Botts' saying that he drove the vehicle there. Botts asked Drager if he could help him, and Drager told him he could not help, based on Lincoln Police Department policy.

Drager testified that he decided he should remain at the location because Botts' vehicle was blocking the roadway and could cause an accident. Drager then stood back by his cruiser and watched Botts push the vehicle back and forth. Drager stated that Botts became "verbally abusive" toward him after he said he could not help him, so Drager decided to ask other officers to come to the location "for safety purposes." Three other officers responded.

One of the officers who responded, Officer Phillip Tran, advised Drager that he had stopped Botts a couple hours earlier that night for traffic violations. Drager testified that Tran told him he had detected an odor of alcohol on Botts at the time of the earlier stop. Based on the information from Tran, Drager decided to approach Botts and ask him if he had been drinking. Drager testified that when he asked Botts if he had been drinking, Botts became angry, started yelling, and started backing up away from him.

Drager testified that Botts' demeanor led him to believe Botts was under the influence of "some kind of alcohol or drug." However, Drager testified that he did not believe alcohol or drugs were affecting Botts' ability to answer questions. Drager did not recall Botts' stating that he had been drinking.

Drager testified that Botts backed up to the other side of the street and stopped with his back against a light pole. When he was backing up, he was not coming at the officers and was not making threats. The four officers surrounded Botts by the light pole. Botts started yelling "something along the line of shoot me, shoot me." Drager testified that Officer David Lopez, one of the officers at the scene, pulled out his Taser for safety purposes and to try to get Botts to comply with their request to put his hands behind his back. He eventually did so and was handcuffed and placed in the back of Drager's cruiser.

Drager testified that the officers were telling Botts to put his hands behind his back for their safety and Botts' safety. Drager stated that he was concerned for his safety because Botts was being verbally abusive.

Drager testified that after Botts was arrested, the officers decided to tow Botts' vehicle because it was blocking the road. He stated that it is Lincoln Police Department policy to search vehicles that are going to be towed. Tran began to search the vehicle and saw the handle of a machete sticking out from underneath the driver's seat. Drager testified that after discovering the machete, Botts was under arrest for being in possession of a concealed weapon.

Tran also testified at the motion to suppress. He testified that he had contact with Botts around midnight on March 10, 2016, a couple hours before Drager made contact with him. Tran testified that he stopped Botts for not having his headlights on and for driving erratically. Tran testified that during that contact, he noticed a "slight odor of alcohol," and that Botts "and another person in the vehicle had just purchased some alcohol." Botts was the driver of the vehicle, and there was more than one passenger. Tran testified that he did not initiate a driving under the influence investigation because he did not see enough signs to believe that Botts was intoxicated.

Tran testified that he and another officer responded to Drager's call for assistance and that when they arrived, he told Drager about his previous contact with Botts. Tran testified that Drager and Lopez then made contact with Botts at his vehicle, at which time Botts' statements and demeanor became erratic. Tran stated Botts backed away from the two officers and was making statements such as "shoot me, kill me, things like that." He also heard Botts make statements indicating the police were harassing him and treating him differently because of his race. Tran testified that Botts backed up and stopped with his back against a light pole and that the four officers were

around Botts. One of the officers asked Botts to put his hands behind his back, and Botts responded that he was not doing anything wrong. Tran testified that during that time, Lopez had his Taser out. Botts eventually put his hands behind his back and was handcuffed.

Tran testified that as soon as Botts was handcuffed, he walked over to Botts' vehicle and looked inside the driver's side front window, which was rolled down. He then saw the handle of a machete sticking out from under the driver's seat. He retrieved the machete out of the vehicle after it was decided that the vehicle would be towed. He testified that the officers were required to do an inventory search every time a vehicle is towed.[1]

Issues on Appeal and Decision of Court of Appeals.

On appeal, Botts contended that the district court erred in denying his motion to suppress. As noted, the Court of Appeals agreed, holding that Botts' arrest was made without probable cause and that the resulting inventory search was invalid. The Court of Appeals remanded the cause with directions to the district court to vacate Botts' conviction:

> The State contends that the officers had probable cause to believe that Botts had committed the offense of driving under the influence. The evidence showed that Tran had stopped Botts around midnight for traffic offenses and detected a "slight odor of alcohol" and noted that Botts and another person in the vehicle had recently purchased alcohol. Botts was driving, and there were passengers in the vehicle. Tran did not initiate a driving under the influence investigation, because he did not see signs of intoxication. When Drager contacted Botts around 2:30 a.m., about 2½ hours after Tran had stopped Botts, Botts was pushing a vehicle that was inoperable. Botts told Drager that his vehicle had run out of gas and that he was trying

[1] *State v. Botts*, 25 Neb. App. 372, 374-77, 905 N.W.2d 704, 708-10 (2017).

to get it to the side of the road. Botts asked Drager for help, and Drager told him he could not help him based on Lincoln Police Department policy. This apparently upset Botts. Botts continued pushing his vehicle and trying to maneuver it to the side of the road while Drager stood back by his cruiser and watched.

It was not until Tran arrived at the scene and told Drager about the earlier stop that Drager decided to approach Botts face to face and ask him if he had been drinking. At this point, all Drager knew was that Tran had smelled an odor of alcohol on Botts and that there was alcohol in the vehicle at the time Tran stopped him. Neither Drager nor any of the officers testified that they smelled an odor of alcohol on Botts. Drager also did not recall Botts' indicating that he had been drinking.

Drager testified that Botts' demeanor led him to believe he was under the influence of alcohol or drugs. However, Botts' demeanor could also be attributed to Drager's telling Botts he could not help him push the vehicle. Drager testified that it was at that point Botts became "verbally abusive" toward him. Botts also indicated that he believed the police were harassing him and that he was being treated differently because of his race.

In addition, Drager did not know if Botts had driven the vehicle to the location where Drager found it. He never saw him in the vehicle, and Botts never indicated that he had been driving the vehicle. The officers did not have probable cause to believe that Botts had been driving under the influence of alcohol.

We conclude that Botts was seized at the time the officers surrounded him by the light pole and Lopez had his Taser drawn and that the officers did not have probable cause to arrest him at that time. Consequently, the trial court erred in overruling Botts' motion to suppress.[2]

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[2] *Id.* at 382-83, 905 N.W.2d at 713.

ASSIGNMENTS OF ERROR

The State filed a petition for further review, arguing that the Court of Appeals erred in holding that (1) Botts was seized at the time he was handcuffed and not at the time he was surrounded by the officers and (2) Botts' arrest was made without probable cause.

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. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[3] The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.[4]

[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.[5]

ANALYSIS

Classification of Police-Citizen Encounters.

[4-6] There are three tiers of police-citizen encounters. A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen.[6]

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[3] *State v. Woldt*, 293 Neb. 265, 876 N.W.2d 891 (2016).

[4] *Id.*

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

[6] *Id.*

Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection.[7] A tier-two police-citizen encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning.[8] A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention.[9] Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.[10]

[7] A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.[11] In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.[12] But an officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the person's movement.[13]

It is clear that the police-citizen encounter in the instant case began as a tier-one encounter and escalated to a tier-three encounter. The question presented here is when the encounter became a tier-three encounter, or an arrest.

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

The State contends that the Court of Appeals erred in finding that Botts was arrested for Fourth Amendment purposes when he was standing by the light pole surrounded by four officers, one with his Taser drawn. The State argues instead that Botts was seized for purposes of the Fourth Amendment when Officer Jason Drager approached Botts and asked if he had been drinking—a tier-two investigatory stop for purposes of a driving under the influence (DUI) investigation.

The State's characterization is supported by the record. Drager found Botts attempting to push his vehicle, which had stalled on the side of the road. Botts explained that he had run out of gas, but at the time, Drager had no independent confirmation of that fact. Upon his arrival on the scene, Officer Phillip Tran informed Drager that a few hours earlier, Tran had stopped Botts in his vehicle for driving erratically, driving without his headlights on, and failing to signal his turn. Tran also testified he informed Drager that he had smelled the odor of alcohol coming from Botts' vehicle and that he saw alcohol in the vehicle. In addition, Drager testified at the motion to suppress hearing that Botts' "behavior would have led me to believe that he was under the influence of something, just his demeanor and how upset he was. I would have guessed he was under some kind of alcohol or drug." Based upon his own observations and the information he obtained from Tran, Drager testified that he approached Botts with the intent to begin a DUI investigation.

Although the Court of Appeals concluded that Botts was not seized until later, we conclude that Botts' seizure began at the time Drager approached him to begin the DUI investigation. But this does not end our inquiry.

The Court of Appeals concluded that not only was Botts seized when he was surrounded by officers—and one of those officers drew his Taser—but that Botts was arrested at that time as well. The State disagrees, again contending that Botts was not arrested until he was handcuffed. The State argues that officers are permitted to take such steps as are "'reasonably

necessary to protect their personal safety and to maintain the status quo,'" so that the limited purposes of an investigatory stop may be achieved, and that doing so does not change an investigatory stop into an arrest.[14] In the State's view, all actions taken by the officers in advance of handcuffing Botts fall under this rule.

But in any case, the record shows that about 10 seconds elapsed between the time the officers surrounded Botts and the time Botts was handcuffed. Thus, for purposes of the real issue on appeal—whether there was probable cause to support Botts' arrest—it does not much matter at which of these two points in time the arrest occurred.

Probable Cause.

[8,9] The State next contends that the Court of Appeals erred in concluding there was not probable cause to support an arrest. Probable cause to support a warrantless arrest exists only if law enforcement has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.[15] Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.[16] An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.[17]

But, in the words of the U.S. Supreme Court, appellate courts should avoid an "'excessively technical dissection' of the factors supporting probable cause."[18] The test to be employed is

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[14] Memorandum brief in support of petition for further review for appellee at 9, quoting *United States v. Jones*, 759 F.2d 633 (8th Cir. 1985).

[15] *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

[16] *Id.*

[17] *Id.*

[18] *District of Columbia v. Wesby*, 583 U.S. 48, 60, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018).

whether the totality of the circumstances would suggest that probable cause existed.[19] It is improper to view

> each fact "in isolation, rather than as a factor in the totality of the circumstances." . . . The "totality of the circumstances" requires courts to consider "the whole picture." . . . Our precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation. . . .
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> . . . .
>
> . . . A factor viewed in isolation is often more "readily susceptible to an innocent explanation" than one viewed as part of a totality.[20]

[10] Thus, "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts."[21] In assessing probable cause, an officer's "'relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of noncriminal acts.'"[22]

The Court of Appeals concluded there was not probable cause to support Botts' arrest for DUI. But in reaching its conclusion, the Court of Appeals emphasized that there were innocent explanations for Botts' erratic behavior. Specifically, the Court of Appeals discounted the testimony regarding Botts' demeanor, suggesting that such behavior could be explained by Botts' being upset that Drager was not helping him push his vehicle, and noted that the officers testified they did not know whether Botts had driven the car to the location where it was found. In addition, the Court of Appeals noted that no officers testified they smelled the odor of alcohol on Botts during the latter stop, nor could Drager recall if Botts indicated that he had been drinking.

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[19] *Id.*

[20] *Id.*, 583 U.S. at 60-62 (citations omitted).

[21] *Id.*, 583 U.S. at 61.

[22] *Id.*

We conclude that the Court of Appeals erred in discounting the officers' assessment of probable cause based upon innocent explanations for Botts' suspicious behavior. Law enforcement is not required to rule out such explanations when assessing whether probable cause exists.

Botts and his vehicle were found stalled by the side of the road. Botts was acting erratically, and Drager in particular noted that Botts' behavior was suggestive of being under the influence of drugs or alcohol. Tran had notified Drager of the earlier stop of Botts and his vehicle for various traffic violations, that alcohol was present in Botts' vehicle, and that Tran had smelled alcohol during that earlier stop. When considered alongside the escalation of Botts' erratic behavior when Drager asked if he had been drinking, we conclude the officers had probable cause to arrest Botts for DUI. And because there was probable cause to support Botts' arrest, the inventory search of Botts' vehicle prior to its towing was authorized and the machete found in that search admissible.

We observe that the State also argues there was probable cause to arrest Botts for failure to comply with a lawful order. We need not reach that argument, because we conclude probable cause existed for a DUI arrest.

We conclude that the Court of Appeals erred in vacating Botts' conviction. Accordingly, we reverse the decision of the Court of Appeals and remand this appeal to that court to consider Botts' other assignments of error.

CONCLUSION

The Court of Appeals erred in vacating Botts' conviction. We reverse, and remand with directions.

Reversed and remanded with directions.

Stacy, J., not participating.

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

Kim M. Thompson, appellant, v. Aaron M. Johnson and Shawna L. Johnson, appellees.

910 N.W.2d 800

Filed May 4, 2018. No. S-17-445.

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. **Torts: Intent: Proof.** To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
4. **Torts: Employer and Employee.** Factors to consider in determining whether interference with a business relationship is "improper" include: (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties.
5. **Torts: Liability.** A person does not incur liability for interfering with a business relationship by giving truthful information to another. Such interference is not improper, even if the facts are marshaled in such a

way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking a contract or refusing to deal with another.

6. **Summary Judgment: Proof.** Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Douglas County, Horatio J. Wheelock, Judge, on appeal thereto from the County Court for Douglas County, Susan M. Bazis, Judge. Judgment of District Court affirmed.

Joy Shiffermiller and Abby Osborn, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Damien J. Wright, of Welch Law Firm, P.C., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, and Stacy, JJ., and Luther and O'Gorman, District Judges.

Luther, District Judge.

INTRODUCTION

This appeal arises from a lawsuit filed by Kim M. Thompson (Kim) in which she alleged that Aaron M. Johnson and Shawna L. Johnson tortiously interfered with her business relationship with her employer, Millard Public Schools (MPS). The county court for Douglas County granted Aaron and Shawna's motion for summary judgment, and the district court for Douglas County affirmed. Kim now appeals to this court. Kim asserts, in pertinent part, that the evidence shows a genuine issue of material fact concerning whether interference by Aaron and Shawna was justified. We conclude that the undisputed facts show that Aaron's and Shawna's actions were justified, because they provided truthful information to MPS. Therefore, we affirm the district court's order.

BACKGROUND

Parties

The undisputed evidence shows that Kim and Aaron met through their work with MPS. In her position as a project manager employed by MPS, Kim organized construction projects within the district. Aaron worked on construction projects for MPS as an independent contractor. At all times relevant to this appeal, Aaron was married to Shawna and they had children attending MPS. In October 2011, Kim and Aaron began an extramarital affair.

October 2012 Suspension

In October 2012, Shawna learned of the affair between Kim and Aaron. Aaron ended the affair and informed MPS that he would no longer work with Kim. Following an investigation, MPS discovered that Kim had used MPS' computers "to communicate inappropriate messages and pictures" with Aaron, in violation of MPS policy. As a result, MPS suspended Kim for 8 days without pay.

Continued Contact and March 2014 Directives

Kim and Aaron continued to have contact with each other. On February 26, 2014, in response to an email from Kim in which she stated that Aaron did not care about her, Aaron wrote, "If I didn't care about you at all, why would I have ever agreed to talk to you? . . . If I didn't care and I wanted to go into your boss and get you fired, and ruin your life, I could have done it long ago."

Not long afterward, new concerns about Kim's job performance prompted a meeting between her and MPS officials. At the meeting on March 3, 2014, MPS officials addressed the issue of an angry and loud telephone call that Kim had conducted with her ex-husband in the workplace and allegations that Kim had gone through documents on her supervisor's desk.

During the meeting process, Kim volunteered that she was having issues with Aaron and Shawna. Kim stated to MPS officials that in November 2013, Aaron had shown up at her workplace demanding to speak to her and threatening to cause a scene. Kim told MPS officials that to process her feelings after "good talks" with Aaron in the summer of 2013, she had painted a painting of her and Aaron and posted it on Facebook, initially identifying the two by name. She stated that when Aaron asked her to remove the painting, she removed the identifying names, but she did not remove the painting. Kim reported that this caused Aaron to threaten to call her supervisor and jeopardize her employment. Kim also told MPS officials that Shawna had been stalking Kim's Facebook page.

On March 7, 2014, MPS wrote a letter to Kim documenting the topics discussed and the expectations communicated at the March 3 meeting. In part, the letter stated:

> **ISSUE #5:** The issue of your relationship with the person who almost cost you your job (Aaron) came up repeatedly . . . . This is related to the affair you had with Aaron (a former contractor for the District) in 2012 that was dealt with in your reprimand and suspension letter from late 2012.
>
> . . . .
>
> **EXPECTATION:** . . .
>
> . . . .
>
> We discussed how your affair with Aaron almost cost [you] your job before. Now, you appear to be escalating a confrontation with Aaron and his wife by posting on a public media page. . . . As we discussed, if you escalate this conflict and that escalation impacts [the] workplace, it is likely to lead to future discipline, up to and including termination.
>
> . . . .
>
> . . . Specifically, it is not our intention to take any action if Aaron or his wife reacts irrationally to a post that

> is not about them. However, if your communications can be reasonably interpreted as an escalation of that conflict and that conflict disrupts the workplace, we may not be able to support you.

Kim signed the document, acknowledging that she had received it.

Further Contact Between Parties, March to June 2014

On or about March 25, 2014, Shawna received a link from "Lisa Johnson," who claimed to be a friend of Kim's. The link invited Shawna to view a cloud account that contained over 200 documents showing communications between Kim and Aaron, to demonstrate to Shawna "what has been happening behind your back for the last year." "Lisa Johnson" claimed that she was able to access the information because Kim's password was easy to deduce. Shawna and "Lisa Johnson," who Shawna believed to be Kim, corresponded about the affair on Facebook, and Shawna used the format to tell Kim not to contact Aaron or Shawna again. On March 30, Aaron posted on the "Lisa Johnson" Facebook page, telling Kim to cease contact with him and his family.

On April 2, 2014, an attorney representing Aaron and Shawna sent a letter to Kim, telling her not to contact them. On April 9, an attorney for Kim sent a letter to Aaron and Shawna's attorney. The letter requested that Aaron not contact Kim at any location, including her workplace.

On April 14 and 23, 2014, Kim sent text messages to Aaron sarcastically praising Aaron's relationship with Shawna and expressing sadness over losing Aaron. On April 24, Shawna sent a long email message to Kim, telling her to stop contacting Aaron.

On April 28, 2014, Kim emailed Shawna an invitation to "Find me on Facebook." The email prompted Shawna to search Facebook, which led her to discover a Facebook page for "Kimberly Johnson." The "Kimberly Johnson" page consisted

of long, indepth journal-style posts related to Kim's affair with Aaron. This content was viewable to the public. Kim made similar posts on her "Kim Thompson" Facebook page. Kim continued to post on the Facebook pages with comments and questions specifically directed at Shawna.

On May 12, 2014, Shawna emailed Kim to arrange a meeting between Aaron, Shawna, and Kim to resolve the issues that had occurred. The meeting did not take place, but over the course of 5 days, Shawna and Kim exchanged a series of lengthy email messages, the tone of which ranged from vitriolic to sympathetic on both sides. Ultimately, Shawna asked for no further contact from Kim and shut down the email account that she had used to communicate with Kim.

Kim continued to post on her "Kimberly Thompson" Facebook page with comments directed at Aaron and Shawna. On May 31, 2014, Kim referenced Aaron and Shawna's children: "I burst out crying tonight just thinking about your boys [I] grew to love from just your stories. I am SO sad. I know it sounds crazy, but [I] feel like [I] lost them too."

On June 2, 2014, Kim reported to MPS that Shawna had posted on her Instagram account that Shawna had scheduled principal/parent meetings to discuss security concerns for her children due to an employee. Kim informed MPS that Aaron and Shawna had been "blocked" from her Facebook account.

On June 5, 2014, in a post directed at Shawna, Kim stated, "I do love your boys like my own, and I would never hurt them intentionally." Also on June 5, "Macy James" messaged the "Kimberly Thompson" Facebook account and stated, "I WILL follow through with the meetings scheduled this fall b/c you are unstable and should not have access to my kids in any way." Other elements of the message suggested that "Macy James" was likely Shawna.

On June 24, 2014, Kim sent a brief message to Aaron's work email account, calling him a "horrible person" and an "ugly man" with "no heart or a conscience." Aaron and Shawna

believed that this was the first time Kim had emailed that particular account. Shawna was concerned that Kim may have obtained the email address from MPS files for Aaron and Shawna's children, where the email address was listed as contact information. Further, Shawna was concerned, because, due to Kim's employment, Kim had access to MPS buildings; and Shawna thought it possible that Kim would attempt to involve her children in the situation or make contact with them to provoke a reaction from Aaron and Shawna.

July 2014 Termination

On July 2, 2014, Shawna emailed MPS to address the concerns that she and Aaron had for the safety and privacy of their children, whom Kim had not met. Shawna's email summarized the contact she and Aaron had with Kim beginning in 2012. Shawna further stated:

> Last week [Kim] emailed my husband's business email account . . . . The only way he or I can think she may have gotten this email account is through our children's confidential information held by the district . . . .
>
> . . . [W]e have sound reason to be concerned for the well[-]being of our children as [Kim] has access to all buildings in the district due to the nature of her job as I understand it. We are also very concerned that our privacy will inevitably be compromised so long as [Kim] works for MPS and our kids attend MPS. We are considering removing them from the district for this reason . . . .

Shawna requested a meeting on the matter, but she did not request any specific action relating to Kim. In an affidavit, Shawna specifically disclaimed sending the email with the intent of ending Kim's employment.

Shawna's email included a link to the "Kim Thompson" Facebook page and offered to provide additional documentation upon request. The same day, the director of human resources for MPS called Shawna and asked for additional

documentation. Shawna provided printouts of several Facebook postings, messages from Kim, and Shawna's own handwritten notes documenting her interactions with Kim.

During the resulting meeting with MPS on July 7, 2014, Kim admitted inviting Shawna to view her Facebook page and, except for some minor factual discrepancies, she admitted to posting the majority of the material provided by Shawna. MPS placed Kim on nondisciplinary, paid administrative leave while MPS investigated the matter. MPS officials told Kim not to have further contact with Aaron and Shawna until MPS decided how to proceed.

On July 8, 2014, the day after the meeting, Shawna received a notification from a social media website that Kim had "repinned [one] of [Shawna's] pins." MPS officials subsequently learned of this notification, which they considered contrary to the no-contact directive they had given to Kim.

MPS officials decided to terminate Kim's employment. At a deposition, MPS' director of employee relations explained that MPS officials based the decision on "insubordination, unprofessional conduct, just the continuation of the escalation of the conflict where she continued to post things that made it . . . uncomfortable with [Aaron and Shawna's] kids being in school as parents of the district, residents of the district, just inappropriate conduct." He also testified regarding why Thompson's employment was terminated in 2014 and not in 2012, when the affair first came to light:

> Q. Why wasn't [Kim] fired in 2012 when the affair was first discovered?
>
> A. . . . I recall the conversation being that she's had a fairly long tenure as a decent employee. Is there anything we can do to save her where she might change her behaviors? And at that point, it was thought there was a reasonable probability of success was the consensus if we allowed [Kim] to continue [her] job.
>
> Q. And in 2014, there was not the same feeling?
>
> A. Correct.

MPS officials offered Kim the option to resign in lieu of termination of her employment. Kim opted to resign.

Litigation

On September 14, 2015, Kim filed a lawsuit against Aaron and Shawna in the county court. She alleged, inter alia, a cause of action based on the theory of tortious interference with a business relationship. In part, she averred that Aaron and Shawna had "committed numerous unjustified intentional acts of interference in an attempt to cause [Kim] to lose her job at [MPS]" and that such interference was done with the intent or reasonably foreseeable effect of causing harm to Kim.

Aaron and Shawna filed a motion for summary judgment. Following a hearing on the motion, consisting of the evidence above, the county court granted summary judgment in favor of Aaron and Shawna and dismissed Kim's complaint, with prejudice. In part, the county court found that Aaron and Shawna were justified in contacting MPS due to concerns for their children and that Shawna's email did not cause termination of Kim's employment. Instead, the county court determined that Kim's own conduct and continued contact with Aaron and Shawna caused the termination.

Kim appealed the county court's order to the district court. After a hearing, the district court affirmed.

Kim now appeals to this court.

ASSIGNMENTS OF ERROR

Kim assigns, condensed and restated, that the county court erred in failing to find a genuine issue of material fact that precluded summary judgment against her claim of tortious interference with a business relationship.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or

as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

Kim appeals the order of the district court that affirmed the county court's order granting summary judgment in favor of Aaron and Shawna. For the benefit of judges and practitioners, we take this opportunity to note that, effective August 24, 2017, the Legislature modified Neb. Rev. Stat. § 25-1332 (Supp. 2017) to impose citation and argument requirements regarding assertions of disputed facts on summary judgment. But here, neither party assigns error based upon the new procedures.

[3] This appeal turns on a single theory of recovery: tortious interference with a business relationship. To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.[3] On appeal, Kim disputes the county court's findings that no genuine issue of material fact existed concerning whether Aaron's and Shawna's interference was unjustified and whether such interference caused Kim to lose her job with MPS.

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[1] *Benard v. McDowall, LLC*, 298 Neb. 398, 904 N.W.2d 679 (2017).

[2] *Id.*

[3] *Recio v. Evers*, 278 Neb. 405, 771 N.W.2d 121 (2009).

Whether Interference by Aaron and Shawna Was Unjustified

[4] To assist in determining whether interference is "unjustified" under the third prong of the foregoing test, Nebraska has adopted the seven-factor balancing test of the Restatement (Second) of Torts.[4] Under the Restatement's general test, factors to consider in determining whether interference with a business relationship is "improper" include: (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties.[5]

[5] Ordinarily, we would use these factors to determine whether interference is "improper" and, thus, "unjustified" under our law.[6] However, if the information provided is truthful, the interference is not unjustified.[7] We have expressly stated, "[A] person does not incur liability for interfering with a business relationship by giving truthful information to another."[8] Such interference is not improper, even if the facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking a contract or refusing to deal with another.[9] When truthful information provides the basis for a termination of a business relationship, the resulting liability, if any, should rest on the party who

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[4] See, *Sulu v. Magana*, 293 Neb. 148, 879 N.W.2d 674 (2016), citing *Recio v. Evers, supra* note 3; Restatement (Second) of Torts § 767 (1979).

[5] *Id.*

[6] See *Sulu v. Magana, supra* note 4.

[7] *Sulu v. Magana, supra* note 4; *Recio v. Evers, supra* note 3.

[8] *Recio v. Evers, supra* note 3, 278 Neb. at 421, 771 N.W.2d at 133.

[9] *Id.*

made an informed choice to terminate the relationship—not the party who provided the facts upon which that decision was based.[10]

Viewed in the light most favorable to Kim, the evidence demonstrates that Aaron and Shawna conveyed truthful information to MPS and that, therefore, such communication was not unjustified. First, in 2012, Aaron informed MPS of his affair with Kim. The entire record and Kim's suit are based on the truthfulness of that disclosure. Second, Shawna's July 2, 2014, email to MPS officials raised Aaron's and Shawna's concerns for the safety and privacy of their children. Shawna provided specific examples of Kim's questionable behavior that were either supported or undisputed by the record. Her email also included a link to Kim's "Kim Thompson" Facebook page, and Shawna later provided additional documentary evidence of Kim's online activity to MPS. When MPS confronted Kim with the documentation provided by Shawna, Kim admitted to posting the material, except for a few minor factual disputes. But the discrepancies noted by Kim did not establish any genuine issue of material fact about the truthfulness of Shawna's disclosures to MPS.

Thus, because Aaron and Shawna deduced evidence that their communications with MPS were truthful and therefore not "unjustified," they disproved an essential element of tortious interference with a business relationship and made a prima facie showing that they were entitled to summary judgment.

[6] Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.[11] Kim asserts that she presented evidence that Aaron's and Shawna's communications with MPS were not based in truth, thereby rebutting their position that those communications

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[10] *Id.*

[11] *Sulu v. Magana, supra* note 4.

were justified. She primarily attempts to raise factual disputes about Aaron's and Shawna's beliefs relating to the source of Aaron's work email address and about their concerns regarding the children that Shawna said prompted her July 2014 email to MPS. We find no merit to Kim's arguments.

