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THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

MAY 18, 2018 and SEPTEMBER 6, 2018

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCC

PEGGY POLACEK

OFFICIAL REPORTER

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DURING THE PERIOD OF THESE REPORTS

Michael G. Heavican, Chief Justice
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
John R. Freudenberg, Associate Justice[1]

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

Peggy Polacek . . . . . Reporter
Wendy Wussow . . . . . Clerk
Corey Steel . . . . . State Court Administrator

[1]As of July 6, 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
James C. Stecker	Seward
Rachel A. Daugherty	Aurora
Christina M. Marroquin	Wahoo

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 299

Bradford Gericke Barker
Jennifer Nichole Brantley
Debra Sue Burton
David Allen Changstrom
Eric Alan Checketts
Mary Elizabeth Catherine Choate
Nicholas John Deganhart
Cristina Fackler
Brooke Ann Harms
Alberto Paulino Hernandez, Jr.
Michelle Donna Hurley
Jordan Patrick Jacupke
Michael Robert Keenan
Maureen Elizabeth McGill Hoogeveen
Shane Christopher Mecham
Danielle Kathleen Miller
Emily Nell Klopfenstein Monroe
Kevin Joseph O'Keefe
Lauren Joan Reyelts
Shannon Nicole Schroeder
Djenita Svinjar
Joseph Andrew Taylor
Amy Marie Thompson
Kevin Patrick Walsh
Aarika Adelle Wellnitz
Tamar Helene Yellin

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No. S-17-971: **State ex rel. Counsel for Dis. v. Leary**. Judgment of public reprimand. Per Curiam.

No. S-18-466: **In re Application of Fackler**. Application granted. Per Curiam.

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No. S-13-002: **State ex rel. Counsel for Dis. v. Sundvold**. Monitoring plan approved. Application for reinstatement of license to practice law granted.

No. S-14-828: **State ex rel. Counsel for Dis. v. Sundvold**. Monitoring plan approved. Application for reinstatement of license to practice law granted.

No. S-17-989: **Iowa Mut. Ins. Co. v. Bridgeway Auto Sales**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-17-1276: **State v. Leon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Kluge*, 198 Neb. 115, 251 N.W.2d 737 (1977).

No. S-18-160: **Janice M. Hinrichsen, Inc. v. Messersmith Ventures**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-18-295: **State v. Jones**. Motion of appellee for summary dismissal sustained. See § 2-107(B)(1).

No. S-18-453: **State v. Casterline**. Appeal dismissed. See § 2-107(A)(2). See, also, *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

No. S-18-511: **State v. Lane**. Stipulation allowed; appeal dismissed.

No. S-18-581: **State v. Hill**. Appeal dismissed. See § 2-107(A)(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

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No. A-16-968: **Thomas v. Kiewit Bldg. Group**, 25 Neb. App. 818 (2018). Petition of appellee for further review denied on July 13, 2018.

No. A-16-1115: **Crossman & Hosford v. Harbison**, 25 Neb. App. 849 (2018). Petition of appellee for further review denied on June 19, 2018.

No. A-16-1218: **Gray v. Nebraska Dept. of Corr. Servs**. Petition of appellant for further review denied on June 7, 2018.

No. A-17-019: **State v. Fessler**. Petition of appellant for further review denied on June 1, 2018.

No. S-17-054: **Simms v. Friel**, 25 Neb. App. 640 (2018). Petition of appellant for further review sustained on June 4, 2018.

No. A-17-084: **State v. Bosse**. Petition of appellant for further review denied on June 26, 2018.

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No. A-17-105: **State v. Bates**. Petition of appellant for further review denied on June 11, 2018.

No. A-17-153: **Leonor v. Frakes**. Petition of appellant for further review denied on June 1, 2018.

No. A-17-181: **Schilke v. Battiato**. Petition of appellant for further review denied on August 9, 2018.

No. A-17-184: **Gardner v. International Paper Destr. & Recycl**. Petition of appellant for further review denied on May 15, 2018.

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No. A-17-310: **State v. Pryce**, 25 Neb. App. 792 (2018). Petition of appellant for further review denied on May 18, 2018.

No. A-17-341: **Rosberg v. Rosberg**, 25 Neb. App. 856 (2018). Petition of appellant for further review denied on June 18, 2018.