Kim contends that Shawna's email falsely claimed that prior to the message Kim sent to Aaron's work email address in June 2014, Kim had not used that particular address. Kim cites to the record and claims that she used Aaron's work email address in February 2014. However, the February 2014 email address cited by Kim is different from the one she used in June 2014; and the record does not reveal any other instance of Kim's sending messages to that address or receiving messages from it. Additionally, we note that Shawna's email did not categorically assert that Kim had accessed the children's records to obtain Aaron's work email address, but, rather, stated that the children's records were the only source for the information that Aaron and Shawna could surmise. The record simply does not raise any dispute as to the truthfulness of Aaron's and Shawna's professed beliefs about the source of the email address.

Kim further attempts to discredit Shawna's concern for her children's safety because Kim had never met the children and because Shawna was aware, through the copious documents disclosed to her, that Kim had expressed to Aaron that she cared about the children. Similarly, Kim argues that the evidence does not support concern for the children on Aaron's part, because he and Kim had previously corresponded about the children and Kim's potential relationship with them. However, the record does not contradict the sincerity of the concerns that Shawna attributed to herself and to Aaron. In fact, the undisputed evidence demonstrates that Aaron and Shawna had ample reason to be concerned. After the affair ended, Kim made varied, time-consuming, and at times underhanded efforts to engage Aaron and Shawna in intense discussions about the affair and about Aaron and Shawna as individuals.

These communications included references to Aaron and Shawna's children, to whom Kim had potential access through her employment. Certainly, Aaron's and Shawna's communications with Kim contributed to escalating tensions with her. But their participation does not negate the truthfulness of their reports to MPS concerning their interactions with Kim.

Kim also tries to refute the veracity of Aaron's and Shawna's concerns by citing their previous "threats" and actions to jeopardize Kim's employment. She specifically refers to Shawna's Instagram post, messages authored by "Macy James," the February 2014 email to Kim from Aaron, and Aaron's attempts to contact her at MPS. According to Kim, this evidence reflects the intent to have Kim's employment terminated. We note that Shawna expressly denied that she intended to end Kim's employment by emailing MPS. Furthermore, we have previously observed that while a malicious motive is a factor which may be considered in determining whether interference is unjustified, it is generally insufficient standing alone to establish that fact; and in making that observation, we reiterated that a party will not incur liability for the communication of truthful information.[12] While the evidence cited by Kim may imply an underlying desire that Kim's employment with MPS end and while the information Shawna provided was marshaled in a way that was damning to Kim, these factors do not diminish the truthfulness of Aaron's and Shawna's communications with MPS.

The factual disputes that Kim attempts to generate simply are not issues of material fact. Having considered Kim's arguments while giving her the benefit of all reasonable inferences deducible from the evidence, we discern no issue of material fact concerning the truthfulness of the information Aaron and Shawna provided to MPS.

In sum, Kim failed to meet her burden to produce admissible contradictory evidence creating a material issue of fact

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[12] See *Recio v. Evers, supra* note 3.

to rebut Aaron and Shawna's prima facie case; and the district court did not err in affirming the county court's order granting summary judgment in favor of Aaron and Shawna.

Whether Interference by Aaron and Shawna Caused Harm to Kim

[7] Because we have concluded that Aaron and Shawna are not liable to Kim based on their truthful communications with MPS, thus defeating Kim's claim, we need not consider Kim's contentions that those communications caused her harm.[13] An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.[14]

CONCLUSION

For the reasons stated above, we conclude that because Aaron and Shawna provided truthful information to MPS about Kim, they could not incur liability for interfering with Kim's business relationship with MPS. Therefore, the county court did not err in granting Aaron and Shawna's motion for summary judgment on Kim's claim of tortious interference with a business relationship, and the district court did not err when it affirmed the county court's ruling. Accordingly, we affirm the district court's order.

Affirmed.

Funke, J., participating on briefs.
Wright, J., not participating.

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[13] See *id.*

[14] *Id.*

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

In re Interest of Kane L., a child under 18 years of age. State of Nebraska, appellee, v. Angela L., appellant, and Scott L., appellee.

In re Interest of Carter L., a child under 18 years of age. State of Nebraska, appellant and cross-appellee, v. Angela L., appellee and cross-appellant.

910 N.W.2d 789

Filed May 4, 2018. Nos. S-17-720, S-17-775.

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, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded to an individual comport with constitutional requirements for due process presents a question of law.
3. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation for an abuse of discretion.
4. ____: ____: ____. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. An appellate court reviews a trial court's ruling on authentication for abuse of discretion.
5. **Parental Rights: Due Process.** The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection. Such due process rights include the right to be free from an unreasonable delay in providing a parent a meaningful hearing after the entry of an ex parte temporary custody order.

6. **Criminal Law: Trial: Evidence.** Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.
7. ____: ____: ____. Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue.
8. **Trial: Evidence: Appeal and Error.** Whether there is sufficient foundation to admit physical evidence is determined on a case-by-case basis. An appellate court's review concerning the admissibility of such evidence is for an abuse of discretion.
9. **Parental Rights.** The purpose of the adjudication phase is to protect the interests of the child.
10. **Juvenile Courts: Jurisdiction: Parental Rights: Proof.** The Nebraska Juvenile Code does not require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction. 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. The State must prove such allegations by a preponderance of the evidence.

Appeals from the County Court for Buffalo County: John P. Rademacher, Judge. Judgment in No. S-17-720 affirmed. Judgment in No. S-17-775 reversed, and cause remanded for further proceedings.

Elizabeth J. Chrisp, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for Angela L., appellant in No. S-17-720 and appellee in No. S-17-775.

Mandi J. Amy, Deputy Buffalo County Attorney, for State of Nebraska, appellee in No. S-17-720 and appellant in No. S-17-775.

Vikki S. Stamm, of Stamm, Romero & Associates, P.C., L.L.O., guardian ad litem.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Strong, District Judge.

Heavican, C.J.

INTRODUCTION

Kane L. and Carter L. were removed from the family home as a result of methamphetamine use by their mother, Angela L., and their father, Scott L. The county court for Buffalo County, sitting as a juvenile court, adjudicated Kane but not Carter. In separate appeals, Angela challenged Kane's adjudication and certain rulings of the juvenile court with respect to the petition seeking to adjudicate Carter. The State, acting through the Buffalo County Attorney's office, appealed the juvenile court's failure to adjudicate Carter. We affirm the juvenile court's order adjudicating Kane and reverse the juvenile court's order declining to adjudicate Carter, and remand the cause for further proceedings.

BACKGROUND

Angela is the mother of Carter, born in September 2000, and Kane, born in September 2008. Carter and Kane's biological father is Scott. Scott and Angela are also biological parents to Lily L. Lily was 19 years old at the time of these proceedings. As such, Lily is not involved in these juvenile court actions, although placement of Kane and Carter was with her for a period of time.

In January 2017, Angela gave birth to another boy. Scott is not the biological father of this child. Angela sought to utilize Nebraska's "Safe Haven" law[1] with regard to the baby; this child's placement is also not at issue in these juvenile court actions.

Angela provided a urine sample at the time of her admission to the hospital prior to the baby's birth, and that sample tested positive for drug use. Later, the baby's "cord blood" tested positive for methamphetamine, amphetamine, "THC," and oxycodone. Law enforcement was then contacted, because of the following: Angela wished to relinquish the baby, the positive

[1] Neb. Rev. Stat. § 29-121 (Reissue 2016).

drug screen, and the hospital social worker's knowledge that Angela had other children at home.

The Department of Health and Human Services and law enforcement first contacted Angela. She admitted to using methamphetamine and marijuana during her pregnancy, including methamphetamine 3 to 4 days before giving birth and marijuana within a day or so of giving birth. Angela insisted that she had never used drugs in the family home and that Scott did not use methamphetamine. Angela declined to give permission for Kane to submit to drug testing.

The Department of Health and Human Services and law enforcement then made contact with Scott and Kane. At this time, Carter was on juvenile probation and was at a juvenile detention center. Scott denied methamphetamine use and, after a few days, gave consent for Kane to be tested.

Toenail testing was done on Kane, and an initial positive result for both THC and methamphetamine was returned. The sample was insufficient to test further for the presence of THC, but the presence of methamphetamine was confirmed by a second test. The presence of methamphetamine, but not amphetamine, suggests that Kane's exposure was environmental in nature.

Scott was eventually tested. His saliva test was initially returned as a presumptive positive for methamphetamine. Scott indicated surprise at this result and stated that he had not used methamphetamine in a week. Scott later indicated that he had not used in the last 4 days. This presumptive positive test was sent in for laboratory testing and eventually tested negative. There was evidence in the record that the sample was initially returned to the organization that gathered the sample, because the wrong type of vial had been used, and that the organization had to "buy new vials and put the saliva into the vial and resend it." Further testing was apparently not sought at the time, because Scott had admitted to methamphetamine use.

As a result of the safety concerns presented by both Angela's and Scott's use of methamphetamine, arrangements were made to place Kane and Carter, who had just returned to the family home, with Lily. The children were later moved to a placement with their maternal grandparents.

The county filed a motion for temporary custody that was granted ex parte on February 17, 2017. The petition to adjudicate was filed on February 21—the next business day following the Presidents Day court holiday. The record indicates that at least Scott was present when Kane and Carter were removed. The record further indicates that Scott and Angela had input into the initial placement of the children with their oldest daughter, Lily, and had visitation with the children throughout, initially in the family home.

Over the next few days, before the first scheduled hearing on March 8, 2017, counsel was appointed for Scott and Angela. On March 1, both Scott and Angela filed answers, through counsel, denying the allegations set forth in the petition to adjudicate.

While the first hearing was scheduled to be held March 8, 2017, it was actually held on March 1. The journal entry for that hearing reflects that Scott and Angela were present without counsel and were shown a rights advisory video. No bill of exceptions for that hearing is in the record. A later journal entry, entered June 21, indicated that a protective custody and detention hearing had been scheduled for March 1 as well, but that this hearing was waived by Scott's and Angela's respective counsel as counsel sought to conduct more discovery and indicated Scott or Angela would motion for such a hearing if it was desired.

Various motions were filed by all parties, and multiple hearings were held in the time leading up to the first adjudication hearing held May 15, 2017, and eventual adjudication on June 30. There is no bill of exceptions in the appellate record for those hearings.

Angela appeals from Kane's adjudication. The county attorney appeals and Angela cross-appeals from the order denying the petition to adjudicate Carter. Scott filed a notice of appeal from Kane's adjudication, but did not further participate.

ASSIGNMENTS OF ERROR

Appeal in Case No. S-17-720,
In re Interest of Kane L.

On appeal, Angela assigns that the juvenile court erred in (1) not ordering a protective custody and detention hearing, thus denying Angela due process; (2) admitting evidence of the baby's cord blood test and Kane's toenail test, because the county failed to establish a foundation for those results; and (3) finding sufficient evidence to support adjudication.

Appeal in Case No. S-17-775,
In re Interest of Carter L.

On appeal, the county attorney assigns that the juvenile court erred in not adjudicating Carter.

On cross-appeal, Angela assigns that the juvenile court erred in (1) not ordering a protective custody and detention hearing, thus denying Angela due process, and (2) admitting evidence of the baby's cord blood test and Kane's toenail test, because the county failed to establish foundation for those results.

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] When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.[3]

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

[3] *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016).

[2] The determination of whether the procedures afforded to an individual comport with constitutional requirements for due process presents a question of law.[4]

[3] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation for an abuse of discretion.[5]

[4] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated.[6] An appellate court reviews a trial court's ruling on authentication for abuse of discretion.[7]

ANALYSIS

Pretrial Hearing.

Angela contends, on both appeal and cross-appeal, that her due process rights were violated when a protective custody and detention hearing was not held.

[5] The proper starting point for legal analysis when the State involves itself in family relations is always the fundamental constitutional rights of a parent.[8] The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court.[9] The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection.[10] Such due process rights include the right to be free from an unreasonable delay in providing a parent a meaningful hearing after the entry of an ex parte temporary custody order.[11]

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[4] *In re Interest of Joseph S. et al.*, 288 Neb. 463, 849 N.W.2d 468 (2014).

[5] *Midland Properties v. Wells Fargo*, 296 Neb. 407, 893 N.W.2d 460 (2017).

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

[7] *Id.*

[8] *In re Interest of Carmelo G., supra* note 2.

[9] *Id.*

[10] *Id.*

[11] See *id.*

Neb. Rev. Stat. § 43-248(2) (Reissue 2016) allows the State to take a juvenile into custody without a warrant or order of the court when it appears the juvenile "is seriously endangered in his or her surroundings and immediate removal appears to be necessary for the juvenile's protection." However, the parent retains a liberty interest in the continuous custody of his or her child.[12] An ex parte order authorizing temporary custody with the Department of Health and Human Services is permitted because of its short duration and the requirement of further action by the State before custody can be continued.[13] But "'the State may not, in exercising its parens patriae interest, unreasonably delay in notifying a parent that the State has taken emergency action regarding that parent's child nor unreasonably delay in providing the parent a meaningful hearing.'"[14] Therefore, following the issuance of an ex parte order for temporary immediate custody, "'[a] prompt detention hearing is required in order to protect the parent against the risk of an erroneous deprivation of his or her parental interests.'"[15]

In *In re Interest of R.G.*,[16] we recognized that parents have a due process right to be free from an unreasonable delay in providing the parents a meaningful hearing after an ex parte order for immediate custody is filed. We concluded that the mother's due process rights were not violated by a 14-day delay between the entry of an ex parte order and that of a detention order when she was given an opportunity to be heard at the detention hearing and was allowed to visit her children in the interim, but cautioned that this 14-day delay

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[12] *Id.*

[13] *Id.*

[14] *Id.* at 813-14, 896 N.W.2d at 908 (emphasis omitted).

[15] *Id.* at 814, 896 N.W.2d at 908.

[16] *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

between the ex parte order and detention hearing was "on the brink of unreasonableness."[17]

In *In re Interest of Carmelo G.*,[18] we held that a delay of 8 months between an ex parte order and one following a protective custody hearing violated a mother's due process rights, even though the mother met with her caseworker during that time, was represented by counsel, and various hearings were held and continuances granted with no objection by her counsel.

In this case, the motion for temporary custody was granted ex parte on February 17, 2017. The petition to adjudicate was filed on February 21—the next business day following the Presidents Day court holiday. The record shows that at least Scott was present when Kane and Carter were removed and that Scott and Angela had input into the initial placement of the children with their oldest daughter, Lily, and had visitation with the children throughout, initially in the family home.

Over the next few days before the first scheduled hearing on March 8, 2017, counsel was appointed for Scott and Angela. On March 1, both Scott and Angela filed answers through counsel denying the allegations set forth in the petition to adjudicate.

While the first hearing was scheduled for March 8, 2017, the record shows that it was actually held on March 1. The journal entry for that hearing reflects that Scott and Angela were present without counsel and shown a rights advisory video. No bill of exceptions for that hearing is in the record. A later journal entry, entered on June 21, indicated that a protective custody and detention hearing had been scheduled for March 1 as well, but that it was waived by counsel, who sought to conduct more discovery and would motion for such a hearing if it was desired.

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[17] *Id.* at 423, 470 N.W.2d at 792.

[18] *In re Interest of Carmelo G., supra* note 2.

Various motions were filed by all parties and multiple hearings held in the time leading up to the first adjudication hearing on May 15, 2017, and eventual adjudication on June 30. There is no bill of exceptions in the record for those hearings, but from the journal entries following those hearings, it does not appear that detention or custody was at issue in any of them.

On these facts, we find no due process violation. The record shows that Angela was almost immediately appointed counsel and that counsel entered a denial of the allegations in the petition within a few days of being appointed. A March 1, 2017, journal entry indicates that Angela was informed of all of her rights, including the right to the hearing she now argues she did not receive. A later journal entry, entered on June 21, indicates that Angela waived her right to such a hearing. There is no indication from the record before us that Angela ever sought any further hearing. Nor does Angela deny that the June 21 journal entry accurately sets forth the events surrounding that March 1 hearing.

The cases cited by Angela in support of her conclusion that she was denied due process are inapplicable. In *In re Interest of Carmelo G.*, the mother clearly sought a detention hearing, and while one was held, it took approximately 7 months and five separate hearings to receive all of the evidence, and an additional 49 days for the court to issue its detention order following the receipt of evidence. In this case, the only evidence in the record was that both Scott and Angela were offered a detention hearing on March 1, 2017, but waived the hearing and never sought another one. There is no merit to this assignment of error.

Foundation for Cord Blood and Toenail Tests.

Angela argues that the juvenile court erred in admitting the results from the cord blood and toenail tests, because the county did not establish proper foundation for the testing.

Specifically, Angela notes that the county did not establish a chain of custody for the cord blood and toenail tests. We note, as did the district court, that Angela does not argue that her Sixth Amendment right to confrontation was violated with regard to the admission of these test results.

[6-8] Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.[19] Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue.[20] It must be shown to the satisfaction of the trial court that no substantial change has taken place in an exhibit so as to render it misleading.[21] Important in determining the chain of custody are the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.[22] Whether there is sufficient foundation to admit physical evidence is determined on a case-by-case basis.[23] Our review concerning the admissibility of such evidence is for an abuse of discretion.[24]

With respect to the toenail test, Angela argues that while the person who collected the sample and the director of the laboratory that did the testing both testified, there was no testimony from the individual who actually conducted the test, and that such is insufficient to show foundation for the admissibility of the results. We disagree.

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

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] See *id.*

The individual who collected the sample testified at the hearing as to the procedures she followed when collecting the toenail sample. That individual indicated that she packaged the sample properly and mailed it to the testing laboratory. And the director of that laboratory testified as to the procedures followed at the laboratory, including the receipt of the sample and its testing. Given this testimony, we cannot conclude that the juvenile court abused its discretion in determining that "no substantial change ha[d] taken place in an exhibit so as to render [the results] misleading"[25] and in admitting the results.

There is no merit to Angela's contentions regarding the toenail testing.

With respect to the cord blood test, Angela contends that the doctor who ordered the test testified, but no one testified to the collection of the sample or to the test procedure itself. We need not address this assertion, because even assuming that the evidence establishing the chain of custody for the cord blood was insufficient, the admissibility of those results, on these facts, was not reversible error.

The cord blood test results were relevant to show that Angela had used drugs, notably methamphetamine. Angela's hospital drug screen was positive, and she admitted to the use of methamphetamine. As such, any error in admitting the positive cord blood test results was harmless.

Error in Adjudicating Kane.

Angela also assigns that the juvenile court erred in adjudicating Kane. She contends that the county failed to show an evidentiary nexus between the use of methamphetamine and a risk of harm that would support adjudication.

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

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[25] See *id.* at 431, 803 N.W.2d at 783.

2016).[26] 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."

[9,10] The purpose of the adjudication phase is to protect the interests of the child.[27] The Nebraska Juvenile Code does not require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction.[28] 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.[29] The State must prove such allegations by a preponderance of the evidence.[30]

The results of Kane's toenail testing show that Kane has been environmentally exposed to methamphetamine. This suggests that either Scott or Angela, or both, have used the drug around Kane. Several witnesses specifically testified that Scott's and Angela's use of methamphetamine was a safety concern. This was sufficient to create the nexus that Angela claims is missing.

The State has proved that Kane is a child under § 43-247(3)(a) because of his parents' methamphetamine use. This creates a safety concern for Kane's being in the family home and suggests that Kane should be removed from parental placement and custody until the situation is safe for Kane to return.

There is no merit to this assignment of error.

Error in Not Adjudicating Carter.

The county assigns, in its appeal from the juvenile court's failure to adjudicate Carter, that it was error to not adjudicate

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[26] *In re Interest of Justine J. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] See *id.*

Carter, because he was exposed to the same threat of present harm as Kane.

It is true, as the juvenile court noted, that Carter was in a detention center during the events immediately leading up to the adjudication in this case. But Carter returned shortly before the children were removed from the home. The concern leading up to that removal and later adjudication was that it was unsafe for the children to be in the home at that time and into the future. The fact that Carter was not in the home in the immediate past has no bearing on whether he would be exposed to harm in Scott and Angela's care going forward.

We further note that there is testimony from law enforcement at the hearings in these cases that Carter was placed on probation in part because of positive drug screens of his own. Given that the reason for adjudication is alleged to be parental drug use, such testimony further supports Carter's adjudication.

The State must establish that without intervention, there is a definite risk of future harm; on these facts as established by the State, it has met that burden. We therefore conclude that the juvenile court erred in not adjudicating Carter.

CONCLUSION

In case No. S-17-720, the decision of the juvenile court adjudicating Kane is affirmed. In case No. S-17-775, the decision not adjudicating Carter is reversed and the cause is remanded for further proceedings.

Judgment in No. S-17-720 affirmed.
Judgment in No. S-17-775 reversed, and cause remanded for further proceedings.

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

In re Interest of Joseph C., a child under 18 years of age. State of Nebraska, appellee, v. Tina E., appellant.

910 N.W.2d 773

Filed May 4, 2018. No. S-17-961.

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. **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.
3. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Standing: Words and Phrases.** Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.
5. **Standing.** Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination.
6. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court.
7. **Juvenile Courts: Standing: Appeal and Error.** In assessing standing, the right of appeal in a juvenile case in Nebraska is purely statutory.
8. **Statutes: Legislature: Intent.** A court gives statutory language its plain and ordinary meaning and will not look beyond the statute to determine the legislative intent when the words are plain, direct, and unambiguous.

Appeal from the County Court for Lincoln County: Kent D. Turnbull, Judge. Appeal dismissed.

James R. Korth and Brock J. Pohlmeier, of Reynolds, Korth & Samuelson, P.C., L.L.O., for appellant.

Rebecca Harling, Lincoln County Attorney, for appellee.

Michael L. Nozicka, of Nozicka Law Office, guardian ad litem.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Derr and Urbom, District Judges.

Derr, District Judge.

INTRODUCTION

This appeal arises from termination proceedings for Joseph C. in the county court for Lincoln County, sitting as a juvenile court. Tina E., the biological aunt and adoptive sister of Joseph's father, appeals the juvenile court's order which held that Joseph's placement with his nonrelative foster parents and permanency through adoption by them was in his best interests. Because Tina lacks standing pursuant to Neb. Rev. Stat. § 43-2,106.01(2) (Reissue 2016), her appeal is dismissed.

BACKGROUND

Joseph, born in May 2009, is the biological child of Dana C. and Michael E. On June 10, 2015, the State, represented by the county attorney, filed a petition alleging that Joseph, then age 6, was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2014). Following an adjudication hearing on September 1, the juvenile court determined Joseph to be a child as defined by § 43-247(3)(a) (Supp. 2015). The State later initiated proceedings to terminate Dana's and Michael's parental rights.

After being removed from the care and custody of his parents, Joseph had two different family placements. Joseph

was initially placed with his maternal grandparents, but that placement was disrupted when the grandparents' home study was denied. Subsequently, Joseph was placed in Colorado with his maternal aunt and uncle. He remained there from August 28, 2015, to June 18, 2016. However, Joseph exhibited behavioral issues at home and at school, and he was removed at the request of the maternal aunt and uncle, who could not handle Joseph's needs.

On June 18, 2016, Joseph was placed in the agency-based foster home of Heather F. and Kevin F. in Nebraska. Ten days later, on June 28, the juvenile court filed its order terminating the parental rights of Joseph's biological parents pursuant to Neb. Rev. Stat. § 43-292(1), (2), and (6) (Reissue 2016) and in accordance with Joseph's best interests.

On June 30, 2016, 2 days after the termination of parental rights, Tina was located through a "Family Finding" contract with the Nebraska Department of Health and Human Services (the Department). Tina, who lives in Wyoming with her husband, Rodney E., is the biological aunt of Joseph's father, Michael. Tina's parents adopted Michael; therefore, in addition to being Michael's biological aunt, Tina is Michael's adoptive sister.

Tina was unaware of Joseph's existence until July 2016, not long after Dana's and Michael's parental rights were terminated. Tina immediately made efforts through the Department to be involved in Joseph's life.

In December 2016, the Department completed a home study for Tina and Rodney, and they were approved for placement in January 2017. Upon the recommendation of Joseph's therapist, Joseph was slowly introduced to the concept of Tina and Rodney through their letters and pictures. Tina was allowed to meet Joseph in person for the first time on February 7, 2017, 7 months after she learned of his existence.

Following a status hearing on February 7, 2017, the juvenile court adopted the Department's recommendation that Joseph remain in his current placement with Heather and

Kevin and that the matter be continued to allow the integration of Tina and Rodney into his life with the goal of placing him with them. Tina and Rodney continued to have periodic visitation with Joseph.

On May 2, 2017, the juvenile court conducted a review hearing. It adopted the case plan and court report recommending eventual placement with Tina and Rodney, modified to include the recommendations of Joseph's therapist as to the process of working toward placement with them.

On June 21, 2017, the juvenile court held a placement hearing. The Department sought a change in Joseph's placement based on a material change in circumstances, i.e., the discovery of Tina, a family member willing and qualified to adopt Joseph. The State and Joseph's guardian ad litem opposed placement with Tina. Tina attended the hearing without counsel and made no motion to intervene. Following the hearing, the juvenile court took the matter of placement under advisement.

On August 4, 2017, the juvenile court filed an order finding that, even assuming the Department had proved a material change in circumstances, the "current placement is in Joseph's best interest and that permanency through adoption with his foster parents [is] in Joseph's best interest." In so finding, the juvenile court noted that it was not concerned about any fault or infirmity of relative placement and that Joseph's time in foster care was not a reason, in and of itself, to deny placement with Tina. However, the juvenile court observed that "allowing a change of placement is the real and present danger to Joseph's long term mental stability due to his current mental health fragility as a result of multiple changes in placements relative to his Post Traumatic Stress Disorder." The juvenile court determined that any further delay in permanency would destabilize Joseph's mental health. The juvenile court set the matter for review on October 3 and ordered the Department to prepare a case plan consistent with the order.

Tina timely filed her notice of appeal.

ASSIGNMENTS OF ERROR

Tina assigns that the juvenile court erred in (1) changing the permanency objective from "reunification" with her to adoption by Heather and Kevin and (2) failing to change Joseph's placement from Heather and Kevin to Tina.

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.[1]

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2]

ANALYSIS

[3] On appeal, Tina challenges the order of the juvenile court that found it was in Joseph's best interests to continue placement with Heather and Kevin and to change the permanency plan from adoption by Tina and Rodney to adoption by Heather and Kevin. In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3] The State and the guardian ad litem argue that Tina lacks standing to appeal the juvenile court's order. This court agrees.

[4-6] Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.[4] Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be

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[1] *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

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

[3] *In re Interest of Zachary B., ante* p. 187, 907 N.W.2d 311 (2018).

[4] *In re Interest of Jackson E.*, 293 Neb. 84, 875 N.W.2d 863 (2016).

entitled to its judicial determination.[5] Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court.[6]

[7] In assessing standing, this court has stated that the right of appeal in a juvenile case in Nebraska is purely statutory.[7] This court's recent cases have made clear that § 43-2,106.01, the juvenile code's appeal statute, controls who has the right to appeal from a juvenile court's placement order.[8] Under § 43-2,106.01(2), an appeal from a final order entered by a juvenile court may be taken by

> (a) The juvenile;
>
> (b) The guardian ad litem;
>
> (c) The juvenile's parent, custodian, or guardian. For purposes of this subdivision, custodian or guardian shall include, but not be limited to, the Department . . . , an association, or an individual to whose care the juvenile has been awarded pursuant to the Nebraska Juvenile Code; or
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> (d) The county attorney or petitioner . . . .

Tina is not expressly included in any of these categories.

This court has previously addressed whether relatives not listed in § 43-2,106.01(2) have standing to appeal a juvenile court order.[9] In *In re Interest of Nettie F.*,[10] this court concluded that § 43-2,106.01 controlled the matter but did not authorize an adjudicated child's sibling to appeal from a juvenile court's adverse placement order. In *In re Interest of Jackson E.*,[11]

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[5] *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

[6] *In re Interest of Jackson E., supra* note 4.

[7] See *id*.

[8] *In re Interest of Nettie F.*, 295 Neb. 117, 887 N.W.2d 45 (2016); *In re Interest of Jackson E., supra* note 4.

[9] See, *In re Interest of Nettie F., supra* note 8; *In re Interest of Jackson E., supra* note 4; *In re Interest of Meridian H., supra* note 5.

[10] *In re Interest of Nettie F., supra* note 8.

[11] *In re Interest of Jackson E., supra* note 4.

this court observed that the right to appeal in a juvenile case is purely statutory and that neither foster parents nor grandparents, as such, have a statutory right to appeal from a juvenile court order pursuant to § 43-2,106.01(2). Further, this court determined that because the appealing parties, as former foster parents, were never awarded custody of the child, they were not custodians or guardians for the purposes of § 43-2,106.01(2) and did not have standing to appeal on that basis.

Here, Tina cannot claim a right to appeal under § 43-2,106.01(2) as Joseph's "custodian," because she has never had custody of him. Nor can she appeal based on her status as the biological aunt and adoptive sister of Joseph's father, Michael. Tina's familial link to Joseph is more remote than the relationships this court found insufficient to provide standing in *In re Interest of Nettie F.* and *In re Interest of Jackson E*. This is especially true considering that Michael's parental rights to Joseph have been terminated.[12] Yet, even if Michael's parental rights to Joseph had remained intact, § 43-2,106.01(2) would not support regarding Tina as one who may appeal a juvenile court order. Accordingly, Tina has no standing to invoke the jurisdiction of this court.

Tina argues that the Legislature did not intend § 43-2,106.01(2) to exclusively govern standing to appeal juvenile matters. She relies on that section's provision that "custodian or guardian shall include, *but not be limited to*, the Department . . . , an association, or an individual to whose care the juvenile has been awarded pursuant to the Nebraska Juvenile Code."[13] This court has already considered the Legislature's

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[12] *In re Interest of Meridian H., supra* note 5 (holding, in context of appeal from juvenile placement order, that grandparents lacked standing, because any interest or right that they may have had via their biological relationship to adjudicated child ceased to exist when parental rights of grandparents' child, that is, adjudicated child's parent, were terminated).

[13] § 43-2,106.01(2)(c) (emphasis supplied).

purpose in defining "custodian or guardian." In *In re Interest of Artharena D.*,[14] this court held that through the language defining "custodian or guardian," the Legislature "expressed an intention to expand the definition of 'custodian' . . . to extend the right of appeal to individuals having the care of a juvenile by means other than an award under the Juvenile Code." Thus, by defining "custodian or guardian," "the Legislature intended . . . to ensure that those with alternative custody arrangements, bestowed outside the courts, have standing to appeal."[15] As noted above, this court's recent cases clarify that § 43-2,106.01 alone controls who may appeal from a juvenile court's placement order,[16] and the language defining "custodian or guardian" in § 43-2,106.01(2) does not establish an extrastatutory path to standing in juvenile appeals, as Tina suggests.

[8] Further, Tina contends that under the facts of this case, a narrow construction of § 43-2,106.01(2) that denies her and similarly situated individuals the right to appeal, while allowing only the county attorney and guardian ad litem to appeal, does not ensure the advancement of the child's best interests in all cases and could not represent the Legislature's intent. A court gives statutory language its plain and ordinary meaning and will not look beyond the statute to determine the legislative intent when the words are plain, direct, and unambiguous.[17] The plain language of § 43-2,106.01(2), supplemented by this court's interpretation of "custodian," clearly limits the right to appeal juvenile orders to a select few, and as explained above, such language does not encompass Tina, regardless of her good intentions.

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[14] *In re Interest of Artharena D.*, 253 Neb. 613, 618, 571 N.W.2d 608, 612 (1997).

[15] *In re Interest of Jackson E., supra* note 4, 293 Neb. at 90, 875 N.W.2d at 868.

[16] *In re Interest of Nettie F., supra* note 8.

[17] *In re Interest of Nizigiyimana R.*, 295 Neb. 324, 889 N.W.2d 362 (2016).

Finally, Tina points out that Neb. Rev. Stat. § 43-533(4) (Reissue 2016) provides, "[W]hen a child cannot remain with parents, [it shall be the policy of the State] to give preference to relatives as a placement resource." She asserts that she has a personal stake in the outcome of Joseph's case as a consequence of this preference, coupled with the affirmative steps she and Rodney have taken toward eventual adoption. Tina's argument hearkens back to *In re Interest of Meridian H.*,[18] where this court noted that the adjudicated child's siblings were not in the categories listed in § 43-2,106.01; but, "[a]ssuming without deciding that a person who is not statutorily authorized to appeal from such an order could nevertheless do so," this court went on to consider whether the siblings had "a personal stake in the controversy in order to have standing necessary to invoke appellate jurisdiction." However, as stated above, this court's more recent opinions have clarified that § 43-2,106.01 exclusively controls who has the right to appeal from a juvenile court's placement order.[19] The preference for relative placement remains a guiding principle for those involved in permanency planning for adjudicated children,[20] and the efforts that Tina and Rodney have made on Joseph's behalf are indeed commendable. But these factors offer no basis to alter this court's conclusion that Tina is not entitled to the statutory right to appeal delineated in § 43-2,106.01(2).

CONCLUSION

For the foregoing reasons, Tina lacks standing, and her appeal is dismissed.

Appeal dismissed.

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[18] *In re Interest of Meridian H., supra* note 5, 281 Neb. at 476, 798 N.W.2d at 105.

[19] See, *In re Interest of Nettie F., supra* note 8; *In re Interest of Jackson E., supra* note 4.

[20] See § 43-533.

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

State of Nebraska, appellant, v. Matthew F. Thalken, appellee.

911 N.W.2d 562

Filed May 11, 2018. No. S-16-830.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Appeal and Error.** An appellate court independently reviews questions of law in appeals from the county court.
5. **Criminal Law: Courts: Appeal and Error.** When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court.
6. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
7. **Statutes.** The interpretation of a statute presents a question of law.
8. **Courts: Appeal and Error.** Neb. Rev. Stat. § 29-2315.01 (Reissue 2016) authorizes error proceedings taken from the district court sitting as an intermediate court of appeal.

9. **Constitutional Law: Search and Seizure: Evidence.** Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure.
10. **Probable Cause: Police Officers and Sheriffs: Investigative Stops: Motor Vehicles.** An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation, no matter how minor, has occurred.
11. **Probable Cause: Appeal and Error.** An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.
12. **Probable Cause: Police Officers and Sheriffs.** Probable cause is not defeated by an officer's incorrect belief regarding the law applicable to the facts.
13. **Probable Cause: Police Officers and Sheriffs: Appeal and Error.** In analyzing probable cause, an appellate court focuses on the facts known to the officer, not the conclusions the officer drew from those facts.
14. **Arrests: Probable Cause: Police Officers and Sheriffs.** Police officers are not required to be legal scholars. This means, among other things, that the arresting officer's knowledge of facts sufficient to support probable cause is more important to the evaluation of the propriety of an arrest than the officer's understanding of the legal basis for the arrest.
15. **Constitutional Law: Statutes: Jurisdiction: Appeal and Error.** In Nebraska, jurisdiction is vested in an appellate court through the Nebraska Constitution and the statutes enacted by the Legislature.
16. **Statutes: Appeal and Error.** The right of appeal in Nebraska is purely statutory.
17. **Constitutional Law: Jurisdiction: Appeal and Error.** Except in those cases where original jurisdiction is specifically conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction.
18. **Criminal Law: Appeal and Error.** The right to appeal in criminal cases can be exercised only by a party to whom it is given, and generally only a person aggrieved or injured by a judgment may take an appeal from it.
19. **Constitutional Law: Double Jeopardy: Appeal and Error.** An acquittal cannot be reviewed, on error or otherwise, without putting the defendant twice in jeopardy, thereby violating the Constitution.
20. **Double Jeopardy: Juries: Evidence: Pleas.** In Nebraska, jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear

evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.

21. **Trial: Double Jeopardy.** Double Jeopardy bars retrial where all three elements are present: (1) Jeopardy has attached in a prior criminal proceeding, (2) the defendant is being retried for the same offense prosecuted in that prior proceeding, and (3) the prior proceeding has terminated jeopardy.
22. **Statutes: Words and Phrases.** Such words and phrases as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood in Nebraska statutes according to such peculiar and appropriate meaning.
23. **Statutes: Legislature: Presumptions: Intent: Appeal and Error.** An appellate court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning.
24. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible in the context in which they appear.
25. **Courts: Judgments: Appeal and Error.** Under the language of Neb. Rev. Stat. § 29-2316 (Reissue 2016), when an exception proceeding is before the Nebraska Supreme Court or Court of Appeals from the district court where the trial took place in district court, § 29-2316 restricts the scope of any ruling directed at the defendant and district court. But under the language of § 29-2316, where the district court is sitting as an appellate court, the defendant was not placed in jeopardy in that court and the limitations of § 29-2316 do not apply to dispositions or orders directed at the district court.

Appeal from the District Court for Douglas County, J. Michael Coffey, Judge, on appeal thereto from the County Court for Douglas County, Lawrence E. Barrett, Judge. Exception sustained, and cause remanded with directions.

Matthew Kuhse, Omaha City Attorney, and Kevin J. Slimp for appellant.

W. Randall Paragas, of Paragas Law Offices, for appellee.

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

Per Curiam.

I. NATURE OF CASE

The county court convicted Matthew F. Thalken of operating a motor vehicle while under the influence of alcohol, and Thalken appealed to the district court. In vacating Thalken's conviction and sentence, the district court focused on a police officer's mistake of law regarding a driving statute[1] and relied on one of our decisions.[2] We granted the State's application for leave to docket an exception proceeding.[3] Notwithstanding the officer's incorrect view of the law, when probable cause exists for a stop based on an objective view of the facts known to the officer, the stop does not offend the Constitution. We sustain the State's exception and conclude that because Thalken was not placed legally in jeopardy by the district court sitting as an appellate court, Neb. Rev. Stat. § 29-2316 (Reissue 2016) does not prevent us from reversing the district court's decision with directions to reinstate Thalken's conviction. Accordingly, we remand the cause to the district court with directions to reinstate and affirm Thalken's conviction and sentence.

II. STATEMENT OF FACTS

This case arises out of Thalken's conviction for operating a motor vehicle while under the influence. At approximately 1:15 a.m. on July 26, 2015, Omaha police officer Pat Soltys was in his cruiser proceeding north on 168th Street in Omaha, Nebraska, when he observed a vehicle approach the cruiser from the rear at a very high rate of speed with illuminated fog lights—a type of auxiliary light. There were two northbound lanes of travel, and eventually, the vehicle, driven by Thalken, proceeded to within 40 feet of Soltys' cruiser and then passed. Soltys observed that the headlights of Thalken's vehicle were "bright" and the fog lights were "exceptionally bright." At

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[1] Neb. Rev. Stat. § 60-6,225 (Reissue 2010).

[2] *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

[3] See Neb. Rev. Stat. § 29-2315.01 (Reissue 2016).

no time did Thalken dim any of his vehicle's lights. Soltys made a traffic stop, observed signs of alcohol impairment, and noticed an odor of alcohol coming from the vehicle.

Soltys testified that the reason he stopped Thalken was not because he was speeding or following too close, but that he believed Thalken's fog lights were illegally illuminated. Soltys testified that he "believed, at the time, that having fog lights on, auxiliary lights on, in itself, was a violation." He further clarified that consistent with his report regarding the incident, he "'[s]topped the vehicle for having its auxiliary lights on during normal/stable weather.'"

The State charged Thalken in the county court for Douglas County with operating a motor vehicle while under the influence. Thalken filed a motion to suppress challenging the traffic stop. The county court denied the motion and, after a bench trial on stipulated facts, found him guilty of the charged offense.

Thalken appealed the county court's denial of his motion to suppress and his conviction to the district court. Therefore, in this case, the district court was sitting as an appellate court. After a hearing, the district court reversed. In its order, the district court determined that Soltys did not have probable cause to stop Thalken. As to the law, the district court concluded that the use of auxiliary lights was not a traffic violation, and as to the facts, the district court found that the traffic stop was based on Soltys' incorrect belief that having auxiliary lights on was in and of itself a traffic violation. The district court stated that because Thalken drove his vehicle within 200 feet of the rear of the cruiser with both extremely bright auxiliary lights and bright headlights illuminated, Thalken had violated § 60-6,225(2) and another statute.[4] However, referring to our decision in *State v. Au*,[5] the district court nonetheless vacated Thalken's county court conviction and sentence.

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[4] Neb. Rev. Stat. § 60-6,224(2) (Reissue 2010).

[5] *State v. Au, supra* note 2.

On August 31, 2016, the State filed an application for leave to docket an exception proceeding. The State claimed that the district court sitting as an appellate court erred when it reversed the county court's ruling denying Thalken's motion to suppress and, as a result, reversed the judgment of the county court and vacated and set aside the conviction. We granted the State's application for leave to docket an exception proceeding.

III. ASSIGNMENTS OF ERROR

The State claims that the district court erred when it (1) reversed the county court's ruling which denied Thalken's motion to suppress and (2) reversed the judgment of the county court and ordered that Thalken's conviction and sentence be vacated and set aside.

IV. STANDARDS OF REVIEW

[1-5] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.[6] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[7] 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.[8] But we independently review questions of law in appeals from the county court.[9] When deciding appeals from criminal convictions in county court, we apply the same standards of review that we apply to decide appeals from criminal convictions in district court.[10]

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[6] *State v. Avey*, 288 Neb. 233, 846 N.W.2d 662 (2014).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[6] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[11] 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.[12]

[7] The interpretation of a statute presents a question of law.[13]

V. ANALYSIS

[8] Before addressing the merits, we note that the State is the appellant. Absent specific statutory authorization, the State generally has no right to appeal an adverse ruling in a criminal case.[14] As we have already noted, the State appeals under § 29-2315.01, which provides an exception to the general rule by allowing a county attorney to request appellate review of an adverse ruling by a district court. We have interpreted the statute to authorize exception proceedings taken from the district court sitting as an intermediate court of appeal.[15] Although we have sometimes described a proceeding under § 29-2315.01 as an "error" proceeding, that statute contemplates the State's "exception" and in the interest of precision, we use that term.

1. Probable Cause for Traffic Stop

[9] This appeal arises out of the question of whether there was legal justification for Soltys to stop Thalken. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the

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[11] *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017).

[12] *Id.*

[13] *State v. Beitel*, 296 Neb. 781, 895 N.W.2d 710 (2017).

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

[15] *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989), *overruled on other grounds, State v. Hense, supra* note 14.

Nebraska Constitution protect individuals against unreasonable searches and seizures by the government. Stopping an automobile and detaining its occupants constitute a "'"seizure"'" within the meaning of the Fourth Amendment, and if the seizure was illegal, the evidence obtained as a result is inadmissible.[16] Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure."[17]

[10-13] An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation, no matter how minor, has occurred.[18] We determine whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.[19] The question is whether the facts available to the officer would cause a reasonably cautious person to believe that the suspect has committed an offense.[20] Probable cause is not defeated by an officer's incorrect belief regarding the law applicable to the facts.[21] We focus on the facts known to the officer, not the conclusions the officer drew from those facts.[22]

In this matter, Thalken urges us to find that the traffic stop was objectively unreasonable because Soltys initiated it based solely on a mistaken interpretation of the auxiliary lights statute, § 60-6,225, which Soltys believed

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[16] *Berkemer v. McCarty*, 468 U.S. 420, 436-37, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

[17] *United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). Accord *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *overruled on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[18] See *State v. Au, supra* note 2.

[19] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[20] See *State v. Au, supra* note 2.

[21] See *State v. McCave, supra* note 19.

[22] *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

Thalken had violated when he drove with fog lights turned on during normal weather conditions. The State contends that because Thalken drove within 40 feet of Soltys' cruiser while displaying exceptionally bright auxiliary lights, i.e., fog lights, Thalken violated § 60-6,225(2), which, when read with other statutes, prohibits the use of bright auxiliary or fog lights when approaching other vehicles. The State claims that because of this violation, the traffic stop was supported by probable cause. Given the State's position, we limit our analysis to whether there was probable cause to stop on the basis that Thalken violated § 60-6,225(2). We agree with the State that probable cause supported the stop.

We first identify the statutes relevant to our analysis. Section 60-6,225(2) provides, in pertinent part:

> Any motor vehicle may be equipped with not to exceed two auxiliary driving lights [which shall comply with the] limitations set forth in section 60-6,221. . . . Auxiliary driving lights shall be turned off at the same time the motor vehicle's headlights are required to be dimmed when approaching another vehicle from either the front or the rear.

As relevant to this case, the "limitations set forth in section 60-6,221" to which reference is made in § 60-6,225(2) include a provision making it illegal for auxiliary lights to "project a glaring or dazzling light to persons in front of such headlights."[23]

Section 60-6,221(2) provides:

> Headlights shall be deemed to comply with the provisions prohibiting glaring and dazzling lights if none of the main bright portion of the headlight beam rises above a horizontal plane passing through the light centers parallel to the level road upon which the loaded vehicle stands and in no case higher than forty-two inches, seventy-five feet ahead of the vehicle.

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[23] Neb. Rev. Stat. § 60-6,221(1) (Reissue 2010).

Finally, § 60-6,224(2) provides that vehicle headlights are required to be dimmed whenever another vehicle follows "another vehicle within two hundred feet to the rear."

As Thalken and the district court agree, Nebraska law does not make it illegal per se to drive with auxiliary driving lights including fog lights turned on, and Soltys was incorrect in his belief that it was improper to drive with fog lights turned on during normal visibility conditions.[24] But the State correctly notes that because Thalken was within 200 feet of Soltys' cruiser, § 60-6,224(2) required Thalken's headlights to be dimmed, and that he failed to turn off his auxiliary lights, which violated § 60-6,225(2). The uncontradicted facts show, as urged by the State, that Thalken violated § 60-6,225(2).

The district court concluded, "[T]he fact that [Thalken] drove his vehicle within two hundred feet of the rear of the cruiser with the auxiliary lights on was a violation of Neb. Rev. Stat. [§§] 60-6,225(2) and 60-6,224(2)." And it is well settled that a violation, no matter how minor, creates probable cause for an officer to stop the driver of a vehicle.[25] However, even though the district court found a violation of driving statutes, the district court did not conclude that probable cause existed.

Instead, in reversing the ruling and judgment of the county court, the district court relied on Soltys' mistake regarding the vehicle's fog lights, which served as his basis for the stop, and determined that "the incorrect assumption of [Soltys] did not provide him with probable cause to stop [Thalken]." The district court reasoned that "[t]o find that [an] officer's mistaken belief that a violation had occurred [gives] police officers the ability to 'create' instances which would then be used as probable cause to justify a traffic stop." The district court referred to *Au*[26] as the basis for its ruling. As we explain below, the district court misperceives *Au*.

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[24] See *State v. Carnicle*, 18 Neb. App. 761, 792 N.W.2d 893 (2010).

[25] *State v. Sanders*, 289 Neb. 335, 855 N.W.2d 350 (2014).

[26] *State v. Au, supra* note 2.

In *Au*, we considered a traffic stop based on Neb. Rev. Stat. § 60-6,139(1) (Reissue 2010), which requires a motor vehicle operator to remain within a traffic lane "as nearly as practicable." We observed that the statute gave leeway in the determination of whether the facts met the descriptive phrase "as nearly as practicable" and whether the driver violated the statute. We noted that the surrounding circumstances must be considered in determining the existence of a violation and hence a determination regarding probable cause.

In *Au*, we said that in contrast to the statute at issue therein, some other driving statutes strictly declare particular actions to be traffic violations. One such strict statute was implicated in *State v. Magallanes*,[27] wherein we held that the driver of a vehicle crossing a fog line and driving on the shoulder of the highway, albeit briefly, violated the statute prohibiting driving on a shoulder. The present case is similar to *Magallanes*, in that particular objective facts and not surrounding circumstances determine whether an act was a violation of a driving statute. The State observed that the uncontradicted facts are that Thalken was within 200 feet of Soltys' cruiser and that he did not turn off his fog lights, in violation of § 60-6,225(2). Here, unlike in *Au*, no subjective or other facts were required to establish a driving violation and hence probable cause.

Evidently, the district court in the instant case referred to *Au* for that case's discussion regarding the mistaken understanding of a statute shared by the district court and the sheriff's officer. Because as just explained, the statute in *Au* and the statute at issue are not comparable and the statute now at issue is not subject to consideration of additional circumstances or scholarly legal analysis, the district court's reliance on *Au* was misplaced.

Similar to the district court's reasoning, Thalken maintains, relying on *Au*, that Soltys' mistaken view of the law makes the stop improper. But in *Au*, we determined that the stop was not

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[27] *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012).

justified due to lack of proof of the surrounding circumstances as required by the statute, not because the sheriff's officer or the district court misperceived the law.

As we have often stated, probable cause to stop a vehicle is analyzed under an objective reasonableness standard, and thus, the officer's subjective intent or motivation is not relevant.[28] That is, if an officer is aware of facts amounting to probable cause to stop a violator, the stop is objectively reasonable and any ulterior motivation is irrelevant.[29]

[14] From our preceding discussion, it is clear that Soltys possessed facts from which it was reasonable to believe Thalken committed a traffic violation, and the county court properly denied Thalken's motion to suppress. The district court erred when it limited its analysis to Soltys' mistake regarding the operation of auxiliary lights statute and ignored the uncontroverted facts. In the arrest context, we have stated: "'Police officers are not required to be legal scholars. This means, among other things, that the arresting officer's knowledge of facts sufficient to support probable cause is more important to the evaluation of the propriety of an arrest than the officer's understanding of the legal basis for the arrest.'"[30] The same reasoning applies here. As the State urges, given the uncontroverted facts, "Thalken was required to turn off his auxiliary lights when he approached Soltys[']s vehicle from the rear."[31] When Thalken failed to do so, Soltys had knowledge of facts that Thalken had committed an offense under § 60-6,225(2); hence, probable cause existed. The county court did not err when it overruled Thalken's motion to suppress, but the district court sitting as an appellate court erred when it disagreed with this ruling and reversed Thalken's conviction.

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[28] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008), citing *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

[29] See *State v. Sanders, supra* note 25.

[30] *State v. Ball, supra* note 22, 271 Neb. at 154, 710 N.W.2d at 605, quoting *Williams v. Jaglowski*, 269 F.3d 778 (7th Cir. 2001).

[31] Brief for appellant at 5.

Accordingly, we find merit in the State's exception to the district court's ruling.

2. Effect of Ruling on Conviction

The parties characterize this appeal as an "'error proceeding.'"[32] They do so, presumably, because of several of our previous decisions.[33]

This, in turn, has led to a focus on language in § 29-2316, stating in pertinent part:

> The judgment of the court in any action taken pursuant to section 29-2315.01 *shall not be reversed nor in any manner affected* when the defendant *in the trial court* has been *placed legally in jeopardy*, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state.

(Emphasis supplied.) The "not be reversed nor in any manner affected" language of § 29-2316 led us to conclude that where a defendant has appealed a county court conviction and sentence in a criminal case to the district court and the district court, as an intermediate appellate court, has erroneously reversed the county court's judgment, a higher appellate court could not, consistent with § 29-2316, reinstate the county court's judgment. We take this opportunity to correct this misunderstanding as well as to identify a basis for appellate jurisdiction other than exception proceedings.

(a) Basis of Appellate Jurisdiction

[15-17] In Nebraska, jurisdiction is vested in an appellate court through the Nebraska Constitution and the statutes

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[32] See, e.g., *id*. at 9.

[33] See *State v. Schall, supra* note 15. See, also, *State v. Kleckner*, 291 Neb. 539, 867 N.W.2d 273 (2015); *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006); *State v. Jones*, 264 Neb. 812, 652 N.W.2d 288 (2002); *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986); *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984).

enacted by the Legislature.[34] Over and over, we have reiterated that the right of appeal in Nebraska is purely statutory.[35] Except in those cases where original jurisdiction is specifically conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction.[36] And the Nebraska Constitution limits that appellate jurisdiction to "such appellate jurisdiction as may be provided by law."[37] In other words, appellate jurisdiction must be created by statute.[38]

This allocation is driven by the constitutional provision dividing the powers of government into three distinct departments—legislative, executive, and judicial.[39] Together, these constitutional provisions prevent courts from inventing rules to enlarge appellate jurisdiction.[40] Thus, we focus on the Nebraska statutes authorizing appellate jurisdiction and providing procedures for its exercise. And we do so in the limited context of appeals or exception proceedings in criminal cases and in particular those cases where the criminal defendant was convicted in county court and appealed to the district court; that is, where the district court was sitting as an appellate court.

(b) Appeals by Defendants From Trial Courts in Criminal Cases

[18] Several Nebraska statutes have been correctly understood to generally limit the right to appeal from a trial court's judgment in criminal cases to appeals by a defendant.[41] Thus,

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[34] See, Neb. Const. art. V, § 2; Neb. Rev. Stat. § 24-204 (Reissue 2016); *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

[35] See, e.g., *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

[36] See *id.*

[37] Neb. Const. art. V, § 2.

[38] See *Heckman v. Marchio, supra* note 35.

[39] See Neb. Const. art. II, § 1(1).

[40] See *Heckman v. Marchio, supra* note 35.

[41] See *State v. Berry*, 192 Neb. 826, 224 N.W.2d 767 (1975).

we have said that it is a general rule that the right to appeal in criminal cases can be exercised only by a party to whom it is given and that generally, only a person aggrieved or injured by a judgment may take an appeal from it.[42] Separate statutes govern defendants' appeals from the respective trial courts.

(i) District Courts

As to criminal proceedings where the district court acts as a trial court, a combination of statutes limits the right to appeal to a defendant.[43] One statute authorizes an appeal by "a person . . . convicted of an offense," in other words, by a defendant.[44] This must be read together with the general statutes authorizing appeals from district court.[45] Section 25-1912 specifically prescribes the appeal procedure, which applies to both civil and criminal appeals.

But review of criminal cases by appeal is a relatively recent development. At one time, the method of review of all criminal cases in the Supreme Court was upon writ of error.[46] The transition away from writs of error began in 1957,[47] continued in 1961[48] and 1973,[49] and culminated in 1982.[50] And an understanding of the writ of error procedure is essential to making sense of the exception proceedings now permitted to be taken by the State.

(ii) County Courts

In contrast to the statutes governing district courts, the statute limiting appeals from county court in criminal cases

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[42] *Id.*

[43] *Id.*

[44] Neb. Rev. Stat. § 29-2301 (Reissue 2016).

[45] See Neb. Rev. Stat. §§ 25-1911 and 25-1912 (Reissue 2016).

[46] See *Krell v. Mantell*, 157 Neb. 900, 62 N.W.2d 308 (1954).

[47] See 1957 Neb. Laws, L.B. 407, § 2.

[48] See 1961 Neb. Laws, L.B. 394, § 3.

[49] See 1973 Neb. Laws, L.B. 146, § 5.

[50] See 1982 Neb. Laws, L.B. 722, § 7.

is explicit: "Any party in a civil case and *any defendant in a criminal case* may appeal from the final judgment or final order of the county court to the district court of the county where the county court is located."[51] This statute also states in part, "In a criminal case, a prosecuting attorney may obtain review by exception proceedings pursuant to sections 29-2317 to 29-2319."[52] Thus, it is clear that in regard to a criminal case in county court, a defendant may "appeal," but the State is limited to an "exception proceeding[]."[53]

In the county court, § 25-2728 authorizes an appeal by a defendant.[54] A separate statute, Neb. Rev. Stat. § 25-2729 (Reissue 2016), prescribes the procedure to be followed in taking such an appeal. In such an appeal, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.[55] Because Thalken took an appeal from the county court to the district court, §§ 25-2728 and 25-2729 governed his appeal.

(c) Appeals by the State

Separate statutes authorize exception proceedings from the respective trial courts.

(i) District Courts

Before 1959, the State could be permitted to proceed upon a writ of error to the Supreme Court from a criminal case in the district court.[56] But the proceeding by the State could not "reverse[] nor in any manner affect[]" the district court's judgment; rather, its sole purpose was to "determine the law to

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[51] Neb. Rev. Stat. § 25-2728(1) (Reissue 2016) (emphasis supplied).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *State v. Todd*, 296 Neb. 424, 894 N.W.2d 255 (2017).