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No. A-17-372: **State v. St. Cyr**, 26 Neb. App. 61 (2018). Petition of appellant for further review denied on August 21, 2018.

No. A-17-409: **Williams v. Williams**. Petition of appellant for further review denied on August 8, 2018.

No. A-17-416: **State v. Reed**. Petition of appellant for further review denied on August 21, 2018.

No. A-17-447: **State v. Mohammed**. Petition of appellant for further review denied on July 6, 2018.

No. A-17-465: **Moss v. C&A Indus.**, 25 Neb. App. 877 (2018). Petition of appellant for further review denied on August 21, 2018.

No. A-17-500: **State v. Kelley**. Petition of appellant for further review denied on June 18, 2018.

No. A-17-507: **Shaw v. Nebraska Med. Ctr**. Petition of appellant for further review denied on July 10, 2018, as untimely.

No. A-17-513: **In re Interest of Jade H. et al.**, 25 Neb. App. 678 (2018). Petition of appellant for further review denied on May 16, 2018.

No. A-17-532: **State v. Muhammad**. Petition of appellant for further review denied on August 16, 2018.

No. A-17-560: **State v. Stephens**, 26 Neb. App. 1 (2018). Petition of appellant for further review denied on July 17, 2018.

No. A-17-574: **Cohrs v. Bruns**. Petition of appellant for further review denied on June 26, 2018.

No. A-17-595: **Gardner v. Burkley Envelope Co**. Petition of appellant for further review denied on June 7, 2018.

No. A-17-603: **In re Interest of Jose H. et al**. Petition of appellant for further review denied on June 26, 2018.

No. A-17-676: **State v. Ruaikot**. Petition of appellant for further review denied on June 7, 2018.

Nos. A-17-677, A-17-678: **In re Interest of Benjamin C. & Alizaeya D**. Petitions of appellant for further review denied on July 25, 2018.

No. A-17-692: **State v. Hallauer**. Petition of appellant for further review denied on July 10, 2018.

No. S-17-710: **Gerber v. P & L Finance Co**. Petition of appellee for further review sustained on July 20, 2018.

No. A-17-733: **State v. Moss**. Petition of appellant for further review denied on August 7, 2018.

No. A-17-752: **State v. Guerrero**. Petition of appellant for further review denied on June 7, 2018.

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No. A-17-779: **State v. Pester**. Petition of appellant for further review denied on July 19, 2018.

No. A-17-788: **Fischer v. Fischer**. Petition of appellant for further review denied on July 20, 2018.

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No. A-17-804: **In re Interest of Dae Lyn W**. Petition of appellant for further review denied on June 4, 2018.

No. A-17-828: **Mengedoht v. Andersen**. Petition of appellants for further review denied on May 16, 2018.

No. A-17-829: **Mengedoht v. Looby**: Petition of appellants for further review denied on May 16, 2018.

No. A-17-836: **Kuhlman v. City of Hastings**. Petition of appellant for further review denied on July 25, 2018.

No. A-17-839: **State v. Young**. Petition of appellant for further review denied on July 6, 2018.

No. A-17-855: **Thompson v. Thompson**. Petition of appellant for further review denied on August 9, 2018.

No. A-17-867: **State v. Coleman**. Petition of appellant for further review denied on August 9, 2018.

No. A-17-880: **State v. Hopkins**. Petition of appellant for further review denied on July 24, 2018, as untimely.

No. A-17-892: **Mumin v. Frakes**. Petition of appellant for further review denied on May 10, 2018.

No. S-17-898: **St. John v. Gering Public Schools**. Petition of appellant for further review granted on July 17, 2018.

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No. A-17-939: **State v. Frazier**. Petition of appellant for further review denied on August 13, 2018.

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No. A-17-1046: **State v. House**. Petition of appellant for further review denied on June 7, 2018.

No. A-17-1067: **In re Interest of Harley F**. Petition of appellant for further review denied on August 21, 2018.

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No. A-17-1122: **Schmidt v. Schmidt**. Petition of appellant for further review denied on May 16, 2018.

No. A-17-1143: **Smith v. Madsen**. Petition of appellant for further review denied on August 23, 2018.

No. A-17-1163: **Mumin v. Hansen**. Petition of appellant for further review denied on June 7, 2018.