[56] See Neb. Rev. Stat. §§ 29-2314 to 29-2316 (Reissue 1956).

govern in any similar case" which might be pending or would arise later.[57]

But in 1959, the statute was changed to permit the Supreme Court's decision to sometimes affect the case giving rise to the matter before it.[58] As of that time, the statute, § 29-2316, prohibited further proceedings in the particular case "where the defendant in the trial court has been placed legally in jeopardy."[59] Where the defendant "had not been placed legally in jeopardy prior to the entry of [the] erroneous order," the proceeding could resume against the defendant, applying the law determined by the Supreme Court.[60] It was also in 1959 that a new statute was adopted prescribing the procedure for the State to follow to "take exception to any ruling or decision of the court" by an application for leave to docket an error proceeding.[61] We have described this statute as a "special procedure."[62] Although the procedure has been modified since then to take exception by seeking "leave to docket an appeal,"[63] the language of § 29-2316 (Reissue 2016) remains essentially unchanged.

(ii) County Courts

Because the case before us addresses an appeal taken by a defendant to the district court, we omit most of the details pertaining to appeals or exception proceedings available to the State from a county court ruling or decision. Prior to the reorganization of county courts in the early 1970's, there was no procedure for appeals from county court judgments in criminal cases by the State. Rather, the statute governing

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[57] See § 29-2316 (Reissue 1956).

[58] See 1959 Neb. Laws, L.B. 461, § 3.

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

[60] § 29-2316 (Reissue 1964).

[61] § 29-2315.01 (Reissue 1964). See 1959 Neb. Laws, L.B. 461, § 1.

[62] *State v. Dunlap*, 271 Neb. 314, 316, 710 N.W.2d 873, 875 (2006).

[63] See § 29-2315.01 (Reissue 2016).

appeals from magistrates, including justices of the peace, municipal judges, and county judges, conferred the right of appeal expressly upon the "defendant."[64] In 1975, a statute, comparable to the procedures applicable to district courts, was enacted to permit a prosecuting attorney to take an "exception" to the district court from a county court ruling or decision.[65]

(d) §§ 24-204 and 25-1912: A Jurisdictional Path

In 1989, in *State v. Schall*,[66] we examined § 29-2315.01 (Cum. Supp. 1988) and reasoned that it provided a jurisdictional basis under which the State could bring a case to the Supreme Court from the district court, where the district court sat as an appellate court in an appeal brought by a criminal defendant. But even in 1989, a jurisdictional path to the Supreme Court from the district court sitting as an appellate court, other than by § 29-2315.01, existed. And our decision in *Schall* overlooked it.

At the time, the defendant's appeal in *Schall* began under Neb. Rev. Stat. § 24-541.01(1) (Cum. Supp. 1984), which stated in part, "Any party may appeal from the final judgment or final order of the county court to the district court of the county where the county court is located." Neb. Rev. Stat. § 24-541.02 (Cum. Supp. 1984) prescribed the familiar appeal procedure, requiring the filing of a notice of appeal and depositing of a docket fee. Neb. Rev. Stat. § 24-541.06(1) (Cum. Supp. 1984) required the district court to "render a judgment which may affirm, affirm but modify, or reverse the judgment or final order of the county court." Under those sections, the district court acted as an intermediate appellate court.[67]

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[64] See Neb. Rev. Stat. § 29-611 (Reissue 1964).

[65] Neb. Rev. Stat. § 29-2317(1) (Reissue 2016). See 1975 Neb. Laws, L.B. 130, § 1.

[66] *State v. Schall, supra* note 15.

[67] See *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987).

In 1989, all appeals from judgments of the district court ran to the Nebraska Supreme Court. This predated the Nebraska Court of Appeals, which had not yet come into existence. And § 24-204 (Reissue 1989) then conferred upon the Supreme Court, as that statute's current version does now, "appellate and final jurisdiction of all matters of appeal and proceedings in error which may be taken from the judgments or decrees" of the district courts. The "judgment" required by § 24-541.06(1) fell within the scope of the Supreme Court's appellate jurisdiction. Thus, § 24-204 (Reissue 1989) broadly conferred appellate jurisdiction on the Supreme Court over appeals including those by the State from a district court's judgments or decrees, which included those rulings by the district court stemming from a defendant's appeal from the county court. Section 25-1911 (Reissue 1985) empowered the Supreme Court to reverse, vacate, or modify, for errors appearing on the record, a judgment rendered or final order made by the district court.[68] Section 25-1912 (Reissue 1985) merely prescribed the procedure for taking of the further appeal from the district court to the Supreme Court. And where the district court was sitting as an appellate court, the issues on appeal to the Supreme Court would be limited to those issues that had been raised in the district court.

Thus, our decision in *Schall*[69] was flawed to the extent that it overlooked the statutes conferring appellate jurisdiction upon the Supreme Court and prescribing the procedure for appeal of district court judgments or decrees to this court. We overlooked the then-existing statutes which provided the jurisdictional path.

We have adhered to § 29-2315.01 (Reissue 2016) as the only jurisdictional "path" from the district court to this court based on the admittedly weak reasoning of *Schall*. However, § 24-204 (Reissue 2016) confers upon this court "appellate

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[68] See, also, Neb. Rev. Stat. § 25-2733 (Reissue 2016) and *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990).

[69] *State v. Schall, supra* note 15.

and final jurisdiction of all matters of appeal and proceedings in error which may be taken from the judgments or decrees of other courts." And Neb. Rev. Stat. § 24-1106(1) (Reissue 2016) confers appellate jurisdiction upon the Nebraska Court of Appeals. Section 25-2728 confers appellate jurisdiction upon the district court over a defendant's appeal from a county court. Instead of relying upon §§ 24-204, 24-1106, and 25-1912, we have depended upon § 29-2315.01 as the path for further appeal by the State in criminal cases where the appeal from county court to district court was initiated by a defendant.

Because of this history, the parties naturally focused on § 29-2315.01 as the only jurisdictional path. This focus led to filing of the § 25-1912 (Reissue 2016) docket fee in this case more than 30 days after the district court's judgment. Of course, this would be fatal to jurisdiction but for the parties' reliance on § 29-2315.01. We respect this choice and proceed accordingly under § 29-2315.01. This will in turn lead to the effect of the ruling statute, § 29-2316, which we address later.

[19] We take this opportunity to note that the Legislature could simplify the procedures governing appeals by the State in criminal cases, but it is neither prudent nor proper for this court to usurp the legislative function. In *United States v. Sisson*,[70] the U.S. Supreme Court, under similar circumstances, elected to await a legislative solution which would clarify the jurisdictional basis for criminal appeals taken by the government. In the federal criminal law, the government is authorized by statute to appeal in a criminal case pursuant to several different statutory provisions subject, of course, to constitutional limitations. Being a jurisdictional statute, the Criminal Appeals Act precludes an appeal by the government where implementation of the outcome will be moot due to double jeopardy; in effect, in federal court where there is no real case

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[70] *United States v. Sisson*, 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970).

or controversy, there will be no appeal.[71] At issue in *Sisson* was whether the federal district court's order styled "arrest of judgment" was in fact an arrest of judgment which was appealable under the then-effective Criminal Appeals Act,[72] or an acquittal, which is not appealable, because an "acquittal [cannot] be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution."[73]

Having concluded the order in *Sisson* was an acquittal and therefore not appealable by the government on that basis, the Court considered whether the order was appealable under the "'motion in bar'" provision of the Criminal Appeals Act, stating: "The language of the motion-in-bar provision itself limits appeals to those granted 'when the defendant has not been put in jeopardy.' We read that limitation to mean exactly what it says—*i. e.*, no appeal from a motion in bar is to be granted after jeopardy attaches."[74] The *Sisson* opinion stated that at the time the statute was written, "there was little dispute over the then-settled notion that a defendant was put into jeopardy once the jury was sworn."[75] The comment regarding "put in jeopardy" echoes the Nebraska Legislature's choice of language in 1959, which we discuss later in the portion of our opinion considering the effect of our ruling under § 29-2316.

The U.S. Supreme Court in *United States v. Jorn*[76] summarized the opinion in *Sisson* as follows: "[T]he 'put in jeopardy' language [precluding an appeal by the government] applied

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[71] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997).

[72] *United States v. Sisson, supra* note 70, 399 U.S. at 270. See 18 U.S.C. § 3731 (1964 & Supp. V 1970).

[73] *United States v. Ball*, 163 U.S. 662, 671, 16 S. Ct. 1192, 41 L. Ed. 300 (1896).

[74] *United States v. Sisson, supra* note 70, 399 U.S. at 304-05.

[75] *Id.*, 399 U.S. at 305.

[76] *United States v. Jorn*, 400 U.S. 470, 474-75, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971).

whenever the jury had been impaneled, even if the defendant might constitutionally have been retried under the double jeopardy provisions of the Fifth Amendment." That is, jurisdiction would not lie because of the statutory language "put in jeopardy," not because the defendant did or did not face constitutional double jeopardy in subsequent proceedings.

The *Sisson* Court refused to read "put in jeopardy" as a "restatement of the constitutional prohibition" against double jeopardy, because such reading would render the phrase "superfluous."[77] The *Sisson* Court, stating the obvious, continued, "No Senator thought that Congress had the power under the Constitution to provide for an appeal in circumstances in which that would violate [the double jeopardy prohibition in] the Constitution."[78] In its conclusion, the *Sisson* Court stated that although it was dissatisfied with the jurisdictional limitations of the Criminal Appeals Act, it would adhere to the terms of the act "until such time as Congress decides to amend the statute."[79]

In 1975, the Court noted that Congress recognized the difficulties of the Criminal Appeals Act disparaged in *Sisson* and

> finally disposed of the statute in 1970 and replaced it with a new Criminal Appeals Act intended to broaden the Government's appeal rights. . . . [T]he legislative history makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.[80]

The new statute, passed as Title III of the Omnibus Crime Control Act of 1970,[81] provides in part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment,

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[77] *United States v. Sisson, supra* note 70, 399 U.S. at 305.

[78] *Id.*

[79] *Id.*, 399 U.S. at 308.

[80] *United States v. Wilson*, 420 U.S. 332, 337, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975).

[81] Pub. L. No. 91-644, 84 Stat. 1890.

> or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the *double jeopardy* clause of the United States Constitution prohibits further prosecution.[82]

This revision to the Criminal Appeals Act made clear that "Congress was determined to avoid creating nonconstitutional bars to the Government's right to appeal."[83] The evolution of the federal statute provides a cautionary tale. The language with respect to jurisdiction was changed by legislature, not the Court. In any event, because the jurisdictional path in this case is controlled by § 29-2315.01, we turn to the effect of a ruling permitted by § 29-2316 in an exception proceeding.

(e) § 29-2316 Remains Controlling

Under the statute pertaining to exception proceedings, as we explained in *State v. Vasquez*,[84] § 29-2316 limits the relief we can afford, even if the exception taken by the State is sustained. This is because the application of § 29-2316 by its terms turns on whether the defendant had been placed in jeopardy in the trial court, not by whether the Double Jeopardy Clause bars further action. Although this is the law in Nebraska, the State urges us to return to the position expressed in an interlude of cases in which we equated "placed legally in jeopardy" with double jeopardy. We reject the State's suggestion. Because jurisdiction of this exception proceeding and its disposition are controlled by §§ 29-2315.01 and 29-2316, we must faithfully adhere to the terms of these statutory grants.

Section 29-2316 provides in relevant part as follows:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the [Nebraska Supreme Court or Court of

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[82] 18 U.S.C. § 3731 (1970) (emphasis supplied).

[83] *United States v. Wilson, supra* note 80, 420 U.S. at 339.

[84] *State v. Vasquez, supra* note 33.

> Appeals] shall determine the law to govern in any similar case which may be pending . . . or which may thereafter arise . . . .

The premise of the State's suggestion is that the phrase of § 29-2316 "has been placed legally in jeopardy" in the trial court is the equivalent of double jeopardy. The premise is faulty and not necessary to the reversal it seeks, and in addition, it ignores the importance of the phrase "in the trial court" found in § 29-2316. As we have discussed above in our discussion of the "jurisdictional path," along with the U.S. Supreme Court as reflected in *United States v. Sisson*,[85] we recognize that "placed in jeopardy" is not the equivalent of "double jeopardy." And as we further explain below, where the matter is brought to us by an exception proceeding from the district court sitting as an appellate court, § 29-2316 does not limit the relief we can order, because the defendant was not placed legally in jeopardy in that court. Our holding necessarily overrules cases like *State v. Kleckner*[86] and *State v. Figeroa*.[87]

Historically, in ruling on cases brought under § 29-2315.01, we have focused on the language of §§ 29-2315.01 and 29-2316, especially as they pertain to the scope of relief. For decades, we respected the language of §§ 29-2315.01 and 29-2316. For example, in a case where the exception proceeding was brought prematurely, we distinguished between the phrases "has been placed legally in jeopardy" in § 29-2316 (Reissue 1964) and "double jeopardy" and found the former to be the proper reading of § 29-2316.[88] And in a case where an exception proceeding had been taken from the county court to the district court under § 29-2317 (Reissue 1975), we found that the district court's conclusion that the county

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[85] *United States v. Sisson, supra* note 70.

[86] *State v. Kleckner, supra* note 33.

[87] *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009).

[88] See *State v. Taylor*, 179 Neb. 42, 136 N.W.2d 179 (1965).

court had erred was correct, but that under the language of Neb. Rev. Stat. § 29-2319(1) (Reissue 1975), which is comparable to § 29-2316, the district court erred when it affected the judgment.[89]

Although we detoured for a period of time in equating "placed legally in jeopardy" with constitutional double jeopardy, we returned to our adherence to the commands of the statutory language. As we reasoned in *Vasquez*, when the Legislature chose language which limited relief where the defendant has previously been placed legally in jeopardy, it meant something different from constitutional double jeopardy.[90] This is a logical reading of this temporal statute; § 29-2316 (Reissue 2016) is structured to limit relief based on past events, and furthermore, it would be unnecessary for the Legislature to remind the Supreme Court to refrain from issuing future orders which violate the defendant's long-upheld constitutional rights, including the right to be free from double jeopardy.

[20] We read "placed legally in jeopardy" as used by the Legislature in § 29-2316 as reflecting and incorporating Nebraska jurisprudence. In Nebraska, jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.[91]

[21] In contrast to "placed legally in jeopardy," more elements must be present to implicate constitutional double jeopardy under both the federal and state Constitutions. We have summarized the elements of double jeopardy in Nebraska.[92] Double jeopardy bars retrial where all three elements are present: (1) Jeopardy has attached in a prior criminal proceeding,

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[89] See *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978).

[90] *State v. Vasquez, supra* note 33.

[91] See *id.*

[92] See *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

(2) the defendant is being retried for the same offense prosecuted in that prior proceeding, and (3) the prior proceeding has terminated jeopardy.[93] Examples of terminated jeopardy are an acquittal by a jury or by a trial judge,[94] a directed verdict of acquittal by the trial judge for insufficient evidence,[95] and a conviction reversed for insufficient evidence.[96] As is evident from the foregoing, jeopardy may have attached, but the several requirements of freedom from double jeopardy which prohibit retrial may not yet have occurred. The universe of defendants who fit the description of the legislative phrase "placed legally in jeopardy" is not the equivalent of and, in fact, is obviously greater than the universe of defendants who are threatened by double jeopardy.

[22,23] We read the phrase "has been placed legally in jeopardy" as having been inserted in § 29-2316 by the Legislature intentionally and with purpose. And under the statute prescribing general rules of construction, such "words and phrases . . . as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood [in Nebraska statutes] according to such peculiar and appropriate meaning."[97] We will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning.[98] Just as the U.S. Supreme Court recognized concerning similar terms in *Sisson*, equating "placed legally in jeopardy" in the controlling statute, § 29-2316, with double jeopardy was

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[93] See *id.*

[94] See *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978).

[95] See *Hudson v. Louisiana*, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981).

[96] See *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

[97] Neb. Rev. Stat. § 49-802(5) (Reissue 2010).

[98] *State v. Covey*, 290 Neb. 257, 859 N.W.2d 558 (2015).

warranted neither by the jurisprudence nor by the language or meaning of that statute.[99]

(f) Effect of § 29-2316 in Exception Proceedings After the Defendant's Appeal From County Court to District Court

We turn now to the phrase "in the trial court" in § 29-2316, which we understand describes where "placed legally in jeopardy" occurred. To repeat, the first sentence of § 29-2316 states:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the [Nebraska Supreme Court or Court of Appeals] shall determine the law to govern in any similar case which may be pending . . . or which may thereafter arise . . . .

[24] We recognize that "trial court" lacks specificity, but we give it a consistent, harmonious, and sensible reading in the statutory context in which it appears.[100] Thus, with respect to relief under § 29-2316, placed legally in jeopardy "in the trial court" means the scope of grantable appellate relief is restricted on cases filed with us or in the Court of Appeals reviewing a ruling from the forum where jeopardy attached. So where the trial took place in district court and the exception proceeding was taken therefrom, the scope of relief is limited, as we recognized in *State v. Hense.*[101] Likewise, where the trial took place in the county court and an exception proceeding is taken to the district court, under § 29-2319 (Reissue 2016), the district court is limited in the scope of relief it can grant to the State.[102]

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[99] *United States v. Sisson, supra* note 70.

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

[101] *State v. Hense, supra* note 14.

[102] See *State v. McDermott, supra* note 89.

However, in a criminal case where the district court is sitting as an appellate court in an appeal brought by the defendant, the defendant was not placed legally in jeopardy in that appellate court; he or she effectively arrived at the district court on appeal already cloaked in jeopardy, having been placed legally in jeopardy by the county court. Such defendant was not placed legally in jeopardy by the district court, and our orders effectuating relief where the district court was sitting as an appellate court are not circumscribed by the statutory limitation in § 29-2316. To the extent that our decision in *Schall*[103] misinterpreted the meaning of the "trial court" in its jurisdictional analysis, we disapprove of its interpretation.

[25] In sum, under the language of § 29-2316, when an exception proceeding is before the Nebraska Supreme Court or Court of Appeals from the district court where the trial took place in district court, § 29-2316 restricts the scope of any ruling directed at the defendant and district court. But under the language of § 29-2316, where the district court is sitting as an appellate court the defendant was not placed in jeopardy in that court, and the limitations of § 29-2316 do not apply to dispositions or orders directed at the district court.

Historically, although our language was sometimes less than precise, we ordinarily followed the foregoing principles in cases before us with respect to exception proceedings challenging the rulings of the district court sitting as an appellate court. In cases such as *State v. Schaf*[104] which were docketed as exception proceedings taken from the district court sitting as an appellate court, although we referred in our opinion to the matter before us as an "appeal," we granted relief in addition to pronouncing the correct law. Thus, historically, in

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[103] *State v. Schall, supra* note 15.

[104] *State v. Schaf*, 218 Neb. 437, 355 N.W.2d 793 (1984). But see *State v. Golgert, supra* note 33; *State v. Merithew*, 220 Neb. 530, 371 N.W.2d 110 (1985); and *State v. Wilkinson*, 219 Neb. 685, 365 N.W.2d 478 (1985) (sustaining exception).

exception proceedings, we recognized that § 29-2316 was not an impediment to correcting an erroneous determination of the district court sitting as an appellate court. As we have recently emphasized, the "Legislature has prescribed when a court may exercise appellate jurisdiction,"[105] and in the exercise of our appellate jurisdiction under §§ 29-2315.01 and 29-2316, correcting the district court sitting as an appellate court adheres to the language of § 29-2316.

In view of our analysis above holding that where an exception proceeding pursuant to § 29-2315.01 is taken from the district court sitting as an appellate court to the Nebraska Supreme Court or Court of Appeals, the disposition of the matter is not limited by the restrictive language of § 29-2316, we must overrule the dispositional portion of cases such as *Kleckner*[106] and *Figeroa*.[107]

Because the matter is before us as an exception proceeding under § 29-2315.01, the relief we can afford is controlled by § 29-2316. As we explain above, the defendant was not "placed legally in jeopardy" in the district court sitting as an appellate court, and therefore, § 29-2316 does not limit the relief in this case and we therefore vacate the ruling of the district court.

VI. CONCLUSION

As we discussed above, the State seeking review of the district court's decision sitting as an appellate court in a criminal appeal brought to it by a defendant could have filed an appeal under §§ 24-204 and 25-1912. However, the State filed an exception proceeding under § 29-2315.01, for which we have historically recognized jurisdiction. Also, as we explained above, § 29-2316 does not limit the relief we can afford the State, where the matter is brought to us by the State from the district court sitting as an appellate court.

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[105] *Heckman v. Marchio, supra* note 35, 296 Neb. at 464, 894 N.W.2d at 301.

[106] *State v. Kleckner, supra* note 33.

[107] *State v. Figeroa, supra* note 87.

Having analyzed the State's contention in this case that the district court sitting as an appellate court erred when it reversed Thalken's conviction, we find merit to the State's argument. Because the uncontroverted known facts showed that Thalken committed a traffic violation for failure to turn off his fog lights, in violation of § 60-6,225(2), there was probable cause for the traffic stop and the county court properly denied Thalken's motion to suppress. The district court, sitting as an appellate court, erred when it ruled to the contrary and vacated Thalken's conviction and sentence.

Because we are not prevented from granting relief under § 29-2316, we sustain the State's exception and reverse the district court's order which had reversed Thalken's conviction and sentence. Accordingly, we remand the cause to the district court with directions to reinstate and affirm Thalken's conviction and sentence.

Exception sustained, and cause remanded with directions.

Wright and Kelch, JJ., 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. Antonio D. Ratumaimuri, appellant.

911 N.W.2d 270

Filed May 11, 2018. No. S-17-187.

1. **Convicted Sex Offender: Proof.** Under Neb. Rev. Stat. § 29-4011(1) (Reissue 2016), the State must prove that the defendant (1) is required to register under the Sex Offender Registration Act, Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2016), and (2) violated a section of the act.
2. **Convicted Sex Offender.** Under Neb. Rev. Stat. § 29-4003(1)(b)(i)(B) (Reissue 2016), a trial court must determine whether a defendant who has committed one of the offenses listed therein is subject to the Sex Offender Registration Act, Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2016), during the proceedings on the underlying conviction and sentence.
3. **Judgments: Words and Phrases.** A judgment is an adjudication of all the matters that are essential to support it, and every proposition assumed or decided by the court leading up to the final conclusion and on which such conclusion is based is as effectually passed upon as the ultimate question which is finally resolved.
4. **Criminal Law: Judgments: Sentences: Appeal and Error.** In a criminal case, the judgment from which the appellant may appeal is the sentence.
5. **Convicted Sex Offender: Appeal and Error.** Whether a defendant is subject to the Sex Offender Registration Act, Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2016), based on a guilty plea or conviction for an offense that is not inherently sexual must be reviewed on direct appeal from the underlying conviction and sentence.
6. **Judgments: Collateral Attack.** When a judgment is attacked in a way other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
7. ____: ____. A judgment that is not void, even if erroneous, cannot be collaterally attacked.

8. **Convicted Sex Offender: Collateral Attack: Appeal and Error.** A challenge to a determination that the Sex Offender Registration Act, Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2016), applies to a defendant for a listed offense that is not inherently sexual outside of a direct appeal from the underlying conviction and sentence is an impermissible collateral attack.
9. **Courts: Judgments: Appeal and Error.** Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.

Petition for further review from the Court of Appeals, Pirtle, Riedmann, and Arterburn, Judges, on appeal thereto from the District Court for Lancaster County, Susan I. Strong, Judge. Judgment of Court of Appeals affirmed.

Joseph D. Nigro, Lancaster County Public Defender, and Nathan J. Sohriakoff for appellant.

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

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Derr and Urbom, District Judges.

Funke, J.

The Lancaster County District Court convicted Antonio Y. Ratumaimuri of violating the registration requirements of the Sex Offender Registration Act (SORA).[1] Before the Nebraska Court of Appeals, Ratumaimuri assigned as error that there was insufficient evidence to support his conviction. Specifically, he argued the State had failed to prove he was subject to SORA's requirements, because it failed to present evidence that—during the proceedings for a previous conviction and sentence—the county court for Lancaster County had made a factual finding pursuant to § 29-4003(1)(b)(i)(B).

[1] See Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2016).

The Court of Appeals affirmed Ratumaimuri's conviction on the sufficiency of the evidence. However, rather than relying on the determination in the previous proceedings—that Ratumaimuri was subject to SORA—alone, the Court of Appeals concluded that determination was valid because it was based on an implied factual finding pursuant to § 29-4003(1)(b)(i)(B).

On further review, we hold that (1) a determination that a defendant is subject to SORA must be reviewed on direct appeal from the underlying conviction and sentence and (2) such a determination is not subject to an impermissible collateral attack in subsequent proceedings. Accordingly, the Court of Appeals erred in analyzing whether the determination in the previous proceedings was valid. While our reasoning differs from that employed by the Court of Appeals, our ultimate conclusion on the judgment is the same. Therefore, we affirm.

BACKGROUND

In November 2015, a police officer found Ratumaimuri sleeping in a parking garage in Lincoln, Nebraska. The officer determined Ratumaimuri was a registered sex offender but had not updated his address since July 2015, when he was incarcerated. Ratumaimuri admitted he had been transient since he was released from prison, in September 2015, and was in violation of his SORA requirements because he had not registered with the Lancaster County Sheriff's Department. The officer arrested Ratumaimuri for violating SORA by failing to update his address or status.

The offense that subjected Ratumaimuri to SORA's requirements was a 2014 conviction for third degree assault. The State had amended the charge from third degree sexual assault in exchange for Ratumaimuri's agreeing to plead no contest. The State informed Ratumaimuri, however, that the county court could still determine he was subject to SORA, under the plea bargain. At the plea hearing, the county court ruled that Ratumaimuri was subject to SORA's requirements and that he had committed a "sexual offense." Ratumaimuri was provided with a "Notification of Registration Responsibilities

Under [SORA]" form, which stated: "Your conviction or guilty plea has caused you to be subject to [SORA]." At the sentencing hearing, the county court questioned Ratumaimuri about whether he had read and signed the notification form and whether he understood his responsibilities as a sex offender. Ratumaimuri did not appeal from that conviction or sentence.

In the current proceedings, Ratumaimuri was charged with violating SORA's registration requirements, under § 29-4011(1). The State offered into evidence the record from his third degree assault conviction, which contained the determination that he was subject to SORA. After a stipulated bench trial, the district court found Ratumaimuri guilty and sentenced him to 12 to 18 months' imprisonment. Ratumaimuri filed a timely appeal.

On appeal, Ratumaimuri assigned the district court erred in convicting him, because there was not sufficient evidence to prove his guilt. He argued the State failed to prove his previous conviction subjected him to SORA's requirements, because there was no factual finding under § 29-4003(1)(b)(i)(B) that the crime involved either "sexual penetration" or "sexual contact." The State argued Ratumaimuri's appeal itself was an impermissible collateral attack on his previous conviction and sentence.

The Court of Appeals determined that Ratumaimuri's appeal, regarding the sufficiency of the evidence, was not a collateral attack and affirmed Ratumaimuri's conviction, because the evidence was sufficient to prove Ratumaimuri was subject to SORA.[2] In reaching its conclusion on the sufficiency of the evidence, the Court of Appeals analyzed the determination of SORA's application to Ratumaimuri in the prior proceedings and concluded it was valid because the county court had made an implied finding of fact pursuant to § 29-4003(1)(b)(i)(B).[3]

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[2] *State v. Ratumaimuri*, No. A-17-187, 2017 WL 5713404 (Neb. App. Nov. 28, 2017) (selected for posting to court website).

[3] *Id.*

Both Ratumaimuri and the State petitioned for further review. We denied Ratumaimuri's petition, which assigned error to the Court of Appeals' holding that sufficient evidence supported his conviction. We granted the State's petition.

ASSIGNMENT OF ERROR

The State assigns, restated, that the Court of Appeals erred in concluding Ratumaimuri's appeal was not an impermissible collateral attack on a previous judgment.

ANALYSIS

[1] Section 29-4011(1) provides: "Any person required to register under [SORA] who violates the act is guilty of a Class IIIA felony." Accordingly, for a conviction under § 29-4011(1), the State is required to prove that the defendant (1) is required to register under SORA and (2) violated a section of SORA. Ratumaimuri did not argue on appeal that he did not violate a section of SORA, so only the sufficiency of evidence regarding whether he was required to register under SORA was at issue.

In reviewing a criminal conviction for a sufficiency of the evidence claim, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[4]

The Court of Appeals determined that the record from Ratumaimuri's third degree assault conviction provided sufficient evidence to support his conviction. Since we denied Ratumaimuri's petition for further review regarding this issue, we do not reconsider the Court of Appeals' holding that Ratumaimuri's conviction was supported by sufficient evidence.

The State contends that Ratumaimuri's appeal as a whole was an impermissible attack on a prior conviction. However,

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[4] *State v. Wofford*, 298 Neb. 412, 904 N.W.2d 649 (2017).

since the appeal raised only one assignment of error, that being the sufficiency of the evidence, the appeal was proper. Nonetheless, Ratumaimuri specifically argued that the record from the prior proceeding was insufficient to subject him to SORA. As a result, we must consider whether this argument constituted an impermissible collateral attack on a previous judgment and whether the Court of Appeals erred in addressing the merits of this argument.

Generally, SORA requires individuals that plead guilty to or are convicted of certain enumerated offenses, also known as automatically registerable offenses, to register with the county sheriff in the counties where they reside, work, and attend school.[5] SORA requirements may also apply to individuals that plead guilty to or are convicted of offenses that are not inherently sexual, but which are listed in subsections (I) through (VII), (IX), and (X) of § 29-4003(1)(b)(i)(A). Third degree assault is one of the listed offenses that is not inherently sexual.[6]

Section 29-4003(1)(b)(i)(B) sets out the requirements to bring an offense that is not inherently sexual within SORA, stating that "[i]n order for [SORA] to apply to the [listed not inherently sexual offenses], a court shall have found that evidence of sexual penetration or sexual contact, as those terms are defined in section 28-318, was present in the record . . . ."

In *State v. Norman* (*Norman I*),[7] on direct appeal, and *State v. Norman* (*Norman II*),[8] on appeal after remand, we considered a trial court's § 29-4003(1)(b)(i)(B) determination for an underlying conviction of third degree assault. Both appeals assigned error to the district court's determination that the defendant was subject to SORA's requirements for his third degree assault conviction. In *Norman I*, we reversed the court's

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[5] See § 29-4001 et seq.

[6] § 29-4003(1)(b)(i)(A)(VI).

[7] *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012).

[8] *State v. Norman*, 285 Neb. 72, 824 N.W.2d 739 (2013).

determination that SORA was applicable, because the court made the requisite finding solely on the State's factual basis for the plea and not the evidence on the record, which denied the defendant procedural due process. In *Norman II*, we determined the burden for proving that the offense included "sexual penetration" or "sexual contact," under § 29-4003(1)(b)(i)(B), was by clear and convincing evidence, and we held that there was sufficient evidence to support the court's factual finding of "sexual contact."

[2] As evidenced by these opinions, the trial court must determine whether a defendant who has committed a listed offense that is not inherently sexual is subject to SORA during the proceedings on the underlying conviction and sentence.[9] This is also supported by § 29-4003(1)(b)(i)(B)'s requirement that the determination be based on the evidence in the record, because the court on the underlying conviction is in the best position to consider the facts present in the case before it.

[3-5] This court has recognized that a judgment is an adjudication of all the matters that are essential to support it, and every proposition assumed or decided by the court leading up to the final conclusion and on which such conclusion is based is as effectually passed upon as the ultimate question which is finally resolved.[10] In a criminal case, the judgment from which the appellant may appeal is the sentence.[11] Thus, we hold that whether a defendant is subject to SORA based on a guilty plea or conviction for an offense that is not inherently sexual must be reviewed on direct appeal from the underlying conviction and sentence.[12]

[6-8] When a judgment is attacked in a way other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its

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[9] See, also, *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016).

[10] *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006).

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

[12] See Neb. Rev. Stat. § 25-1911 (Reissue 2016).

enforcement, the attack is a collateral attack.[13] A judgment that is not void, even if erroneous, cannot be collaterally attacked.[14] Therefore, we further hold that a challenge to a determination that SORA applies to a defendant for a listed offense that is not inherently sexual outside of a direct appeal from the underlying conviction and sentence is an impermissible collateral attack.

As a result, in the instant matter, we conclude Ratumaimuri's argument that the determination in the previous proceedings was invalid constituted an impermissible collateral attack on the judgment of his previous conviction and sentence. Therefore, the Court of Appeals erred in addressing the merits of Ratumaimuri's argument and not relying solely on the prior determination that Ratumaimuri was subject to SORA.

We note that these holdings do not conflict with our earlier opinion in *State v. Torres*.[15] At the time we decided *Torres*, SORA applied only to the automatically registerable offenses now listed in § 29-4003(1)(a).[16] SORA provides that its requirements apply to these automatically registerable offenses without any determination during the proceedings on the underlying conviction.[17] After our decision in *Torres*, the Legislature amended SORA to add the offenses that are not inherently sexual and the requisite findings of sexual penetration or sexual contact.[18] Our opinions in *Norman I* and *Norman II* addressed these new considerations.

Further, *Torres* is distinguishable from Ratumaimuri's matter and our opinions in *Norman I* and *Norman II* as it concerned Reyes Torres' standing to challenge his conviction and sentence by attacking the constitutionality of SORA. Torres was

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[13] *Fetherkile v. Fetherkile, ante* p. 76, 907 N.W.2d 275 (2018).

[14] *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

[15] *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998).

[16] See § 29-4003 (Cum. Supp. 1996).

[17] See § 29-4003(1)(a) (Reissue 2016).

[18] 2009 Neb. Laws, L.B. 285.

convicted of third degree sexual assault, which automatically made him subject to SORA. During the sentencing, Torres was advised of the requirement, but the district court's sentencing order did not address SORA's requirements. Further, Torres did not argue to the sentencing court that SORA was unconstitutional. On appeal, however, Torres argued that his sentence was excessive because SORA potentially increased his sentence for failing to register under it.

Our decision in *Torres* first addressed the fact that Torres did not raise the constitutional challenge before the sentencing court. We noted that an appellate court will not consider a constitutional question unless the question has been properly presented to the trial court for disposition. We then noted the proposition of law that "defendants are prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another, collateral statute which is irrelevant to the prosecution."[19] As a result, we determined that the underlying conviction could not be attacked based upon the constitutionality of SORA.

[9] While our reasoning differs from that employed by the Court of Appeals, our ultimate conclusion on the judgment is the same. Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.[20]

CONCLUSION

The judgment of the Nebraska Court of Appeals is affirmed.

Affirmed.

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[19] *Torres, supra* note 15, 254 Neb. at 94, 574 N.W.2d at 155.

[20] *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

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

State of Nebraska, appellee, v. Desiderio C. Hernandez, appellant.

911 N.W.2d 524

Filed May 11, 2018. No. S-17-235.

1. **Constitutional Law: Self-Incrimination: Appeal and Error.** Whether a defendant voluntarily made a statement while in custody and whether a defendant unambiguously invoked his or her right to remain silent or to have counsel present are mixed questions of law and fact. An appellate court reviews a trial court's finding of historical facts for clear error and independently determines whether those facts satisfy the constitutional standards.
2. **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.
3. **Motions for Mistrial: Appeal and Error.** Whether to grant a motion for mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
4. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
5. **Constitutional Law: Witnesses: Self-Incrimination.** The 5th Amendment to the U.S. Constitution—applicable to state governments by incorporation through the 14th Amendment—protects against compelled self-incrimination by providing that no person shall be compelled in any criminal case to be a witness against himself or herself.
6. **Motions to Suppress: Self-Incrimination: Proof.** To overcome a motion to suppress, the prosecution has the burden to prove by a preponderance of the evidence that incriminating statements by the accused were voluntarily given and not the product of coercion.

7. **Confessions: Police Officers and Sheriffs.** In determining whether an accused's statement was given freely and voluntarily, courts examine police conduct in light of the totality of the circumstances.
8. ____: ____. Coercive police activity is a necessary predicate to a finding that a confession is not voluntary.
9. **Miranda Rights: Waiver: Words and Phrases.** To be a valid waiver of *Miranda* rights, the waiver must be knowing and voluntary. A waiver is knowing if it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. A waiver is voluntary if it is the product of a free and deliberate choice rather than through intimidation, coercion, or deception.
10. **Miranda Rights: Waiver.** An express waiver of a suspect's *Miranda* rights is not required to be made in writing; an oral waiver is sufficient.
11. ____: ____. Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.
12. ____: ____. Statements prefaced by equivocal words like "I think," "maybe," or "I believe" generally do not constitute a clear, unambiguous, and unequivocal invocation.
13. **Evidence: Words and Phrases.** To be relevant, evidence must be probative and material. Evidence is probative if it has any tendency to make the existence of a fact more or less probable than it would be without the evidence. A fact is material if it is of consequence to the determination of the case.
14. **Rules of Evidence: Words and Phrases.** In the context of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), unfair prejudice means an undue tendency to suggest a decision based on an improper basis.
15. **Convictions: Other Acts: Appeal and Error.** When considering whether evidence of other acts is unfairly prejudicial, an appellate court considers whether the evidence tends to make conviction of the defendant more probable for an incorrect reason.
16. **Trial: Prosecuting Attorneys: Words and Phrases.** Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.
17. **Trial: Prosecuting Attorneys: Due Process.** Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infects the trial that the resulting conviction violates due process.
18. **Trial: Prosecuting Attorneys.** Prosecutors generally may not give their personal opinions on the veracity of a witness or the guilt or innocence of the accused. The principle behind this rule is that the prosecutor's opinion carries with it the imprimatur of the government and may

induce the jury to trust the government's judgement rather than its own view of the evidence.

19. ____: ____. 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.
20. **Juries: Prosecuting Attorneys.** Prosecutors should not make statements or elicit testimony intended to focus the jury's attention on the qualities and personal attributes of the victim.
21. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely upon the context of the trial as a whole.
22. **Trial: Prosecuting Attorneys: Appeal and Error.** In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury, (2) whether the conduct or remarks were extensive or isolated, (3) whether defense counsel invited the remarks, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting the conviction.

Appeal from the District Court for Richardson County: Daniel E. Bryan, Jr., Judge, Retired. Affirmed.

Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Heavican, C.J., Cassel, Stacy, and Funke, JJ., and Colborn and Samson, District Judges.

Samson, District Judge.

I. INTRODUCTION

A confession may not be used in a criminal prosecution if it was obtained through police coercion rather than voluntarily made. The appellant, who was convicted of first degree murder, argues that his confession was not voluntary, because he was still under the influence of the methamphetamine he

smoked the day before. Because we find no police coercion, we conclude it was voluntary.

The appellant also claims that prior to his confession, he did not voluntarily waive his right to remain silent, but instead invoked that right during his interview with law enforcement. After a review of the evidence, we conclude that the appellant understood his rights, yet still agreed to speak with law enforcement. We also find that the appellant's statement that he would "probably stop talking" was not an unequivocal invocation of the right to remain silent. We also conclude that the district court did not abuse its discretion by not redacting some of the statements in the interview.

Finally, we conclude that the prosecuting attorney made several inappropriate comments during his closing arguments. However, the district court did not abuse its discretion by not declaring a mistrial, in part because of the strength of the evidence supporting the convictions.

II. BACKGROUND

Desiderio "Desi" C. Hernandez was charged with first degree murder (a Class I or IA felony),[1] use of a firearm to commit a felony (a Class IC felony),[2] and possession of a firearm by a prohibited person (a Class ID felony).[3] All of these charges were made in connection with the death of his cousin, Joseph "Joey" A. Debella, Jr. A 5-day jury trial was held. The following evidence was adduced.

1. The Brownell House

Debella moved to Falls City, Nebraska, in the summer of 2015. Shortly thereafter, Debella began staying at Jason Brownell's house (the Brownell house). Several other individuals also stayed there or visited frequently, including John Hall, Brett Winters, David McPherson, Jeff Morley, and

[1] See Neb. Rev. Stat. § 28-303 (Supp. 2017).

[2] See Neb. Rev. Stat. § 28-1205(1)(c) (Reissue 2016).

[3] See Neb. Rev. Stat. § 28-1206(3)(b) (Reissue 2016).

Hernandez. Debella lived in the basement. All other residents, including Hernandez, slept upstairs.

Evidence suggested that methamphetamine was sold in the house on a daily basis and that everyone in the house was involved in drug sales, including Hernandez and Debella. One house resident testified that Debella was the primary dealer of methamphetamine.

2. August 4, 2015

Hall and McPherson testified to the events leading up to the discovery that Debella had been shot. On the evening of August 4, 2015, Hall and McPherson were smoking methamphetamine in Hall's bedroom in the Brownell house when they heard what sounded like a gunshot. According to McPherson, he said to Hall, "'was that a gunshot I just heard?'" to which Hall replied, "'Yeah. They're probably shooting that gun in the basement, again.'"

A few minutes later, Hernandez opened the door to Hall's bedroom and asked if they wanted to go to the basement to smoke. Hall accepted the invitation, but shortly afterward, Hernandez left out the front door.

After Hernandez left, Hall yelled downstairs to Debella. Debella did not answer. Hall then heard "fast" breathing and went downstairs to discover Debella lying on the floor and shaking, with blood coming out of his head and blood on the floor. Hall yelled to McPherson that Debella had been shot and told McPherson to call the 911 emergency dispatch service. McPherson testified that he did not call 911, because it was not his house and he did not want to get involved. Instead, McPherson went to Brownell's workplace to tell Brownell about Debella.

McPherson and Hall testified that they did not hear anyone entering or leaving the house from the time they arrived to the time Hernandez left. Winters arrived at the house around the time that McPherson was leaving.

Hernandez' sister, Esperanza Ogden, also testified as to her recollections of that night. She testified that Hernandez came

to her house at approximately 11:40 p.m. Hernandez gave Ogden a cigarette and said, "'That will probably be the last cigarette I ever give you.'" Hernandez then told Ogden he had shot Debella and indicated he had shot him in the forehead. Hernandez then walked away.

Ogden then called her and Hernandez' brother and sister-in-law, who also lived in Falls City, to tell them what Hernandez had said. Minutes later, Hernandez arrived at their house. When he arrived, the brother and sister-in-law were on the front porch. From the sidewalk, Hernandez said, "'I shot that motherfucker.'" The brother asked why, and Hernandez replied, "'His bitch shouldn't have been late.'" Hernandez also said, "'I told you guys I wasn't fucking around.'" According to the sister-in-law, as Hernandez was walking away, he sarcastically said, "'Somebody should probably call 911. It's been at least ten minutes now.'" The sister-in-law testified that during the time Hernandez was at their house (about a minute), Hernandez was "hopping around" and could not keep still from adrenaline.

After Hernandez left, the sister-in-law called Ogden back and said she was coming to get her so they could go to the Brownell house together.

When Ogden and the sister-in law arrived at the Brownell house, the front door was locked. As they were knocking, McPherson arrived and yelled to Hall to open the door. Soon after, Hall and Winters opened the door, and McPherson left.

Ogden and the sister-in-law entered the house, and they could hear Debella's labored breathing and moaning. Ogden described Debella's breathing as a "death hurl" or "death gurgle." Ogden then went into the basement and found Debella lying face down, with blood around his head. She told the sister-in-law to call 911.

3. August 5, 2015

Police responded shortly after the call. At approximately 12:15 a.m. on August 5, 2015, a Falls City Police Department officer, Jonathan Kirkendall, and another officer arrived at the

scene. Hall told the officers that Debella was downstairs. When Kirkendall arrived at Debella's side, Debella was still breathing laboriously, but when Kirkendall attempted to communicate with him, Debella did not respond.

Kirkendall testified that he did not see any signs of struggle in the basement. The officers found some .22-caliber ammunition in the basement and a revolver handgun under some blankets on a futon bed.

Debella was taken by ambulance to a local hospital and then transported by helicopter to a hospital in Lincoln, Nebraska, where he was stabilized and placed in an intensive care unit. He was kept alive with a life support system. About a week later, Debella's mother decided to remove him from life support, after which he died.

At around 10 a.m. on August 5, 2015, Hernandez went to Michael Seager's house in Falls City. Seager was an acquaintance of Hernandez, whom Hernandez had gotten into an altercation with and had not been in contact with for 6 to 8 months.

Hernandez told Seager he had nowhere to go and asked if Seager wanted to "hang out" and smoke methamphetamine. Seager agreed, and the two spent the day together smoking multiple times. At some time during the day, Hernandez asked Seager if he could stay in his house and pay rent. Seager turned him down.

Hernandez then called his cousin, Tiffany Gates, who lived in Horton, Kansas, which is approximately 35 minutes outside of Falls City. Hernandez told Gates that he needed a place to stay. At the time Hernandez called, Gates already knew Hernandez was wanted in connection with the shooting of Debella and told Hernandez that he could come stay with her. Gates then got her children out of the house and arranged for someone to call the police when she sent a text message indicating that Hernandez had arrived.

Seager drove Hernandez to Gates' house. When they arrived, Gates sent the text message. Gates testified that she asked Hernandez what happened and that he chuckled and said, "'I

got that motherfucker right there.'" Seager testified that he overheard Hernandez say to Gates, "'He was breathing when I got there. He wasn't when I left,'" and he saw Hernandez make a gesture like a gun pointed at his forehead. However, Gates testified that Hernandez told her Debella was still breathing when he left.

At about 7 p.m. on August 5, 2015, Horton police approached the Gates' residence. Hernandez immediately said to Gates, "'I'm not here'" and ran into the house. Gates told one of the officers that Hernandez was inside.

Hernandez was ordered to come out of the house, but he stayed inside. The officers did not enter the house.

4. August 6, 2015

After an 8-hour standoff, which included a "SWAT team," Hernandez was taken into custody at approximately 3 a.m. on August 6, 2015. A Taser was deployed on Hernandez during his arrest.

After being briefly treated at a local hospital for a small laceration on his head and for a Taser prong stuck in his chest, Hernandez was medically cleared, turned over to the police, and transported to jail at around 3:30 a.m. on August 6, 2015.

5. Interview With Investigators

At around 2:30 p.m. on August 6, 2015, Hernandez was interviewed by two Nebraska State Patrol investigators, Cory Townsend and Nicholas Frederick, in an interview room at the Brown County sheriff's office in Hiawatha, Kansas.

At the beginning of the video-recorded interview, Townsend introduced himself and Frederick and told Hernandez that they were from the Nebraska State Patrol. Hernandez asked Townsend, "Why am I in Kansas, and you guys are questioning me in another state?" Townsend explained that they can question people in other states, but do not have authority to make arrests there.

Townsend told Hernandez that they had an idea about what happened between him and "Joey." Hernandez said,

"Joey who?" Townsend said, "Joey [Debella,] your cousin." Hernandez said, "What about my cousin?" Townsend said, "Tell me your name, please." Hernandez said, "My name is Desi. You just got my name from in there, didn't you?"

Hernandez then launched into a long discussion of his family and various topics. After a while, Townsend told Hernandez again that he wanted to talk to him about Debella and that he needed Hernandez' cooperation to get his side of the story. Hernandez said, "There's nothing I can tell you guys that can help me any more than if I tell you the truth."

Townsend told Hernandez that he needed to make sure Hernandez knew what his rights were. Hernandez responded, "I don't even know what my rights are." As Townsend tried to proceed with reading Hernandez his rights, Hernandez interjected and started talking about various off-topic subjects.

Townsend tried to bring Hernandez back on topic and read from a *Miranda* rights advisory form. He read, "Before asking you any questions about the shooting of Joseph Anthony Debella Jr., I must advise you and you must understand each of the following," and he read the *Miranda* rights. He then said, "Now [Hernandez], did you understand those?" Hernandez said, "Yeah, I'm still focusing on the shooting." Townsend said, "Do you want me to explain or to repeat any of that?" Hernandez shook his head "no."

Townsend then read the bottom of the form, which stated that Hernandez had been advised of his rights and was willing to answer questions. He told Hernandez that there are two sides to every story and that Townsend wanted to get Hernandez' side of the story. Pointing to the line on the rights advisory form that read "the shooting of Joseph Anthony Debella, Jr.," Hernandez said, "That right there is . . . somebody's mistake somewhere." He said he heard that "something happened at that house," but that no one told him what happened. He then asked Townsend to tell him.

Hernandez started talking about his family and other topics. Townsend tried to bring Hernandez' attention back to the advisory form. The following colloquy occurred:

Townsend: Because of my job as a police officer, I live by a lot of rules. And I have expectations. And I live by upholding the rights of individuals. Ok?

Hernandez: And because of my job as a civilian I live by a lot of rules. I respect them a lot more than I probably should.

Townsend: And that's what makes socie . . . .

Hernandez: I get disrespected more than I probably should. But that's nor [sic] here nor there.

Townsend: To talk to you about this, [Hernandez], I'd like for you to know that you understand this and to agree to talk to me. Is that something you can do?

Hernandez: I can try.

Townsend: Ok, would you be willing to sign here?

Hernandez: I guess. Well, what do I sign, my name? You [inaudible] my name.

Townsend: Is this your name right here?

Hernandez: [Inaudible] I was around in things that happened in the '70s, supposedly. Everybody swears I wasn't there. Do you know what I mean? I've got cousins upon cousins telling me, "You couldn't have been there." You know what I'm saying? "That didn't happen." Well, I know that happened. I was there. I was there when this happening [sic] in Grandma's front yard. I was there when Grandpa kept bringing all this fucking [inaudible].

Hernandez: [Pointing at the rights advisory form and stating,] I just want to know if this is my name or not.

Townsend: Well, I believe that's what your name to be. I mean you've got a tattoo there on your forearm that says "Desi."

Hernandez: That's why I'm slowly putting all this shit on my body.

Hernandez then complained that he was shocked with a Taser and began discussing other topics like his family and childhood. He then said, "You guys probably don't even know where this is coming from. I'm just fed the fuck up. I'm fed up with lies."

At many times during the interview, Hernandez would change the topic or talk about things that were not responsive to the question he was asked. He spoke multiple times at length about his family, wondering whether various family members were actually his family members.

Hernandez also made multiple odd or nonsensical statements, such as statements about people having two stomachs like cows and about defecating being similar to having a child.

Townsend then told Hernandez that Hernandez' perspective of what happened mattered. Hernandez interjected, "Yeah, I'm catching everything you are saying."

Townsend asked Hernandez why he shot Debella, and Hernandez denied shooting him. Townsend told Hernandez that other people had told him that Hernandez shot Debella. Hernandez said, "Well as far as things go, anything I say can incriminate me and put me in prison."

Townsend told Hernandez that Hall told him what had happened. Hernandez then claimed he was in the basement "smoking dope" with Debella and went upstairs to ask Hall and McPherson if they wanted to smoke dope. Hernandez did not want to wait on Hall, so he left. Hernandez claimed he did not hear any gunshot.

Townsend told Hernandez that what makes people interested in a case is "the why" behind what happened and that people want to know what Debella did to offend Hernandez. Hernandez said, "What did he do to offend me? Well, there's a number of things." Townsend asked him if he was upset that Debella was not cutting him in on his profits. Hernandez said, "It's not about the profits, it's about respect." Later in the interview, Hernandez said, "Never once. [Debella's] never showed me respect from the very first time I ever met him." Townsend asked, "Is that why you got upset and shot him?" Hernandez said, "No, no, no. And I didn't shoot him. Thanks for that addition, though."

At some time during the interview, Hernandez said, "I think I'll probably stop talking now." Townsend said, "What's that?" Hernandez repeated, "I think I'll probably stop talking

now." Townsend said "ok," paused, and then started talking about the importance of getting Hernandez' side of the story. Townsend then told Hernandez that he is a unique person. Hernandez replied:

> And I'm very intelligent. I know what I'm doing. All this shit right here. [Circling the rights advisory form in pen and stating,] I don't run around trying to do all this shit because I think I'm a badass or a hardass or I can prove something. I do all this because I know all this shit that happens [pointing at rights advisory form with a pen in hand] in the court of law. All this shit happens for a reason, which is good. And some of it I love too much, you know what I'm saying, as far as reading people's cases, this and that, and the other. I can go and tell you where the judge, the prosecutor, and your lawyer fucked you. . . . I can tell you who can be judges and who can be lawyers and who can be prosecutors.

Townsend also asked Hernandez about the gun. Hernandez said, "That was [Debella's] revolver. That revolver don't belong to me." Townsend asked Hernandez how, if the gun belonged to Debella, Hernandez ended up using it. He replied, "Let's just say because [Debella's] careless."

Townsend again talked about the importance of honesty and asked Hernandez whether his story was going to change once DNA testing results were received. Townsend stressed that no matter what Hernandez had done, he could still have his integrity and honesty and not be a liar. Hernandez said, "A liar is a liar because they lie to themselves."

Townsend asked Hernandez if he was lying to himself about shooting Debella. Hernandez said no. Townsend asked, "Did you shoot [Debella]?" Hernandez then confessed, "Did I shoot [Debella]? Yes, I did." He told Townsend that he left the gun "right there." When pressed more about his motive, Hernandez said, "He was stepping on my toes, we can say."

Townsend asked Hernandez if he was sorry about what happened. Hernandez replied, "Of course I am." He started talking about how he was raised and then said, "But as far as

[Debella] goes, if I could take everything back, that's what I'd love to do."

Near the end of the interview, Hernandez asked, "Who told you I shot [Debella]?" Townsend said, "You just told me that you shot [Debella]." Hernandez said, "Of course I did. But I also told many a people that Bill Clinton was my daddy. Or I shot John F. Kennedy too. Can you guys believe that? Would you believe that? No." Similarly, several minutes later, Hernandez said, "You're so convinced I shot him. . . . Who told you that I shot him?" Townsend said, "You just did." Hernandez said, "I also told you that I shot John F. Kennedy. Can you prove that?"

At the end of the interview, Hernandez put his face in his hands, and as Townsend was starting to ask another question, Hernandez said, "Boss, I think we should end this interview right now. If we could please. I'd much rather talk later." The investigators ended the interview, which lasted approximately 2 hours.

6. Motion to Suppress

Prior to trial, Hernandez moved to suppress the statements made in the August 6, 2015, interview on the basis that they were involuntary or taken in violation of his *Miranda*[4] rights. At a hearing to determine the statements' admissibility, Hernandez argued that his statements were not voluntary and that he could not waive his *Miranda* rights "due to his mental state and the influence of illegal narcotics in his system."

At the hearing, the video of the interview was introduced and the court heard testimony from Townsend and the Falls City Police Department's chief of police.

Townsend testified that prior to Hernandez' interview, investigators had spoken with Seager and Gates. Gates told investigators that Hernandez appeared to be "high" when he arrived at her house the day before the interview.

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

Townsend testified that a baggie of what appeared to contain methamphetamine was found on the passenger side of Seager's truck, where Hernandez had been sitting. But no evidence of methamphetamine or other drug use was found in Gates' residence where Hernandez was apprehended.

Townsend explained that his technique for interviews is to initially build rapport. He said that neither he nor Frederick yelled or raised their voices during the interview. The temperature and lighting in the interview room were normal. The interview lasted around 2 hours, without any breaks. Townsend said that Hernandez did not appear overly tired and was "very focused."

Townsend testified that Hernandez did not demonstrate any behaviors associated with methamphetamine use at the time of the interview. Although Townsend did not know when Hernandez had last used methamphetamine or any other drugs, Hernandez had been in custody for approximately 12 hours, so Townsend assumed he had not had any during that time. Townsend thought Hernandez' "odd" statements were the result of his personality or a "show or display."

The district court overruled Hernandez' motion to suppress. In its findings of fact, the court noted that the interview began approximately 11½ hours after Hernandez was arrested. The court said that Hernandez "was articulate at times" and "appeared coherent throughout the interview." The court said that Hernandez' lack of focus "was not because Hernandez was delusional or under some type of drug but because he . . . [h]ad emotional difficulty trying to admit his actions involving his cousin [Debella] and . . . was aware of the legal consequences of his admission."

The court concluded that Hernandez' statements were not involuntarily made and that his *Miranda* waiver was also voluntary. It further found that his statement midway through the interview was not a clear, unequivocal, unambiguous invocation of the right to remain silent.