No. A-17-1200: **Yah v. Fontenelle Realty**. Petition of appellant for further review denied on June 26, 2018.

No. A-17-1225: **State v. Almusa**. Petition of appellant for further review denied on July 25, 2018.

No. A-17-1253: **State v. Loebig**. Petition of appellant for further review denied on July 20, 2018.

No. A-17-1273: **State v. Garibo**. Petition of appellant for further review denied on June 13, 2018, for failure to comply with § 2-102(F)(1).

No. A-17-1290: **State v. Gray**. Petition of appellant pro se for further review overruled as untimely filed. See § 2-102(F)(1).

No. A-17-1304: **State v. Hughes**. Petition of appellant for further review denied on July 6, 2018.

No. A-18-125: **State v. Hayes**. Petition of appellant for further review denied on August 9, 2018.

No. A-18-136: **State v. O'Toole**. Petition of appellant for further review denied on August 29, 2018.

No. A-18-235: **State v. McDonald**. Petition of appellant for further review denied on July 13, 2018.

No. A-18-271: **State v. Page**. Petition of appellant for further review denied on August 29, 2018.

No. A-18-337: **State v. Wilson**. Petition of appellant for further review denied on August 21, 2018.

No. A-18-469: **McElroy v. Davita Dialysis Clinics Corp**. Petition of appellant for further review denied on July 10, 2018.

300 Nebraska Reports
NESBITT v. FRAKES
Cite as 300 Neb. 1

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

Thomas Nesbitt, on behalf of himself and all other similarly situated Nebraska State Penitentiary segregated prisoners, appellant, v. Scott Frakes et al., appellees.

911 N.W.2d 598

Filed May 18, 2018. No. S-16-931.

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. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.
3. **Courts: Jurisdiction.** While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power.
4. **Actions: Moot Question.** An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
5. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.
6. **Moot Question.** Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.
7. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
8. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
9. **Injunction: Intent.** The purpose of an injunction is to restrain actions that have not yet been taken.

10. **Injunction.** Injunctive relief is preventive, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury has been done.
11. **Declaratory Judgments: Moot Question.** A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
12. **Declaratory Judgments: Justiciable Issues.** At the time that the declaration is sought, there must be an actual justiciable issue from which the court can declare law as it applies to a given set of facts.
13. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
14. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
15. **Moot Question: Words and Phrases.** The public interest exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
16. **Moot Question: Appeal and Error.** An application of the public interest exception to the mootness doctrine is inappropriate when the issues presented on appeal do not inherently evade appellate review.
17. **Class Actions.** In order to justify class action treatment, there must exist both a question of common or general interest *and* numerous parties so as to make it impracticable to bring all the parties before the court.
18. ____. In determining whether a class action is properly brought, considerable discretion is vested in the trial court.
19. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Lancaster County: Jodi L. Nelson, Judge. Appeal dismissed.

Thomas Nesbitt, pro se.

Douglas J. Peterson, Attorney General, and Timothy R. Ertz for appellee.

Heavican, C.J., Miller-Lerman, and Cassel, JJ., and Luther and O'Gorman, District Judges.

Per Curiam.

Thomas Nesbitt brought suit against the Nebraska Department of Correctional Services (DCS), its director, and various other officials and employees of the DCS, alleging that the conditions at the Nebraska State Penitentiary (NSP) violate his rights under Nebraska law and that his claims are representative of all inmates housed in the segregation units at the NSP.

This is an appeal from an order dismissing Nesbitt's amended complaint for failing to state a cause of action. Because Nesbitt no longer resides at the NSP, this matter is moot and the appeal is dismissed.

BACKGROUND

Nesbitt is an inmate with the DCS. At the time he filed his pro se complaint "for class action, declaratory, and injunctive relief," he resided in a segregated unit at the NSP, located in Lincoln, Nebraska. Nesbitt's complaint asserted state law claims based on a range of matters within the correctional facility's setting, including overcrowding, cell assignments, flooding, and inadequate showering conditions.

Nesbitt, age 71, claims he suffers from a debilitating spinal condition which causes him sciatic nerve pain and restless leg syndrome. He claims, according to his medical diagnosis, he is required to sleep from 2 a.m. to 10 a.m. every day in order to prevent paralysis. He asserts prison officials violate his rights when they allow the prison to become overpopulated and, as a result, place another prisoner in his "medically designed one-man segregation single-cell," which disturbs his circadian rhythm.