7. Motion in Limine

Hernandez also filed a motion in limine to exclude certain statements made during the interview. The motion requested that the court exclude various statements, primarily about his past behavior and his family, on the basis of Neb. Evid. R. 401 to 403.[5]

The district court overruled Hernandez' motion in limine in part and in part sustained it. The court excluded statements by Hernandez about being in prison, about "screwing [a] bitch," and about a prior assault conviction for slitting an individual's throat. The court also found that "while there are many statements made by [Hernandez] during [the] interview that seem irrelevant[,] any unfair prejudice (403) is outweighed by [the] necessity for [the] fact finder to consider context within [the] interview and [Hernandez'] voluntariness of his ultimate confession."

8. Closing Arguments

At the conclusion of the State's closing arguments, Hernandez moved for a mistrial based upon several statements made by the prosecuting attorney. These statements are set forth in greater detail in our discussion of Hernandez' assignment of error on this topic. The district court overruled Hernandez' motion for mistrial, finding that if any of the statements were improper, they were harmless.

9. Jury Verdicts and Sentences

The court instructed the jury on determining the voluntariness of the statements made by Hernandez in his interview with the investigators. The instruction required the jury to find that he understood what he was saying and made the statements freely and voluntarily under all of the circumstances. If the jury did not find that this was established by proof beyond a reasonable doubt, it was instructed to disregard the statements even if it believed them to be true.

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[5] See Neb. Rev. Stat. §§ 27-401 to 27-403 (Reissue 2016).

The jury found Hernandez guilty on all three counts. He was sentenced to life imprisonment for the first degree murder conviction and 3 to 7 and 5 to 10 years' imprisonment on the other two convictions, all to run consecutively.

III. ASSIGNMENTS OF ERROR

Hernandez assigns, combined and restated, that the district court erred in (1) admitting the video of his interview with law enforcement officials, (2) not redacting various statements made in the interview pursuant to evidence rules 401 to 403, and (3) overruling his motion for mistrial based on statements made by the prosecution in closing arguments.

IV. STANDARD OF REVIEW

[1] Whether a defendant voluntarily made a statement while in custody and whether a defendant unambiguously invoked his or her right to remain silent or to have counsel present are mixed questions of law and fact. We review a trial court's finding of historical facts for clear error and independently determine whether those facts satisfy the constitutional standards.[6]

[2] 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.[7]

[3,4] Whether to grant a motion for mistrial is within the trial court's discretion, and this court will not disturb its ruling unless the court abused its discretion.[8] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[9]

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[6] *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

[7] *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017).

[8] *Id.*

[9] *Id.*

V. ANALYSIS

Before delving into the assignments of error, we note that it is not entirely clear from Hernandez' brief whether his constitutional arguments are grounded solely in the U.S. Constitution or also in the Nebraska Constitution. Because Hernandez has not argued to the contrary, we will adhere to our practice of construing the provisions of the bill of rights in article I of the Nebraska Constitution in lockstep with the U.S. Supreme Court's construction of parallel provisions in the U.S. Constitution.[10]

1. Admission of Video Interview

We first consider Hernandez' assignment that the district court erred in overruling his motion to suppress and admitting the video of his interview with law enforcement officials. Hernandez argues that the video should have been excluded because the statements in the video were obtained involuntarily in violation of the Fifth Amendment prohibition of compelled self-incrimination, Hernandez did not validly waive his *Miranda* rights, and Hernandez invoked his right to remain silent during the interview.

(a) Voluntariness of Confession

[5] The 5th Amendment to the U.S. Constitution—applicable to state governments by incorporation through the 14th Amendment—protects against compelled self-incrimination by providing that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself . . . ."[11] This constitutional provision, along with the Due Process Clause of the 14th Amendment, prevents the use of involuntary confessions in criminal prosecutions.[12] Likewise, the Nebraska Constitution

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[10] See, *State v. Baker*, 298 Neb. 216, 903 N.W.2d 469 (2017); *State v. Rocha, supra* note 7; *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

[11] U.S. Const. amend. V; *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

[12] *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); *State v. Turner*, 288 Neb. 249, 847 N.W.2d 69 (2014).

bars the use of involuntary confessions.[13] These constitutional protections are rooted not only in the risk of false confessions flowing from the use of coercion, but also in the right of citizens to be free from oppressive overreaching at the hands of government officials.[14]

[6] To overcome a motion to suppress, the prosecution has the burden to prove by a preponderance of the evidence that incriminating statements by the accused were voluntarily given and not the product of coercion.[15]

[7] In determining whether an accused's statement was given freely and voluntarily, courts examine police conduct in light of the totality of the circumstances, including the tactics used by the police and the details of the interrogation.[16] Importantly for Hernandez' argument, relevant factors include any characteristics of the accused known to police, which might cause his or her will to be easily overborne, such as a defendant's mental state or intoxication.[17]

Hernandez argues that the statements made in the video interview were not voluntary for purposes of the Fifth Amendment, because they were made while he was under the influence of methamphetamine. We disagree.

While intoxication is relevant to determining whether police conduct amounted to coercion, "[i]ntoxication does 'not automatically render a confession involuntary . . . .'"[18]

[8] We have repeatedly said that coercive police activity is a necessary predicate to a finding that a confession is not

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[13] Neb. Const. art. I, §§ 3 and 12.

[14] See, *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986); *Jackson v. Denno, supra* note 12.

[15] *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

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

[17] See, *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

[18] *U.S. v. Jones*, 842 F.3d 1077, 1083 (8th Cir. 2016).

voluntary.[19] The prohibition on the use of involuntary confessions is at its core—like other constitutional rights—a limitation on the power of government.[20] Thus, the focus of this inquiry is on the conduct of governmental actors.[21]

This principle is demonstrated in the U.S. Supreme Court case *Colorado v. Connelly*,[22] in which the defendant approached a police officer on the street and made an unprompted confession that he had murdered someone and wanted to talk about it. The confession was suppressed by a Colorado trial court, and the suppression was affirmed by the Colorado Supreme Court, based on evidence that the defendant suffered from schizophrenia and was in a psychotic state at the time of the confession.[23] The defendant heard what he believed to be the "'voice of God'" telling him to confess to the murder or commit suicide.[24] The Colorado courts concluded that the confession was involuntary, because it was not "'the product of a rational intellect and a free will.'"[25]

The U.S. Supreme Court reversed the decision of the Colorado Supreme Court, concluding that the confession was voluntary for purposes of the Due Process Clause.[26] The Court said that its voluntariness cases have all "focused upon the

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[19] See *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016). See, also, *State v. Dubray, supra* note 10; *State v. McClain, supra* note 15; *State v. Landis*, 281 Neb. 139, 794 N.W.2d 151 (2011); *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

[20] See, generally, *NCAA v. Tarkanian*, 488 U.S. 179, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988) (state action doctrine); *Colorado v. Connelly, supra* note 14 (coercion and state action); *State v. Dubray, supra* note 10 (confession to private citizens).

[21] *Colorado v. Connelly, supra* note 14. See, also, *State v. Dubray, supra* note 10.

[22] *Colorado v. Connelly, supra* note 14.

[23] *Id.*

[24] *Id.*, 479 U.S. at 161.

[25] *Id.*, 479 U.S. at 162.

[26] *Colorado v. Connelly, supra* note 14.

crucial element of police overreaching" and each contained "a substantial element of coercive police conduct."[27] The Court contrasted the facts in *Connelly* to the facts of a prior case[28] in which a confession was deemed involuntary where the police knew of a defendant's history of mental illness and exploited it with coercive tactics such as an 8- to 9-hour interrogation in a tiny room in isolation from family, friends, or legal counsel.[29] The Court reversed, because it concluded that the Colorado Supreme Court's approach "fail[ed] to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other."[30]

Again, the primary basis of Hernandez' argument is that he was under the influence of methamphetamine. He points to the fact that, as the investigators knew, he had used methamphetamine the day before the interview. He also points to the many odd statements made during the interview. He also raises the question of whether he had adequate sleep prior to the interview.

Applying the voluntariness factors set forth above, a review of the video interview reveals no overreaching or coercive conduct by law enforcement.

The demeanor of each investigator was calm and relaxed. Throughout the interview, Townsend focused on building rapport with Hernandez and appealing to his better instincts, such as a belief in the importance of telling the truth. The investigators never raised their voices, took an aggressive demeanor, or unfairly manipulated or lied to Hernandez. Hernandez was also allowed to speak at length without interruption on a variety of topics well afield of the scope of the interview, with eventual gentle redirection.

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[27] *Id.*, 479 U.S. at 163, 164.

[28] *Blackburn v. Alabama*, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960).

[29] *Colorado v. Connelly, supra* note 14.

[30] *Id.*, 479 U.S. at 165.

The interview was only about 2 hours long, and there was nothing unusual or oppressive about the environment in which it was conducted. There is no evidence in the record that Hernandez was ever kept from sleeping, and Townsend testified that Hernandez appeared reasonably well rested.

Hernandez undoubtedly made numerous strange statements in the interview. It is possible he felt some effect from the residual methamphetamine in his body from smoking the day before, was not in a state of full mental health, or both. But such facts are not dispositive. As we have explained, intoxication and mental illness alone are insufficient to render a confession involuntary.[31] The record belies any notion that the investigators exploited Hernandez' mental state in order to overbear his will and wring out a confession. To the contrary, Hernandez was certainly coherent and able to intelligently answer questions with specificity and in a reasonably articulate manner when he chose to do so. The questioning was entirely appropriate for someone in Hernandez' state.

Moreover, some of Hernandez' statements indicate that several of his strange comments may have been strategic, rather than the product of drugs or his mental condition. When confronted with the fact that he said he shot Debella, he said, "Of course I did. But I also told many a people that Bill Clinton was my daddy. Or I shot John F. Kennedy too. Can you guys believe that? Would you believe that? No." He made a similar comment after another reminder of his previous confession: "I also told you that I shot John F. Kennedy. Can you prove that?"

These statements show that, at least sometimes, Hernandez made absurd statements in an effort to undermine the credibility of his incriminating statements. It is thus doubtful whether all of his off-the-wall comments were truly the result of intoxication or an unsound mental state.

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[31] See, *Colorado v. Connelly, supra* note 14; *U.S. v. Jones, supra* note 18. See, also, *State v. Goodwin, supra* note 19.

Additionally, Hernandez' ability to think clearly was illustrated by the fact that he began the interview by asking the Nebraska investigators why they were questioning him in Kansas. Questioning the territorial scope of law enforcement jurisdiction reveals a reasonably cogent mind.

Because we find no evidence of coercion on the part of law enforcement officials, we conclude that Hernandez' statements were made voluntarily. The district court did not err in overruling Hernandez' motion to suppress or his trial objections regarding the admission of the video interview.

(b) Waiver of *Miranda* Rights

Hernandez also argues that the district court erred in admitting the video interview, because he did not voluntarily waive his *Miranda* rights to remain silent and to counsel.

In *Miranda v. Arizona*,[32] the U.S. Supreme Court announced the rule that confessions obtained in custodial interrogations may not be used in criminal prosecutions unless certain procedural safeguards were met, including advising the detainee of his or her constitutional right to remain silent and right to counsel.[33] These rights must be knowingly and voluntarily waived.[34]

Although the *Miranda* rule and the requirement that confessions be made voluntarily both arise out of the Fifth Amendment, the question of whether a custodial interrogation complies with *Miranda* is distinct from the question of whether statements made during a custodial interrogation were sufficiently voluntary.[35] The *Miranda* warnings are an "absolute prerequisite" to custodial interrogation; statements made during a custodial interrogation in the absence of these

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[32] *Miranda v. Arizona, supra* note 4.

[33] *Id.*

[34] *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); *Miranda v. Arizona, supra* note 4; *State v. Goodwin, supra* note 19.

[35] See, *Miranda v. Arizona, supra* note 4; *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009); *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

warnings and a valid *Miranda* waiver are inadmissible, even if otherwise voluntarily made.[36]

[9] To be a valid waiver of *Miranda* rights, the waiver must be "'knowing' and 'voluntary.'"[37] A waiver is "knowing" if it is "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[38] A waiver is "voluntary" if it is "the product of a free and deliberate choice rather than [through] intimidation, coercion, or deception."[39] The standard for determining voluntariness in the context of a *Miranda* waiver is the same standard used to determine the voluntariness of confessions, which we have discussed in detail above.[40] Whether a knowing and voluntary waiver has been made is determined by looking to the totality of the circumstances.[41]

The parties do not dispute that Hernandez was given a *Miranda* rights advisory. The issue is whether Hernandez knowingly and voluntarily waived his *Miranda* rights. After a review of the evidence, we find that he did.

First, several of Hernandez' statements show that he understood his rights. One comment is of unique importance. At one point in the interview, Hernandez said, "[A]nything I say can incriminate me and put me in prison." This statement is strong evidence of his understanding of his rights. Additionally, Hernandez' clear and unequivocal invocation of his right to remain silent at the end of the interview indicates that he understood that right as well.

Hernandez also boasted of his understanding of the legal system, saying, "I know all this shit that happens in the court

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[36] *Miranda v. Arizona, supra* note 4, 384 U.S. at 468.

[37] *Moran v. Burbine*, *supra* note 34, 475 U.S. at 419. Accord *State v. Goodwin, supra* note 19.

[38] *Moran v. Burbine, supra* note 34, 475 U.S. at 421.

[39] *Id.*

[40] See *Colorado v. Connelly, supra* note 14.

[41] *State v. Burries, supra* note 6.

of law." He spoke about how he liked to read other people's cases and understood how they were disadvantaged by the legal system.

Testimony was presented at the suppression hearing that Hernandez was questioned in connection with a prior assault conviction, and at that time, he signed a rights advisory form and seemed to understand his rights.

Hernandez also expressly indicated that he understood his rights. When Townsend asked him if he understood, Hernandez said "Yeah, I'm still focusing on the shooting." After Hernandez gave this response, Townsend asked him, "Do you want me to explain or to repeat any of that?" Hernandez shook his head "no," indicating that he understood his rights.

[10,11] Not only did Hernandez understand his rights, but he voluntarily waived them. An express waiver of a suspect's *Miranda* rights is not required to be made in writing; an oral waiver is sufficient.[42] In addition, the U.S. Supreme Court has said that a *Miranda* waiver need not be express, but can be implied.[43] A "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver," may establish a valid, implied waiver.[44] Thus, "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent."[45]

As discussed, the evidence shows that Hernandez understood these rights. Thus, by voluntarily speaking with the investigators, Hernandez impliedly waived his rights.[46]

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[42] *U.S. v. Sturdivant*, 796 F.3d 690 (7th Cir. 2015); *U.S. v. Murdock*, 491 F.3d 694 (7th Cir. 2007). See, also, *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979).

[43] *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).

[44] *North Carolina v. Butler, supra* note 42, 441 U.S. at 373.

[45] *Berghuis v. Thompkins, supra* note 43, 560 U.S. at 384.

[46] See, *Berghuis v. Thompkins, supra* note 43; *North Carolina v. Butler, supra* note 42.

Not only did Hernandez' conduct constitute an implied waiver, but he also validly provided an express oral waiver. When Townsend asked Hernandez if he would be willing to speak with him, Hernandez said, "I can try." When asked to sign the rights advisory form to express this waiver in writing, he said, "I guess," and leaned forward to sign before getting sidetracked and moving on to another topic. Hernandez' statements and conduct constitute an express waiver of his *Miranda* rights.

(c) Invocation of Right to Remain Silent

Hernandez also argues that the video interview should have been excluded, because he invoked his right to remain silent when he said, "I think I'll probably stop talking now." We disagree. An invocation of the right to remain silent or right to counsel must be clear, unambiguous, and unequivocal.[47]

[12] Here, to "think" about "probably" being silent is ambiguous and equivocal. In *State v. Rogers*,[48] we discussed how statements prefaced by equivocal words like "I think," "maybe," or "I believe" generally do not constitute a clear, unambiguous, and unequivocal invocation.

Hernandez' equivocal statement about how he thought he would "probably stop talking" stands in stark contrast to his unequivocal invocation of his right to remain silent at the end of the interview, which was scrupulously honored. Hernandez said, "Boss, I think we should end this interview right now. If we could please. I'd much rather talk later." When he wanted to exercise his right to remain silent, rather than merely musing about probably stopping talking, Hernandez was very capable of requesting that the interviewers "end this interview right now."

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[47] See, *Berghuis v. Thompkins, supra* note 43; *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); *State v. Rogers, supra* note 35.

[48] *State v. Rogers, supra* note 35.

We conclude that Hernandez' statement, "I think I'll probably stop talking now," was not a clear, unambiguous, and unequivocal of his right to remain silent and terminate the custodial interrogation.

Because Hernandez validly waived his *Miranda* rights, voluntarily spoke with the investigators, and did not subsequently invoke his right to remain silent until the end of the interview, we conclude that the district court did not err in denying Hernandez' motion to suppress and trial objections to the video interview.

2. Relevance and Rule 403

Hernandez also argues that the district court erred in overruling in part his motion in limine and trial objections and admitting various statements in Hernandez' interview with the investigators. He argues first that these statements were not relevant and, secondly, that even if relevant, the statements should have been excluded under rule 403. We conclude that the district court did not abuse its discretion in finding the statements were relevant. Nor did it abuse its discretion in finding that the statements were not inadmissible under rule 403.

(a) Relevance

[13] Evidence which is not relevant is inadmissible.[49] To be relevant, evidence must be probative and material.[50] Evidence is probative if it has any tendency to make the existence of a fact more or less probable than it would be without the evidence.[51] A fact is material if it is of consequence to the determination of the case.[52]

The district court determined that Hernandez' statements were relevant to show the voluntariness of his confession in

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[49] § 27-402.

[50] *State v. Rocha, supra* note 7.

[51] *Id.*

[52] *Id.*

his interview with law enforcement. We find that this was not an abuse of discretion.

At the suppression hearing, the State was required to prove that Hernandez' confession was voluntary by a preponderance of the evidence. At trial, in order to rely on the confession, the jury was required to find voluntariness beyond a reasonable doubt. Thus, evidence probative of the voluntariness of Hernandez' statements in the interview is relevant and the statements made by Hernandez in the interview are undoubtedly relevant to the voluntariness of Hernandez' confessions in the interview. Accordingly, the district court did not abuse its discretion in determining that the statements Hernandez sought to exclude were relevant.

(b) Rule 403

Even relevant evidence is not automatically admissible.[53] It must pass muster under rule 403.[54] Under rule 403, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.[55]

[14,15] Rule 403 considers the danger of *unfair* prejudice. Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party.[56] In the context of rule 403, unfair prejudice means an undue tendency to suggest a decision based on an improper basis.[57] Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.[58] When considering whether evidence of other

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[53] *Id.*

[54] *Id.*; § 27-403.

[55] *State v. Rocha, supra* note 7.

[56] *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016).

[57] *Id.* See, also, *State v. Baker, supra* note 10; *State v. Rocha, supra* note 7.

[58] *State v. Oldson, supra* note 56.

acts is unfairly prejudicial, we consider whether the evidence tends to make conviction of the defendant more probable for an incorrect reason.[59]

When trial courts admit recorded conversations or interviews, it does not follow that they must be in an unredacted form.[60] Hernandez rightly points out that "[c]onfessions are not an all-or-nothing proposition."[61]

We first note that the district court did sustain Hernandez' motion in limine in part and excluded discussion of an incident where he slit a person's throat, a reference to being in prison, and a comment about "screwing [a] bitch." These statements, especially the lengthy discussion about his prior assault, certainly bear a significant risk of unfair prejudice.

But the statements that the district court admitted and that Hernandez challenges do not bear the same risk of unfair prejudice. The bulk of the statements challenged by Hernandez pertain to his family. His brief refers to the "perceived abuse inflicted upon Hernandez by his parents."[62] His statements show a negative perception of many family members. Additionally, his wondering whether various family members are truly his family members is a recurring theme.

Hernandez' statements about his family do not bear a significant risk of unfair prejudice. The fact that Hernandez does not have a healthy relationship with or a positive view of some members of his family, or that he has suffered abuse, is unlikely to make the jury more likely to convict him on that improper basis. This is not to say that there is no risk of unfair prejudice from these statements, just that it is not substantial.

Hernandez' statements about his family also have some probative value on the issue of voluntariness. As discussed

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[59] *Id.*

[60] See *State v. Rocha, supra* note 7.

[61] Brief for appellant at 39.

[62] *Id.*

above, the voluntariness of a statement is considered in light of the totality of the circumstances, including the suspect's mental state or intoxication.[63] Hernandez wondered at various times whether certain family members were who he was told they were. These comments, which could be characterized as paranoia, have some probative value with respect to Hernandez' mental state or intoxication, and thus with respect to the issue of voluntariness.

Hernandez also sought to exclude statements in which he referenced "gang-banging" in his past and not believing in God. While these types of statements generally can carry a risk of unfair prejudice, they were in this case isolated statements in the context of a 2-hour interview. These comments were made briefly and were not repeated. This is not to say that there is no risk of unfair prejudice, but merely that the risk of prejudice is not nearly as grave as if the interview contained an extended conversation on these topics.

In sum, Hernandez' statements about his family have little risk of unfair prejudice but also only moderate probative value. His statements about "gang-banging" and not believing in God carry some risk of prejudice, but not significant given the isolated and brief nature of those comments. Whether the risk of unfair prejudice substantially outweighed the probative value of these statements is a question left to the discretion of the trial court.[64] We conclude that the district court did not abuse its discretion by overruling in part Hernandez' motion in limine and trial objections.

3. Closing Statements

Finally, we turn to Hernandez' assignment that the district court erred in overruling his motion for mistrial on the basis that statements made by the prosecuting attorney in his closing arguments constitute prosecutorial misconduct.

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[63] See *State v. Goodwin, supra* note 19.

[64] See *State v. Baker, supra* note 10.

[16] When considering a claim of prosecutorial misconduct, we first consider whether the prosecutor's acts constitute misconduct.[65] We have acknowledged that "prosecutorial misconduct" cannot be neatly defined, but we have said that generally, it encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.[66] We have also said that a prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.[67]

[17] If we conclude that a prosecutor's acts were misconduct, we next consider whether the misconduct prejudiced the defendant's right to a fair trial.[68] Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infects the trial that the resulting conviction violates due process.[69]

Hernandez divides the statements into two categories of prosecutorial misconduct: statements of personal belief/imprimatur of government and statements that inflame the prejudices or excite the passions of the jury against the accused. We consider each in turn.

(a) Statements of Personal Belief/ Imprimatur of Government

[18,19] Prosecutors generally may not give their personal opinions on the veracity of a witness or the guilt or innocence of the accused.[70] The principle behind this rule is that

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[65] See *State v. Dubray, supra* note 10.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] See Neb. Ct. R. of Prof. Cond. § 3-503.4 ("[a] lawyer shall not . . . in trial, . . . state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused"). See, also, *State v. Gonzales*, 294 Neb. 627, 884 N.W.2d 102 (2016).

the prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence.[71] Stated differently, when a prosecutor asserts his or her personal opinions, the jury might be persuaded by a perception that counsel's opinions are correct because of his position as a prosecutor, rather than being persuaded by the evidence. Thus, 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.[72]

Hernandez argues that the prosecutor in this case made a number of statements improperly expressing his personal beliefs. These statements include:

> [1] The fact that he had a point to prove and that he then acted upon that point by shooting . . . Debella is among the numerous reasons the State of Nebraska believes that this crime is a premeditated first degree murder because it shows he thought about what he wanted to do and hoped to accomplish before he actually did it.
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> . . . .
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> [2] The State believes that when you consider all of the evidence, not just one piece, not just two, but you consider all the evidence in totality, the State believes that it has more than satisfied its burden to prove that this is, in fact, a first degree premeditated murder committed by . . . Hernandez, and that he, likewise, used a firearm to commit a felony, that being the murder, and was a felon at the time he committed his offense and it was unlawful for him to possess that gun he used to kill . . . Debella.

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[71] *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

[72] See *State v. Gonzales, supra* note 70.

> [3] Accordingly, the State of Nebraska is asking you, based upon the totality of the circumstances, evidence, testimony you've heard over these past four days, to return a guilty verdict against . . . Hernandez for each of these crimes.
>
> [4] Ladies and Gentlemen, to be perfectly honest with you, when looking and reflecting back on the testimony and evidence you've heard throughout the course of this case, I don't know that there is sufficient words in the dictionary or adjectives in the thesaurus to describe the selflessness [sic], the senseless, the heartlessness, the disgusting acts committed not by just by . . . Hernandez but, also, by the likes of John Hall, Brett Winters, and Dave McPherson. It, honestly, made me sick and it makes me sick that the State had to present any of these witnesses before you in its case in chief in hopes that you'll realize that this was only necessary because of the fact that . . . Debella was the victim of the ultimate injustice that one human can commit against another.
>
> . . . .
>
> [5] So the State believes that [the testimony of the firearms examiner] has helped us corroborate another thing that . . . Hernandez tells us in his statement and that is that he left that gun there.

After reviewing these statements, we find that the first, second, third, and fifth statements do not constitute prosecutorial misconduct. Although each of these statements contains the phrases "the State believes" or "the State of Nebraska is asking you," merely using such phrases does not turn an otherwise proper summation of the evidence into an improper one.[73]

In the first statement, the prosecutor was relying on Hernandez' statement that he "had a point to prove" as evidence that the murder was premeditated. Although the prosecutor said

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[73] See *State v. Green*, 287 Neb. 212, 229, 842 N.W.2d 74, 91 (2014) ("[s]o, while the prosecutor might have referenced his personal beliefs, it appears that such were a deduction from the evidence").

"the State of Nebraska believes," within that statement, the prosecutor was merely attempting to point to evidence supporting a finding that the murder was premeditated.

In the second statement, although the prosecutor again used the statement "the State believes," the prosecutor was simply arguing that the jury should consider all the evidence and find that the State had met its burden. This is not improper.

In the third statement, the prosecutor said that "the State of Nebraska is asking you, based upon the totality of the circumstances, evidence, [and] testimony . . . to return a guilty verdict." Again, the prosecutor is merely asking the jury to consider all the evidence and to return a guilty verdict, which is not improper.

In the fifth statement, the prosecutor said that "the State believes that [the testimony of the firearms examiner] has helped us corroborate another thing that . . . Hernandez tells us in his statement and that is that he left that gun there." Although the phrase "the State believes" is used, the prosecutor is simply arguing that certain evidence—the expert's testimony—helped corroborate Hernandez' statement.

Although we find that these specific statements were not misconduct within their context in this particular case, there are many circumstances where "I" statements—"I think," "I know," "I believe," "the State of Nebraska believes," et cetera—could be considered as conveying a personal opinion and are thus misconduct.

We have previously encouraged prosecutors to preface any questionable statements with the phrase "'the evidence shows.'"[74] We emphasize, once again, that prosecutors could easily avoid an appearance of impropriety by simply substituting "I believe" or "the State believes" with the simple phrase "the evidence shows."

The fourth statement is another matter. It contains an improper personal opinion not based on any evidence. Within that statement, the prosecutor told the jury that it "honestly"

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[74] *State v. Gonzales, supra* note 70, 294 Neb. at 649, 884 N.W.2d at 119.

"made [him] sick" that the State had to present certain witnesses as part of its case in chief. Although we understand that the prosecutor was attempting to acknowledge the lack of credibility in his witnesses, the manner in which he attempted to do so was highly improper. This statement was not a summation of the evidence. The prosecutor was expressing a personal opinion not based on any evidence; this is clearly prosecutorial misconduct.

The fourth statement also constitutes prosecutorial misconduct for other reasons, which shall be discussed below.

(b) Statements That Inflame Prejudices or Excite Passions of Jurors

[20] Prosecutors also may not inflame the jurors' prejudices or excite their passions against the accused.[75] Prosecutors should not make statements or elicit testimony intended to focus the jury's attention on the qualities and personal attributes of the victim.[76] These facts lack any relevance to the criminal prosecution and have the potential to evoke jurors' sympathy and outrage against the defendant.[77]

Hernandez argues that the fourth statement, described above, was intended to inflame the prejudices of the jurors and to excite their passions. He makes the same argument regarding the following statements made by the prosecutor in his closing arguments:

> [6] From every account you've heard these past four days, including that given by . . . Hernandez, . . . Debella's sins were, at most, punishable by incarceration, not eternal rest in a coffin, particularly at the hands of a man whose primary complaint was that . . . Debella was stepping on his toes.
>
> . . . .

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[75] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). See, also, *State v. Dubray, supra* note 10.

[76] *State v. Iromuanya, supra* note 75.

[77] *Id.*

> [7] We know that [Debella] fought hard for his life. We heard about how he was gasping for breath and trying to hang on. We know that he held on in the hospital for eight days afterwards with the assistance of machines. We heard from [his mother] about the heart-wrenching decision she had to make in taking him off those machines . . . . She held on as long as she could.

Hernandez also complains that the prosecutor referred to the other individuals living in the Brownell house as "vermin," "riffraff," and "lowlife people, so low that they would let a bleeding man lie on the floor."

We agree with Hernandez that all of these statements constitute prosecutorial misconduct. The prosecutor's comment about "the selflessness [sic], the senseless, the heartlessness, the disgusting acts" committed by Hernandez and others was clearly improper. This type of a comment is an appeal to the emotions of the jurors, not an argument regarding any of the elements of the crimes charged. The prosecutor's comments about Debella's fighting for his life and Debella's mother's having to make the "heart-wrenching" decision to take him off life support, as well as the reference to Debella's being punished by "eternal rest in a coffin," were all clearly intended to play on the jurors' emotions by attempting to draw sympathy to Debella and his mother, which is entirely improper.[78]

Referring to the individuals that lived in the Brownell house as "vermin," "riffraff," and "lowlife people" is improper. This type of name calling has no place in a criminal prosecution. While this language was not directed at Hernandez, it was used to describe those living in the Brownell house. This language certainly reflected on Hernandez by his association with those individuals.

Because we find that the prosecutor's statements constituted prosecutorial misconduct, we must consider whether the misconduct prejudiced Hernandez' right to a fair trial.

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[78] See *id.*

As we said in another prosecutorial misconduct case, "the prosecutor has dodged a reversal" in this case.[79] Despite the fact that a number of the prosecutor's statements constitute prosecutorial misconduct, the evidence against Hernandez is overwhelming and the misconduct did not prejudice his right to a fair trial.

[21,22] Whether prosecutorial misconduct is prejudicial depends largely upon the context of the trial as a whole.[80] In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, we consider the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury, (2) whether the conduct or remarks were extensive or isolated, (3) whether defense counsel invited the remarks, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting the conviction.[81]

While the prosecutor made several improper remarks in closing arguments, and while a curative instruction from the court would have been warranted, we cannot say that Hernandez' right to a fair trial was prejudiced.

Most importantly, the evidence against Hernandez was overwhelming. Hernandez confessed to shooting Debella to numerous relatives who testified at trial. Moreover, he confessed to law enforcement in a video interview that was played for the jury. He was seen shortly after the shooting by those in the upstairs of the house. There was no evidence that Debella's death was the result of suicide, and there was little to no evidence of any alternative theory of Debella's murder. The jury could also infer Hernandez' guilt from the fact that he ran from police and resisted arrest. It would simply stretch credulity to think that the jury found Hernandez guilty because of the prosecutor's improper statements rather

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[79] *State v. Dubray, supra* note 10, 289 Neb. at 228, 854 N.W.2d at 605.

[80] *State v. Iromuanya, supra* note 75.

[81] See *id.*

than because of the overwhelming and undeniable evidence of his guilt.

For these reasons, we conclude that Hernandez' right to a fair trial was not prejudiced and the district court did not abuse its discretion in overruling Hernandez' motion for mistrial.

VI. CONCLUSION

For the reasons set forth herein, we affirm.

Affirmed.

Miller-Lerman, J., participating on briefs.
Wright, J., not participating.

Miller-Lerman, J., concurring.

I concur. The prosecutor's improper statements made in his closing remarks constituted serious prosecutorial misconduct. Were it not for the strength of the evidence supporting the convictions, I would reverse.

Cassel, J., joins in this concurrence.

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

Betty L. Green Living Trust and Richard R. Green Living Trust, appellants, v. Morrill County Board of Equalization, appellee.

911 N.W.2d 551

Filed May 11, 2018. No. S-17-873.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of the Tax Equalization and Review Commission's decisions are reviewed de novo on the record.
4. **Administrative Law: Judgments.** Whether an agency decision conforms to the law is by definition a question of law.
5. **Administrative Law: Judgments: Words and Phrases.** Agency action is arbitrary, capricious, and unreasonable if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.
6. **Taxation: Valuation: Presumptions: Evidence.** A presumption exists that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented.
7. **Taxation: Valuation: Proof: Appeal and Error.** The burden of showing a valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board of equalization.

8. **Taxation: Valuation: Proof.** The burden of persuasion imposed on a complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing 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.
9. **Taxation: 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. 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.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Timothy L. Moll and Anthony M. Aerts, of Rembolt Ludtke, L.L.P., for appellants.

Travis R. Rodak, Morrill County Attorney, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Colborn and Samson, District Judges.

Miller-Lerman, J.

NATURE OF CASE

This appeal involves the valuations of certain grassland properties owned by the Betty L. Green Living Trust and the Richard R. Green Living Trust (the Trusts). The Trusts appeal from the July 18, 2017, order of the Tax Equalization and Review Commission (TERC) which affirmed the valuations which had been established by the Morrill County assessor and were approved by the Morrill County Board of Equalization (the Board). We affirm TERC's order.

STATEMENT OF FACTS

Between them, the Trusts own five grassland parcels of agricultural and horticultural land located in Morrill County, Nebraska, the assessed valuations of which for tax year 2016 were the subject of protests. In its order, TERC dismissed

the case involving a sixth property for lack of jurisdiction. The Trusts do not challenge that part of the decision, and therefore, we discuss only the five parcels that are at issue in this appeal.

For tax year 2016, the assessor determined the assessed valuations of the five properties to be $144,025, $106,260, $166,080, $157,410, and $186,470, for a total of $760,245. The Trusts protested the assessments to the Board and requested assessed valuations of $100,249, $41,824, $132,076, $91,627, and $78,966, respectively, for a total of $444,742. The Board accepted the assessor's valuations and denied the protests. The Trusts appealed to TERC.

As they argued to the Board and to TERC, the Trusts assert in this appeal that the assessor used a method of valuation that was flawed when applied to grassland properties such as the properties at issue in this case. TERC noted in its order that valuation of agricultural and horticultural land is governed by, inter alia, chapter 77, article 13, of the Nebraska Revised Statutes and the regulations adopted thereunder by the Property Tax Administrator and the Nebraska Department of Revenue's property assessment division (PAD). TERC found Neb. Rev. Stat. § 77-1363 (Cum. Supp. 2016) to be relevant to this case. Section 77-1363 provides as follows:

> Agricultural land and horticultural land shall be divided into classes and subclasses of real property under section 77-103.01, including, but not limited to, irrigated cropland, dryland cropland, grassland, wasteland, nurseries, feedlots, and orchards, so that the categories reflect uses appropriate for the valuation of such land according to law. Classes shall be inventoried by subclasses of real property based on soil classification standards developed by the Natural Resources Conservation Service of the United States Department of Agriculture as converted into land capability groups by the Property Tax Administrator. County assessors shall utilize soil surveys from the Natural Resources Conservation Service of the

> United States Department of Agriculture as directed by the Property Tax Administrator. Nothing in this section shall be construed to limit the classes and subclasses of real property that may be used by county assessors or [TERC] to achieve more uniform and proportionate valuations.

TERC described the law and regulations relevant to valuation in this case as follows:

> In Nebraska agricultural land and horticultural land classes shall be inventoried by subclasses of real property based on soil classification standards developed by the Natural Resources Conservation Service (NRCS) of the United States Department of Agriculture as converted into land capability groups (LCG) by the Property Tax Administrator. County assessors are required to utilize these LCGs as directed by the Property Tax Administrator. The Property Tax Administrator and the Nebraska Department of Revenue's [PAD] has adopted and promulgated Rules and Regulations to carry out their duties pertaining to the classification of agricultural and horticultural land by LCGs. These rules and regulations state that the conversion legend for all LCGs is prepared by the PAD according to the dryland capability classification of each soil that shows, in a general way, the suitability of each soil for most kinds of field crops. This conversion legend shows the LCGs for each soil in a county whether in grassland, dryland or irrigated cropland.
>
> PAD's regulations require county assessors to inventory and categorize each parcel of agricultural land using the following classes: (1) irrigated cropland; (2) dryland cropland; (3) grassland; and (4) wasteland. The county assessor is then required to use a soil conversion legend created by PAD to assign agricultural land to an appropriate LCG.
>
> For grassland the LCGs 1G1, 1G, 2G1, 2G, 3G1, 3G, 4G1, and 4G should generally progress from very high

> yields of forage to very low yields of forage. In addition to the soil conversion legend, the regulations provide LCG definitions and guidelines for use by county assessors for purposes of assessing agricultural and horticultural land. The regulations also permit county assessors to develop additional LCG sub-classifications if needed to achieve uniform and proportionate valuation.

Much of the case that the Trusts presented to TERC was based on testimony and exhibits provided by Gerald W. Green, who is the trustee of the Trusts. Green testified regarding his experience and study in the area of agricultural land valuation. Through Green, the Trusts presented evidence to TERC which purported to show that the land capability groups (LCG) assignments determined by the PAD for grassland soil types present in Morrill County, when compared to Natural Resources Conservation Service range production ratings, did not progress from very high yields of forage to very low yields of forage. In other words, the Trusts argued that grassland soil types assigned to the 1G1 classification should have the highest yields of forage while those assigned to the 4G classification should have the lowest yields of forage. The evidence presented through Green purported to show that this expectation was not the case and that instead, a full range of yields of forage was present in each LCG classification and some soils classified as 4G had higher yields of forage than some soils classified as 1G. Green opined that the LCG assignments were random, arbitrary, and virtually meaningless and that therefore, the LCG's established by the PAD for grassland classifications did not meet the requirements of the applicable regulations and did not result in assessments that were uniform and proportionate.

Green proposed an alternate valuation methodology that did not use the LCG's determined by the Property Tax Administrator and instead categorized grassland properties by the Natural Resources Conservation Service range production rating. Valuations would be determined by using comparable

sales in Morrill County and nearby counties and making "a determination of what buyers are paying for livestock carrying capacity or in other words, $/AUM (Animal Unit Month)." Such "$/AUM" could then be "applied to all grassland parcels to come up with a valuation that is based on the current market conditions and the individual parcel's productivity." The Trusts calculated their requested valuations for the subject properties by determining a dollar value per animal unit month (AUM) based on sales of other grassland properties in Morrill County and then applying that dollar value per AUM to AUM's for the subject properties. This process resulted in the requested assessed valuations noted above.

In its order of July 18, 2017, TERC acknowledged the Trusts' evidence and stated that "[t]he LCG assignments for each grassland soil type according to the Rules and Regulations of the Department of Revenue for grassland in Morrill County appear to be flawed when looking at the [Natural Resources Conservation Service] production ratings for each soil type compared to its assigned LCG." In its order, TERC nevertheless found that while the Trusts showed potential flaws in the LCG assignments for grasslands, they "failed to demonstrate that this flaw has resulted in assessed value determinations in Morrill County that are incorrect or grossly excessive and the result of systematic will or failure of a plain legal duty." In reaching this determination, TERC noted the assessor had testified that she valued the Trusts' properties "in the same way that she valued all agricultural and horticultural property in Morrill County, and that this valuation followed the requirements of law imposed upon her." The assessor "looked at all sales, not just sales containing only grassland, to determine the assessed values for agricultural and horticultural land values in all classes, irrigated, dryland and grassland." With respect to the specific properties at issue in this case, the court described the assessor's procedure, relating that "there were no sales of properties with the same soil types as those on the [Trusts' properties] so she utilized her training and experience

along with the sales information pertaining to similar rough rocky ridge areas to determine the assessed values for" the Trusts' properties. The assessor, the court wrote, had noted in this regard that sales of such "rough rocky ridge areas in and around Morrill County were influenced by factors other than productivity alone."

As compared to the assessor's approach, TERC emphasized that the valuation methodology urged by the Trusts "focused on a single factor, production of forage, as the basis for [the] entire analysis, alleging that no other factors apply to grassland values in Morrill County." TERC noted that the assessor "testified that she had no market information to indicate that a reclassification of grassland soil types from the flawed LCG's . . . was warranted when determining assessed values for Morrill County." TERC noted that although the assessor acknowledged that production capability was one factor to be considered when valuing grassland, the assessor also "testified that the sales she utilized indicated that there were other factors at work in the market beyond production of forage alone," and that she "determined the assessed values for grassland in Morrill County based on all of the evidence before her," which included both the concerns presented by the Trusts as well as the legal requirements imposed on her in making assessments.

Taking all this into consideration, TERC found that

> while the [Trusts have] demonstrated that there are flaws in the LCGs classified as grassland determined by the PAD, the [Trusts have] failed to demonstrate that this flaw has resulted in assessed value determinations in Morrill County that are incorrect or grossly excessive and the result of systematic will or failure of a plain legal duty.

TERC further found that the Trusts did not establish by clear and convincing evidence that the valuations placed on their properties, when compared to valuations placed on similar property, were grossly excessive and the result of systematic

will or failure of a plain legal duty and not mere error of judgment.

TERC concluded that there was "not competent evidence to rebut the presumption that the . . . Board faithfully performed its duties and had sufficient competent evidence to make its determination." TERC further concluded that there was "not clear and convincing evidence that the . . . Board's decision was arbitrary or unreasonable." TERC therefore denied the Trusts' appeals and affirmed the valuations determined by the Board.

The Trusts appeal TERC's order.

ASSIGNMENTS OF ERROR

The Trusts claim, restated and renumbered, that TERC erred when it (1) improperly applied the standard of review, (2) concluded that they failed to rebut the presumption of correctness as to the Board's determinations, and (3) found that the Board's valuations were not arbitrary, capricious, and unreasonable.

STANDARDS OF REVIEW

[1,2] Appellate courts review decisions rendered by TERC for errors appearing on the record. *Platte River Crane Trust v. Hall Cty. Bd. of Equal.*, 298 Neb. 970, 906 N.W.2d 646 (2018). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*.

[3,4] Questions of law arising during appellate review of TERC's decisions are reviewed de novo on the record. *County of Webster v. Nebraska Tax Equal. & Rev. Comm.*, 296 Neb. 751, 896 N.W.2d 887 (2017). Whether an agency decision conforms to the law is by definition a question of law. *Id*.

[5] Agency action is arbitrary, capricious, and unreasonable if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion. *County of Douglas*

v. Nebraska Tax Equal. & Rev. Comm., 296 Neb. 501, 894 N.W.2d 308 (2017).

ANALYSIS

The Trusts generally claim that TERC erred when it affirmed the Board's decision accepting the assessor's valuations of their properties for the 2016 tax year. The Trusts specifically argue that TERC misapplied the standard of review, that TERC erred when it found that the Trusts did not rebut the presumption of correctness of the Board's decision, and that TERC erred when it failed to find the Board's decision to be arbitrary, capricious, and unreasonable. We reject these assignments of error and affirm TERC's order.

Standards of Review.

With regard to the standard of review that TERC is to use when reviewing decisions of county boards of equalization, Neb. Rev. Stat. § 77-5016(9) (Cum. Supp. 2016) provides as follows:

> In all appeals, excepting those arising under section 77-1606, if the appellant presents no evidence to show that the order, decision, determination, or action appealed from is incorrect, [TERC] shall deny the appeal. If the appellant presents any evidence to show that the order, decision, determination, or action appealed from is incorrect, such order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.

[6-8] We have held that the language of § 77-5016(9) creates a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013). That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence

adduced on appeal to the contrary. *Id*. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. *Id*. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board. *Id*. We have further stated that the burden of persuasion imposed on a complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing 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. *Id*. The burden of persuasion always remains with the taxpayer. See *id.*

The Trusts assert that TERC misapplied the foregoing standards in this case. They argue that TERC erred when it found the Trusts failed to rebut the presumption of validity afforded by § 77-5016(9) to the Board and that it compounded the error by applying a presumption in favor of the Board when it found that the Board's valuation of their property was not arbitrary, capricious, and unreasonable.

We believe that although TERC's order as written lends itself to confusion, TERC did not err in its application of the correct standards of review. The confusion appears to result from the fact that TERC both concluded that there was "not competent evidence to rebut the presumption that the . . . Board faithfully performed its duties and had sufficient competent evidence to make its determination" and also stated that there was "not clear and convincing evidence that the . . . Board's decision was arbitrary or unreasonable." From these and other statements in the order, the Trusts contend that TERC improperly applied a presumption of reasonableness to the Board's valuations. We reject the Trusts' assignment of error claiming that TERC applied an incorrect standard of review.

It is well settled that TERC's threshold determination should be whether the taxpayer presented competent evidence to rebut

the presumption in favor of the Board. *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008); *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999). TERC's determination of that question may often be informed by considering whether the taxpayer has presented evidence that would call into question whether the valuation adopted by the Board is reasonable. That is, evidence tending to show that the valuation is questionable can serve toward rebutting the presumption that the Board faithfully performed its duties. And where a taxpayer overcomes the presumption of validity for the county's valuation, the reasonableness of the valuation fixed by the board of equalization becomes a question of fact based on all of the evidence presented. *JQH La Vista Conf. Ctr., supra*.

The Evidence.

With the foregoing explanation in mind, and as we discuss below, we read TERC's order in this case as having concluded that the Trusts did not present competent evidence to rebut the presumption. See § 77-5016(9). Having concluded that the Trusts did not rebut the presumption, TERC did not need to, nor did it, make a fact finding regarding the reasonableness of the Board's valuations. A fortiori, TERC did not apply an improper presumption relative to a hypothetical reasonableness determination.

Reading the order in this manner, we review TERC's decision for errors appearing on the record. Our inquiry is whether TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *Platte River Crane Trust v. Hall Cty. Bd. of Equal.*, 298 Neb. 970, 906 N.W.2d 646 (2018). As discussed below, we conclude under this standard of review that TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

The Trusts rely on *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013), in support

of their argument that TERC erred when it concluded that they had failed to rebut the presumptions regarding the Board's determinations. In *JQH La Vista Conf. Ctr.*, we reviewed TERC's decision which had affirmed a board of equalization's valuations. We first determined that "TERC was incorrect when it concluded that the presumption of correctness was not overcome by competent evidence." *Id.* at 126, 825 N.W.2d at 452. Because we determined that the taxpayer in that case had rebutted the presumption, we then examined whether the taxpayer had shown by clear and convincing evidence that the board's valuation was unreasonable. Because we determined that the taxpayer "failed to meet its burden of showing that the county's valuation was unreasonable and arbitrary," we ultimately affirmed TERC's decision. *Id.* at 129, 825 N.W.2d at 454.

In reaching the initial conclusion in *JQH La Vista Conf. Ctr.* that the taxpayer had overcome the presumption of validity, we reasoned that the taxpayer had done so by presenting the appraisals of a certified appraiser who testified that the appraisals were prepared in conformity with uniform standards of appraisal practice. We noted that "[t]he appraisals provided three alternative valuations of the [subject property], using each of the three methods provided for by" Neb. Rev. Stat. § 77-112 (Reissue 2009). *JQH La Vista Conf. Ctr.*, 285 Neb. at 126, 825 N.W.2d at 453.

We note at this point that under Neb. Rev. Stat. § 77-201(1) (Cum. Supp. 2016), all real property, unless expressly exempt, is subject to taxation and is to be valued at its actual value. Agricultural and horticultural land is valued for taxation purposes at 75 percent of its value, but the starting point for determining taxable value is still actual value. Under § 77-112, which we cited in *JQH La Vista Conf. Ctr.*, "[a]ctual value . . . means the market value of real property in the ordinary course of trade." Section 77-112 provides, "Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales

comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach." Ultimately in *JQH La Vista Conf. Ctr.*, we concluded that the taxpayer had rebutted the presumption of correctness of the board's decision by presenting appraisals for the subject property, which appraisals were performed by a certified appraiser using approved methods.

In contrast to the evidence presented by taxpayers in *JQH La Vista Conf. Ctr.*, the Trusts in this case attempted to rebut the presumption of validity by presenting valuations of their properties that were determined using a method that was not shown to be a "professionally accepted mass appraisal method[]." See § 77-112. The Trusts did not present evidence of alternate valuations calculated using methods of valuation that were authorized under the relevant statutes and regulations, and as we discuss below, the method urged by the Trusts was not appropriate. That is, we believe the Trusts' evidence and methodology did not tend to show that the Board and the assessor failed to faithfully perform their duties or that they did not have sufficient competent evidence to make their determination of valuations in accordance with the law and regulations that govern the assessment process. The evidence in this case indicates instead that the Board and the assessor followed the relevant statutes and regulations to arrive at valuations for the Trusts' properties.

TERC acknowledged that the Trusts' evidence may have indicated a possible flaw in the methodology developed by the PAD to classify grassland properties, which methodology the assessor was required to employ. The assessor generally testified that she used the classifications required by the PAD and then valued the properties using a sales comparison approach based on such classifications. TERC determined that the evidence showed that the assessor and the Board followed the law imposed on them and valued the properties using a professionally accepted mass appraisal method. That is, TERC determined that the evidence did not indicate that the Board in this

case neither failed to faithfully perform its duties nor made its determinations based on incompetent evidence.

The Trusts' arguments were directed to flaws in the classifications promulgated by the PAD rather than to failures on the part of the assessor or the Board in applying the methods imposed on them by law. The Trusts argued in part that the assessor should have made additional subclassifications based on productivity of the soil for grassland purposes. However, the assessor generally testified that in applying a sales comparison approach, she compared the subject properties to sales of what she determined to be comparable properties based on various factors, including but not limited to productivity as grassland. In particular, she noted that the subject properties were characterized by areas of "rocky, rough ground" and that she compared the subject properties to other properties with similar rough, rocky features. TERC determined that the Trusts did not rebut the presumption of correctness, and in comparison, it noted that the Trusts' alternate methodology had focused on a single factor—productivity—rather than the multiple factors that the assessor considered in making sales comparisons.

The Trusts generally used sales comparisons to calculate a valuation per AUM, which they asserted to be the best measure of productivity for grassland purposes. The Trusts calculated a valuation per AUM for the comparison properties based on AUM for those properties and then calculated an alternate valuation for their properties by multiplying that "$/AUM" by AUM for their properties. The Trusts did not demonstrate or present evidence to show that this method was a recognized professionally accepted mass appraisal method in addition to those identified in § 77-112. The method appeared to be a modified sales comparison approach in which sales of other grasslands were considered but were adjusted based entirely on the single feature of productivity. As noted above, TERC rejected this approach because it focused on a single feature, as compared to the assessor's testimony that she

considered various features of the properties to determine comparable sales.

We recognize that the Trusts' reliance on AUM as a measure of productivity for grasslands finds some support in the law governing property valuation. Under § 77-112, an income approach is specifically noted as an appropriate professionally accepted mass appraisal method, and the regulations set forth an income approach for valuing grasslands based on AUM in appropriate circumstances. See 350 Neb. Admin. Code, ch. 11, § 005.03 (rev. 2009). This income approach generally requires capitalizing net cash rents, and specifically "in the case of grassland use," net cash rents are to be determined as "cash rent per [AUM]." § 005.03A(3). However, in this case, the Trusts did not present evidence of cash rent per AUM and did not capitalize net cash rent in accordance with the income approach as set forth in this regulation. Instead, the Trusts used the modified sales comparison approach described above in which they adjusted valuations based on the sole factor of AUM. Given the law in this area, the valuations that resulted from the Trusts' approach were not competent evidence to rebut the presumption that the Board faithfully performed its duties and had sufficient competent evidence to make its determination.

[9] In connection with competent evidence, we note that the Trusts argue that TERC erred by rejecting Green's testimony which they assert was "competent evidence" to rebut the presumption of correctness. Brief for appellants at 17. They rely on cases in which we have said that 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 and that 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. See *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Trusts argue that because an owner may so testify, Green's testimony in this case was competent evidence to

rebut the presumption in favor of the Board. However, these principles relate to admissibility and foundation requirements for a resident owner's testimony regarding the value of his or her property. And although this sort of testimony is admissible evidence, it does not automatically lead to the conclusion that such evidence constitutes competent evidence contrary to the presumption. That determination involves considering not only whether the taxpayer presented admissible evidence but specifically whether the substance of the evidence presented by the taxpayer was competent to rebut the presumption that the Board faithfully performed its duties and had sufficient competent evidence to make its determinations.

In this case, TERC did not dismiss Green's testimony out of hand. Instead, TERC allowed Green to testify regarding the value of the property, but after considering his testimony, TERC concluded that it did not serve to rebut the presumption. As discussed above, we conclude that TERC did not err when it determined that Green's testimony and other evidence presented by the Trusts did not rebut the presumption of validity regarding the Board's determinations.

CONCLUSION

We conclude that TERC's decision—in which it concluded that the Trusts did not present competent evidence to rebut the presumption that the Board faithfully performed its duties and had sufficient competent evidence to make its determinations—conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. We therefore affirm TERC's order.

Affirmed.

Wright, J., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Todd A. Burklund and Shelly M. Burklund, appellants, v. Brad Fuehrer and Structure Technologies, LLC, appellees.

911 N.W.2d 843

Filed May 11, 2018. No. S-17-885.

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.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
3. **Actions: Pleadings: Notice.** Civil actions are controlled by a liberal pleading regime; a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief and is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
4. **Actions: Pleadings.** The rationale for a liberal notice pleading standard in civil actions is that when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Reversed and remanded for further proceedings.

Elizabeth Ryan Cano and John P. Weis, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellants.

Brian S. Kruse, of Rembolt Ludtke, L.L.P., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Riedmann, Judge, and Martinez, District Judge.

Miller-Lerman, J.

NATURE OF CASE

This appeal arises from a disputed real estate transaction. Appellants, Todd A. Burklund and Shelly M. Burklund, sought damages for breach of contract, breach of warranty, and fraudulent misrepresentation after discovering extensive hail damage to the roof of a real property they were under contract to purchase from appellees, Brad Fuehrer and Structure Technologies, LLC (the sellers). The district court for Lancaster County granted the sellers' joint motion to dismiss for failure to state a claim and dismissed the second amended complaint with prejudice and without leave to amend based on the "fact" that the damage was reasonably ascertainable by the Burklunds. The Burklunds appeal. We reverse the district court's dismissal and remand the cause for further proceedings.

FACTS

On August 11, 2016, the Burklunds entered into a real estate purchase agreement (the Purchase Agreement) with the sellers for the purchase of real property in Lincoln, Nebraska (the Property). The Purchase Agreement included a lease-back provision whereby the Burklunds agreed to lease the Property, including a building located on the premises, to the sellers for a period of 1 year, with a 1-year renewal option, in consideration for monthly rent in the amount of $4,000. The Purchase Agreement included several addendums which were executed on the same day.

The Burklunds planned to purchase the Property, in part, to use it as part of a tax-deferred exchange under the Internal Revenue Code, I.R.C. § 1031 (2006) (i.e., a like-kind

exchange). In May 2016, the Burklunds had sold a different property, the proceeds of which sale they placed into escrow to accomplish the like-kind exchange. To complete the like-kind exchange, the Burklunds needed to close on a new property no later than November 1. The Burklunds selected the Property for that purpose, and arranged for an initial closing date of October 6. To this end, addendum No. 4 to the Purchase Agreement provides, in relevant part:

> A material part of the consideration for [the Burklunds'] purchasing the Property is that [the Burklunds] intend[] to qualify this transaction as part of a tax-deferred exchange under Section 1031 of the Internal Revenue Code. . . . No additional expense or liability will be incurred by the [sellers] as a result of this like-kind exchange.

On September 29, 2016, the sellers informed the Burklunds, for the first time, that the roof of the building on the Property sustained hail damage earlier in the year; that Structure Technologies, LLC, received $39,000 from an insurance claim for that hail damage; and that the roof was not repaired. The hail damage occurred and the insurance claim was resolved before the parties executed the Purchase Agreement. The Burklunds requested to delay closing to inspect the roof.

The Burklunds' subsequent inspections revealed that the roof had received substantial hail damage. The Burklunds learned that while they could obtain insurance for the building, future damage to the roof would not be covered. The Burklunds alleged that the inability to fully insure the building would prevent them from renting the Property at an agreed-upon amount of $4,000 per month.

The Burklunds alleged that in the Purchase Agreement, the sellers warranted that they had already disclosed to the Burklunds "all defects that would 'significantly alter' the 'desirability'" of the building. Brief for appellants at 7. The relevant contract provisions are as follows:

> 7. Condition of Property. This Agreement is based upon the [Burklunds'] inspection or investigation of [the] Property. [They] agree[] to accept [the] Property in its present condition, except as provided in this Agreement. [The sellers] represent[] that to the best of [their] knowledge, there are no defects in the Property that (1) are not reasonably ascertainable and which significantly affect the desirability or value of the Property, or (2) which the [sellers have] not disclosed to [their] Agent in writing.

Addendum No. 1 provides, in relevant part:

> 1. Due Diligence. Prior to closing [the Burklunds] shall have the right to conduct any inspections, and/or tests [they] deem[] necessary . . . . In the event that [they] discover[] any condition or circumstance with respect to the [P]roperty which is unacceptable to [them] in [their] sole discretion, [they] may terminate the Purchase Agreement at any time.

Following the discovery of the extensive roof damage and its impact on insurability, the Burklunds asked to proceed with closing due to the requirements of the like-kind exchange, but demanded that the sellers either replace the roof with the insurance funds or escrow the funds for repairs. According to the second amended complaint, on October 6, 2016, Fuehrer represented to the Burklunds' real estate agent that he would replace the roof. No such action was taken by November 1, and the closing did not occur. The Burklunds did not benefit from their planned tax-deferred exchange and thereafter filed suit.

The Burklunds' initial complaint filed in 2016 against Fuehrer; Structure Technologies, LLC; and Pamela A. Manske was dismissed after a hearing on February 14, 2017. The district court granted leave to the Burklunds to file an amended complaint within 20 days. The Burklunds filed a first amended complaint on March 3. On March 8, the sellers filed a motion to

dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6). The Burklunds then sought leave to file a second amended complaint under Neb. Ct. R. Pldg. § 6-1115 by stipulation of the parties. The district court granted leave, and the Burklunds filed a second amended complaint on April 20. The second amended complaint named only Fuehrer and Structure Technologies as defendants, and the district court dismissed Manske without prejudice. The second amended complaint alleged breach of contract, breach of warranty, and fraudulent misrepresentation. The Purchase Agreement and addendum No. 4 were attached to the second amended complaint.

The sellers reinitiated their joint motion to dismiss in which they contended that the second amended complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted. At the hearing on the motion to dismiss, the district court received additional addendums executed simultaneously with the Purchase Agreement.

In a July 21, 2017, order, the district court first determined that the receipt of addendums to the contract that was the subject of the suit did not convert the motion to a motion for summary judgment. The district court then sustained the motion to dismiss with prejudice for failure to state a claim. The district court reasoned that the Purchase Agreement "clearly states it is based upon the [Burklunds'] inspection or investigation of the [P]roperty and [the Burklunds] agreed to accept the [P]roperty in its present condition unless otherwise provided in the Agreement" and that "the damage was obviously reasonably ascertainable as a subsequent roof inspection by [the Burklunds] disclosed the hail damage." Finally, the district court determined that the remedy of damages sought by the Burklunds was unavailable under the contract because, according to the district court, the "[Purchase] Agreement specifically gives [the Burklunds] the option to terminate the [Purchase] Agreement."

The Burklunds appeal.

ASSIGNMENTS OF ERROR

On appeal, the Burklunds claim that the district court erred when it (1) dismissed the second amended complaint based on its determination that the complaint failed to state a claim for fraudulent misrepresentation, breach of contract, and breach of warranty and (2) determined that rescission is the only remedy available.

STANDARDS OF REVIEW

[1,2] 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. *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. *Id*. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id*.

ANALYSIS

Review of Orders of Dismissal

The Burklunds claim that the district court erred when it granted the motion to dismiss with prejudice for failure to state a claim. When reviewing an order dismissing a complaint, an 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 conclusions. *Rodriguez v. Catholic Health Initiatives*, 297 Neb. 1, 899 N.W.2d 227 (2017). Accordingly, for the purpose of reviewing the court's dismissal of the second amended complaint, the facts that we have set out in this opinion are the facts as alleged by the Burklunds, which we accept as true.

[3,4] Nebraska is a notice pleading jurisdiction. Civil actions are controlled by a liberal pleading regime; a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief and is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted. *Id*. The rationale for this liberal notice pleading standard in civil actions is that when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage. *Id*.

As we explain below, we determine that the Burklunds' second amended complaint contains allegations of facts which are sufficient to state a claim for relief which is plausible on its face. Accordingly, we reverse the district court's order of dismissal.

Breach of Contract, Breach of Warranty, and Fraudulent Misrepresentation

In their second amended complaint, the Burklunds alleged breach of contract, fraudulent misrepresentation, and breach of warranty. The Burklunds' claims are based on their interpretation of paragraph 7 of the Purchase Agreement. As set forth above, paragraph 7 provides, "[The sellers] represent[] that to the best of [their] knowledge, there are no defects in the Property that (1) are not reasonably ascertainable and which significantly affect the desirability or value of the Property, or (2) which the [sellers have] not disclosed to [their] Agent in writing." The Burklunds contend that they are entitled to relief both because (1) there are defects in the Property which were not reasonably ascertainable and which significantly affect the desirability of the Property and (2) the sellers had not disclosed defects in the Property. Without commenting on the Burklunds' reading of paragraph 7, we conclude that the Burklunds' claims are plausible.

In its July 21, 2017, order, the district court characterized the second amended complaint as admitting the "fact"

that the roof damage was "reasonably ascertainable" by the Burklunds because it was ascertained upon subsequent inspections. Contrary to the district court's reading of the second amended complaint, the Burklunds' allegation that they ultimately ascertained the extent of the roof damage before closing does not necessarily mean they admitted the defect was "reasonably" ascertainable.

In their second amended complaint, the Burklunds alleged only that "[t]hrough the course of the [Burklunds'] inspection, it was determined that the roof had received substantial hail damage." The Burklunds further described an "investigation" into the Property's insurability following the sellers' disclosure of unrepaired hail damage and collection on an insurance claim. The reasonable inferences of the second amended complaint lack any indication of whether these inspections were the same or beyond what would ordinarily be conducted by a buyer of commercial property.

The sellers urge us to follow *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009), a commercial real estate case with similar facts in which a buyer claimed damages for fraudulent and negligent misrepresentation after discovering that an office building's roof was partially deteriorated in two sections although areas visible from the ground were recently replaced. After a bench trial, the evidence showed that a visual inspection of the weathered and aging roof sections would have made the buyer aware of the deteriorating condition of the building. *Id*. We noted that the record showed that the buyer routinely examined heating and air-conditioning units on roofs, so an inspection of this roof did not pose a hardship and was reasonable under the circumstances for an experienced purchaser of commercial buildings. *Id*. In that case, we concluded that a commercial buyer was not justified in forgoing routine visual real estate inspections and relying on a seller's representations about a property.

Although the allegations here resemble many facts developed after trial in *Lucky 7*, we lack the facts at this stage

from which we may draw conclusions about whether the contract was breached by the sellers. And contrary to the district court's apparent "finding," the second amended complaint does not contain factual allegations from which a court can determine that the damage to the roof was "reasonably ascertainable" under paragraph 7 of the Purchase Agreement, because, as we have noted above, the nature and extent of the inspections conducted by the Burklunds and the background on ordinary business practice are not contained within that pleading.

The centerpiece of the Burklunds' case is the allegation that contrary to the truth, the sellers promised that the Property was free from defects because either the defects were reasonably ascertainable or the sellers had disclosed the defects, and in addition, the sellers represented they would repair the roof, but failed to do so.

As we read the second amended complaint, it contains allegations of facts which are sufficient to state a claim for relief under breach of contract or breach of warranty primarily related to paragraph 7 of the Purchase Agreement. Likewise, the Burklunds' claim for fraudulent representation as alleged is plausible on its face. See *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 815, 824 N.W.2d 12, 23 (2012) ("[w]hether a party's reliance upon a misrepresentation was reasonable is a question of fact"). Accordingly, we reverse the district court's order of dismissal.

Availability of Remedies

For their second assignment of error, the Burklunds claim that the district court erred when it determined that even if the Burklunds were successful on one of their claims, their only remedy was to terminate the Purchase Agreement. We make no comment on the correctness of the district court's conclusions concerning the availability of remedies. Because the district court incorrectly concluded that the second amended complaint failed to state a cause of action and its decision is

reversed, the district court's reasoning about damages falls with the order and the consideration of availability of damages is premature.

CONCLUSION

Accepting the facts in the second amended complaint as true, we determine that the Burklunds alleged sufficient facts to state claims which are plausible on their face. Thus, we determine that the district court erred when it granted the sellers' motion to dismiss and dismissed the Burklunds' case. We reverse the decision of the district court and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska, appellant, v. Tyler P., appellee.

911 N.W.2d 260

Filed May 11, 2018. No. S-17-1250.

1. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
2. **Juvenile Courts: Jurisdiction: Waiver.** In deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in the light of the criteria or factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 2016).
3. **Courts: Juvenile Courts: Evidence.** Under Neb. Rev. Stat. § 29-1816(3) (Supp. 2017), after considering the evidence and the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 2016), the court shall transfer the case to juvenile court unless a sound basis exists for retaining the case in county court or district court.
4. **Courts: Juvenile Courts: Jurisdiction: Proof.** In a motion to transfer to juvenile court, the burden of proving a sound basis for retaining jurisdiction in county court or district court lies with the State.
5. **Courts: Juvenile Courts: Jurisdiction: Evidence.** There is no arithmetical computation or formula required in a county court's or district court's consideration of the statutory criteria or factors when deciding whether to grant a request to transfer to juvenile court.
6. ____: ____: ____: ____. When a county court or district court is deciding whether to grant a motion to transfer to juvenile court, there are no weighted factors, that is, no prescribed method by which more or less weight is assigned to each factor specified by statute.
7. ____: ____: ____: ____. When a county court or district court is deciding whether to grant a motion to transfer to juvenile court, its consideration is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.

8. **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.
9. **Appeal and Error.** Abuse of discretion is a highly deferential standard of review.
10. **Criminal Law: Appeal and Error.** Harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.
11. **Appeal and Error.** It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires a reversal.
12. ____. When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

Donald W. Kleine, Douglas County Attorney, Amy G. Jacobsen, and Jameson D. Cantwell for appellant.

James Martin Davis, of Davis Law Office, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Riedmann, Judge, and Martinez, District Judge.

Funke, J.

Tyler P. was 17 years old when he was charged in the Douglas County District Court with multiple felonies arising from a disturbance at his family's home. He filed a motion to transfer the case to juvenile court, which was sustained. The State appeals, assigning error to the grant of the motion to transfer. We affirm.

BACKGROUND

Facts

The State filed an information in the district court for Douglas County charging Tyler with five felonies: two charges of attempted second degree murder, a Class II felony; two

charges of use of a deadly weapon (firearm) to commit a felony, a Class IC felony; and one charge of second degree assault, a Class IIA felony.

Tyler filed a motion to transfer the matter to juvenile court under Neb. Rev. Stat. §§ 29-1816 (Supp. 2017) and 43-261 (Reissue 2016). Tyler requested the district court waive jurisdiction of the matter to the separate juvenile court for further proceedings under chapter 43, article 2, of the Nebraska Revised Statutes.

A juvenile transfer hearing was held by the district court at which several witnesses testified and the State offered police reports concerning the incident of September 3, 2017. Gail P., Tyler's mother, testified about the events surrounding the incident; Dr. Terry Davis testified about Tyler's mental condition; and Heather Briggs, a juvenile probation officer, testified about the services available to Tyler in juvenile court.

Gail testified that Tyler was born in February 2000 and that she and Dennis P. are Tyler's parents. She also testified that Tyler resided with Dennis and Gail in their home in Waterloo, Nebraska; that he was active in high school sports, including being a standout football player; that he had minimal disciplinary problems at home or at school; and that he had never been in juvenile court.

She further testified that on the evening of September 2, 2017, Tyler had a group of friends at the house to watch a football game. In the early morning hours of September 3, Gail noticed activity outside the house so she and Dennis went to investigate. In doing so, they discovered that the interior of a barn on their property had significant damage and they found beer cans present. As a result, Dennis and Gail confronted Tyler about consuming alcohol and breaking the rules. In doing so, they noticed that Tyler was unsteady on his feet and lisping and, at one point, he sat down on the ground and stared blankly at them. They demanded that Tyler give them his car keys and cell phone in an effort to punish him for his behavior. At that time, Tyler became confrontational

and began to verbally and physically abuse Dennis and Gail and block their entrance into the house. Tyler then ran to a shed and returned with a baseball bat. Dennis called the 911 emergency dispatch service for assistance, which caused Tyler to chase Dennis and threaten him with the bat. Eventually Dennis and Gail were able to gain access to the house and lock the door. Tyler struck the door of the house with the bat several times and then gained access to the house through another door.

Gail was again confronted by Tyler in the family room of the home. At that time, she noticed that "his eyes were black" and he was laughing in a "creepy" manner. Tyler then ran toward the family's gun safe. Dennis lunged at Tyler and grabbed his legs in an effort to stop him from reaching the guns. Tyler broke free of Dennis and began stomping on his head and kicking him in the back. Tyler picked up an oversized ottoman in an effort to smash Dennis with it. Gail then began to kick Tyler in an effort to distract him from hurting Dennis further. Tyler then punched Gail in the head and struck her in the legs with the bat. After striking Gail, Tyler fled the house. While he was outside, Gail could hear Tyler laughing, yelling, and smashing things around the property. Gail testified that it was a very foggy night, so she could not see him at the time. Dennis and Gail exited the home and were standing on a patio when Tyler emerged from the fog. He appeared "eerily calm" and was saying that it was too late for him, that he was not good at football, and that he did not deserve to live. Tyler then went into the house and retrieved a shotgun.

Law enforcement arrived, and Tyler fled on foot. Deputies attempted to locate Tyler on the property, but due to the intense fog, they were not able to see him. Tyler then approached Gail and pointed the gun directly at her. Gail pleaded for Tyler not to shoot her and to put down the gun. Tyler then ran off again. Gail then heard gunfire and saw that Tyler had been shot.

Gail also testified that though she did not see Tyler shoot at the officers, she knew that he had been accused of doing so.

While in the hospital, Gail told Tyler that he had shot one of the officers.

Davis, a board-certified psychiatrist who is also certified in forensic psychiatry and addiction psychiatry, testified on behalf of Tyler. Davis testified that while playing a football game on September 1, 2017, Tyler had sustained four head-to-head significant impacts which most likely caused a concussion. Davis stated that Tyler had no memory of the events occurring on September 3 and that it was his diagnosis that Tyler suffered from neurocognitive disorder due to a traumatic brain injury. Davis based his diagnosis on the evaluation he completed of Tyler, evaluations completed by Tyler's pediatrician and a neuropsychologist after the shooting, and an interview of Gail in which she detailed Tyler's behavioral changes on the day of the incident. Davis noted that symptoms exhibited by Tyler, including such things as a personality change, the flatness of his affect and emotional display, his aggressive behavior, his change of smell and taste, and his hypersensitivity to sound and light are fairly classic signs of a traumatic brain injury. Davis testified that though Tyler had a blood alcohol content of .148, his behavior was not the result of alcoholic intoxication or an alcoholic blackout.

Davis opined that

> Tyler was in an amnestic episode and did not fully understand or appreciate what he was doing or that it was wrong, since he has no memory of it now. Was he able to intentionally carry out specific motor actions? Yes. He was able to get a baseball bat. He was able to chase after his mother. He was able to go to the gun cabinet and get a gun. He was able to load the gun, I assume, and fire it. But in terms of his intent to harm anyone or his appreciation of what his actions were at that time, those would have been substantially impaired.

Davis further opined that Tyler's prognosis was good. Davis stated that Tyler "should pretty much recover" within 3 months from the type of brain injury he sustained. Though there may

be some lingering effects, Davis believed those could be addressed through rehabilitation treatment through an outpatient brain injury clinic. He also testified that the events of September 3, 2017, appeared to be an isolated incident, that it was unlikely Tyler would commit a violent act in the future, and that incarcerating Tyler was not necessary for the safety of the public.

Briggs testified that she has been a juvenile probation officer for 13 years. Briggs stated that juvenile probation could offer services, including inhome services, family support, tracker, electronic monitoring, and assistance with arranging outpatient treatment for mental health or substance abuse. She further testified that due to Tyler's turning 18 in February 2018, some services would be limited, including out-of-home placement. In addition, Briggs testified that Tyler would be subject to the jurisdiction of the juvenile court only until he reached the age of 19.

District Court's Findings

At the completion of the juvenile transfer hearing, the district court ruled from the bench and later entered a written order. The written order indicated that evidence was adduced and that after having considered the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 2016), and for the reasons stated in open court, Tyler's motion to transfer the case to the separate juvenile court of Douglas County was sustained.

The court's full oral pronouncement from the bench is provided as follows:

> It goes without saying, but the Court will say it anyway, that this was a very serious and life-threatening event to all those involved, and based upon the fact that [Tyler] does not have a memory as to the events, it is — I guess, in that sense, it arguably deprives the Court of being able to analyze what the motivation for the events would be or motivation for why he did what he did on that night.

At the same time, there is evidence, I guess, adduced from the expert, Dr. Davis, of this, in his diagnosis, of the neurocognitive disorder, which resulted from the traumatic brain injury, and that does at least coincide with the fact that a football game was played, that [Tyler] was involved in the day before, as well as another game, I guess, arguably, the week before. And when you're weighing all that with the factors in [§] 43-276 and having to balance those with the fact that he's never been through the Juvenile System, then you're trying to balance those with the safety of the public. And that is further balanced by, I guess, the fact that he has been out on bond for some time, and you could argue that there has at least been some time where he may have been able to access the public and whether this was just a one-time event.

And I guess from the Court's perspective, I would not see if he were to be transferred to the Juvenile Court, that that would be considered a free pass. I guess the Court would defer to the — if, in fact, he were in the Juvenile Court, to their expertise, and clearly there was something going on that needs to be evaluated and further evaluated, as it relates to [Tyler] and his mental/emotional state absolutely needs to be further evaluated and maybe even treated.

And the Court doesn't lose sight of the obvious that — of weighing the best interests of [Tyler], that the Court believes that he should be transferred to the Juvenile Court, and that is what the Court is going to do.

ASSIGNMENTS OF ERROR

The State assigns, reordered and restated, that the district court abused its discretion in transferring Tyler to juvenile court, because (1) a sound basis existed for retaining the matter in district court, (2) the court did not sufficiently make the required findings pursuant to § 43-276, and (3) the court decided the motion to transfer without first reading and

considering the police reports related to the investigation of the crimes charged.

STANDARD OF REVIEW

[1] A motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.[1]

ANALYSIS

Legal Framework

Under § 29-1816(3)(a) for motions to transfer a case from the county court or district court to juvenile court:

> The county court or district court shall schedule a hearing on such motion within fifteen days. . . . The criteria set forth in section 43-276 shall be considered at such hearing. After considering all the evidence and reasons presented by both parties, the case shall be transferred to juvenile court unless a sound basis exists for retaining the case in county court or district court[.]

The considerations in determining whether to transfer a case are set out in § 43-276(1):

> The county attorney or city attorney, in making the determination whether to file a criminal charge, file a juvenile court petition, offer juvenile pretrial diversion or mediation, or transfer a case to or from juvenile court, and the juvenile court, county court, or district court in making the determination whether to transfer a case, shall consider: (a) The type of treatment such juvenile would most likely be amenable to; (b) whether there is evidence that the alleged offense included violence; (c) the motivation for the commission of the offense; (d) the age of the juvenile and the ages and circumstances of any others involved in the offense; (e) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court;

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[1] See *State v. Hunt, ante* p. 573, 909 N.W.2d 363 (2018); *State v. Dimmitt*, 5 Neb. App. 451, 560 N.W.2d 498 (1997).

(f) the best interests of the juvenile; (g) consideration of public safety; (h) consideration of the juvenile's ability to appreciate the nature and seriousness of his or her conduct; (i) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; (j) whether the victim agrees to participate in mediation; (k) whether there is a juvenile pretrial diversion program established pursuant to sections 43-260.02 to 43-260.07; (l) whether the juvenile has been convicted of or has acknowledged unauthorized use or possession of a firearm; (m) whether a juvenile court order has been issued for the juvenile pursuant to section 43-2,106.03; (n) whether the juvenile is a criminal street gang member; and (o) such other matters as the parties deem relevant to aid in the decision.

District Court Did Not Abuse Discretion Transferring to Juvenile Court

The State contends that a sound basis existed for retaining the matter in district court. More specifically, the State argues that the extreme level of violence, the obvious public safety concerns, the motivation of the offense, and Tyler's age at the time of the offense all support retaining the matter in adult court.

[2-4] This court has stated that in deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in the light of the criteria or factors set forth in § 43-276.[2] After the court considers the evidence in light of the § 43-276 factors, "'the case shall be transferred to juvenile court unless a sound basis exists for retaining the case in county court or

[2] *State v. Thieszen*, 232 Neb. 952, 442 N.W.2d 887 (1989).

district court.'"[3] Thus, transfer in the absence of a sound basis for retention is the general rule.[4] The burden of proving a sound basis for retention lies with the State.[5]

[5-7] There is no arithmetical computation or formula required in a court's consideration of the statutory criteria or factors.[6] Also, there are no weighted factors, that is, no prescribed method by which more or less weight is assigned to each factor specified in the statute.[7] It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.[8]

In the instant matter, based on the evidence considered by the district court, the district court found that there was not a sound basis for the adult court to retain jurisdiction of the defendant's case. These findings may be summarized as follows:

- The case involved a "very serious and life-threatening event to all those involved."
- The court could not determine Tyler's motives due to his lack of memory as to the events.
- Davis' diagnosis provided evidence that Tyler had a neurocognitive disorder, which resulted from a previous traumatic brain injury.
- Tyler had never been involved with the juvenile system.
- Tyler had been out on bond for some time, and there was no evidence of additional violence.
- The incident seemed to be a one-time event.
- Were Tyler in juvenile court, he would be subject to further evaluations for his mental/emotional state.
- Treatment for Tyler's mental state may be necessary.

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[3] *Hunt, supra* note 1, *ante* at 582, 909 N.W.2d at 371.

[4] *State v. Doyle*, 237 Neb. 60, 464 N.W.2d 779 (1991).

[5] *Hunt, supra* note 1.

[6] See *State v. Alexander*, 215 Neb. 478, 339 N.W.2d 297 (1983).

[7] *Id.*

[8] See *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

Although the record shows that this matter involved very serious crimes and that due to Tyler's age, he will be under the jurisdiction of the juvenile court for less than 1 year, the record also supports the district court's findings. The evidence indicates that Tyler continues to reside at home with Dennis and Gail, that he had not been violent in the past, that he had no prior criminal record, that his crimes were attributable to a previously suffered brain trauma, that treatment and the passage of time would most likely resolve his brain trauma, and that he had not been violent since the event.

[8,9] Applying the balancing test in the light of the several criteria or factors found in § 43-276(1), we find that the district court did not abuse its discretion in transferring Tyler's case to the separate juvenile court. 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.[9] Abuse of discretion is a highly deferential standard of review.[10]

Our review indicates the district court applied the general rule set forth by the Legislature under § 29-1816(3)(a) that the case "shall be transferred to juvenile court unless a sound basis exists for retaining the case" and that, when weighed against the evidence Tyler presented at the hearing, the State failed to meet its burden to show a sound basis for retention. The State's first assignment of error is therefore without merit.

District Court Made Sufficient Findings

The State contends that the court failed to set forth sufficient findings to warrant a transfer to juvenile court. Under § 29-1816(3)(b), the district court is required to set forth findings for the reason for its decision.

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[9] *Rodriguez v. Surgical Assocs. P.C.*, 298 Neb. 573, 905 N.W.2d 247 (2018).

[10] See *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

In *State v. Phinney*,[11] we held that when a juvenile requests that the case be transferred to juvenile court, it is mandatory for a trial court to set forth on the record its findings supporting its determination that there is a sound basis for refusing to transfer the juvenile's case. We noted that in *Kent v. United States*,[12] the U.S. Supreme Court, in reviewing a District of Columbia statute which permitted juvenile courts to waive jurisdiction over minors to adult criminal courts, stated that the juvenile court must accompany its waiver order with the statement of reasons or considerations therefor and that such a statement "must set forth the basis for the order with sufficient specificity to permit meaningful review." We also noted in *State v. Trevino*[13] that a trial court must make a statement of its findings which provides sufficient specificity to permit meaningful review by this court.

In *State v. Stewart*,[14] we addressed the issue of the findings that must accompany a trial court's decision on a motion to transfer to juvenile court. In *Stewart*, the trial court made a separate statement of its findings for retaining jurisdiction of the case, specifically mentioning five of the factors set forth in Neb. Rev. Stat. § 43-202.01 (Reissue 1978) (the predecessor of § 43-276). We found that while it would have been preferable for the trial court to refer to all the considerations set forth in § 43-202.01, in its order, the statute in question did not require the court to do so.

However, in *State v. Doyle*,[15] we remanded a motion to transfer to juvenile court back to the trial court to make specific findings as provided by statute. Neither the oral findings

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[11] *State v. Phinney*, 235 Neb. 486, 455 N.W.2d 795 (1990).

[12] *Kent v. United States*, 383 U.S. 541, 561, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).

[13] See *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988).

[14] *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *overruled on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

[15] *Doyle, supra* note 4.

of the court nor the court's written order detailed the findings made in support of the order of denying the transfer.

In the instant matter, the district court's order merely sets forth that after considering all the factors of § 43-276, and for the reasons stated in open court, Tyler's motion to transfer was sustained. Without more, the order would not permit meaningful review by this court. However, in its oral findings, the court stated that it weighed the factors in § 43-276(1) and balanced those with the safety of the public. In doing so, the court found that the case should be transferred to juvenile court. The court specifically referenced relevant statutory factors, including the motivation behind the offense, the juvenile's previous criminal history, the juvenile's ability to appreciate his conduct, the best interests of the juvenile, and the safety of the public. And, as we have previously stated, though it would have been preferable for the district court to refer to all the statutory considerations, the statute does not require it to do so. As a result, this assignment of error is without merit.

Harmless Error Not to Consider All Evidence

The State contends that the district court failed to consider all of the evidence submitted by the parties prior to pronouncing its ruling. More specifically, the State argues that the court did not review the investigative reports concerning the events on September 3, 2017.

Section 29-1816(3)(a) requires that only after the trial court "*consider*[*s*] *all the evidence* and reasons presented by both parties" may a case be transferred to juvenile court. (Emphasis supplied.)

The record is clear that approximately 141 pages of police reports were offered into evidence by the State at the close of the juvenile transfer hearing. After receiving the police reports, the court immediately heard closing arguments from counsel. Upon completion of the closing arguments, the court

proceeded to render its findings and decision. Though the State asked the court to delay its ruling until it had considered all of the evidence, the court chose not to do so. As a result, the district court erred by failing to review and consider the police reports offered by the State.

[10-12] However, the determination that the district court erred does not end our consideration of this assignment of error. Our harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.[16] It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires a reversal.[17] When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.[18]

The evidence the district court failed to review involved the law enforcement investigation of the events on September 3, 2017. Within those reports is evidence that Tyler had consumed alcohol that night, that he verbally and physically assaulted Dennis and Gail, that he destroyed property with a baseball bat, that he physically assaulted Dennis and Gail, that he fired a shotgun at two law enforcement officers, that one of the officers received a gunshot wound to his arm, that the officers returned fire at Tyler, and that one of the officers shot Tyler in the abdomen. Though the police reports provided detailed information, the facts set forth in the reports are similar in nature to the allegations of the information filed by the State and the facts recounted by Gail and Davis. As noted, the district court began its oral findings by stating that "this was a very serious and life-threatening event to all those involved."

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[16] *State v. Kidder, ante* p. 232, 908 N.W.2d 1 (2018).

[17] See *id.*

[18] *Id.*

As a result, the error of not reviewing the police reports, in light of the totality of the record, did not influence the outcome of the case.

CONCLUSION

For the reasons stated in this opinion, we affirm the decision of the district court to transfer this matter to the juvenile court.

Affirmed.

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