Nesbitt's complaint named as defendants the appellees, eight officials and employees with the DCS, in both their official and individual capacities, but he served the appellees in their individual capacities only. Nesbitt's praecipe for issuance and

service of summons requested service at the DCS and NSP, and not at the Attorney General's office.

The district court dismissed Nesbitt's original complaint under Neb. Ct. R. Pldg. § 6-1112(b)(6), finding that the appellees had been served in only their individual capacities and that the complaint failed to state a claim for relief against any of the appellees personally. The court denied Nesbitt's request for class action status and motion for restraining order. Nesbitt filed an amended verified complaint, in which he included additional claims related to prison conditions. He sought temporary and permanent injunctive relief and declaratory judgment—the same relief requested in his initial complaint. The appellees filed another motion to dismiss, and the court again dismissed the complaint under § 6-1112(b)(6), noting that the new pleading had the same defects as the original and that no further opportunity to amend should be permitted.

Nesbitt filed a motion to alter or amend the court's judgment, in which he stated that he had been transferred to the Omaha Correctional Center located in Omaha, Nebraska. Nesbitt confirmed this fact at the hearing on his motion, which motion the court overruled. Nesbitt timely appealed.

ASSIGNMENTS OF ERROR

Nesbitt assigns that the court erred in (1) denying his verified complaint; (2) failing to properly evaluate his claims under the notice pleading system; and (3) refusing to (a) certify class members, (b) appoint legal counsel, and (c) issue a restraining order and temporary injunction.

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.[1]

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[1] *Salem Grain Co. v. Consolidated Grain & Barge Co.*, 297 Neb. 682, 900 N.W.2d 909 (2017).

ANALYSIS

Mootness

[2,3] Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.[2] While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power.[3]

The appellees assert that Nesbitt's claims seeking injunctive relief and declaratory judgment are moot, because he has been transferred to a different correctional facility. Thus, we must first determine whether Nesbitt's transfer to a different facility has rendered this appeal moot.

[4-8] An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.[4] A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.[5] Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.[6] Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.[7] As a general rule, a moot case is subject to summary dismissal.[8]

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[2] See *Boyd v. Cook*, 298 Neb. 819, 906 N.W.2d 31 (2018).

[3] *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

[4] *Stewart v. Heineman*, 296 Neb. 262, 892 N.W.2d 542 (2017).

[5] *Applied Underwriters v. S.E.B. Servs. of New York*, 297 Neb. 246, 898 N.W.2d 366 (2017).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9,10] In considering Nesbitt's specific claims, we note that the purpose of an injunction is to restrain actions that have not yet been taken.[9] On several previous occasions, we have recognized that "'injunctive relief is preventive, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury has been done.'"[10] We have also said:

> "'Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong, rights already lost and wrongs already perpetrated cannot be corrected by injunction.'"[11]

In *Putnam v. Fortenberry*,[12] the plaintiff sought to enjoin the city of Lincoln from selling a publicly owned hospital to a private company. A few days after the plaintiff had brought her action, the city council passed an ordinance approving the sale. Within 3 weeks, the city and the private company had entered into an affiliation agreement that set a closing date. Three weeks later, the court denied the plaintiff's request for temporary and permanent injunctive relief. Before the plaintiff appealed, the city and the private company had closed the sale and the title to the hospital was transferred. We said "[b]ecause the act which [the plaintiff] sought to enjoin is complete, our opinion on the trial court's denial of injunction would be nugatory. We, therefore, conclude that the issue of injunctive relief is moot."[13]

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[9] *Stewart, supra* note 4.

[10] *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 645, 658 N.W.2d 636, 643 (2003).

[11] *Putnam v. Fortenberry*, 256 Neb. 266, 271, 589 N.W.2d 838, 843 (1999) (quoting *Conrad v. Kaup*, 137 Neb. 900, 291 N.W. 687 (1940)).

[12] *Putnam, supra* note 11.

[13] *Id.* at 272, 589 N.W.2d at 843.

The same analysis applies in this case. If Nesbitt had a personal interest in seeking improved conditions at the NSP, his interest ceased upon his transfer to another facility. Nesbitt is no longer subject to the conditions at the NSP, and the injunctive relief he seeks has been rendered moot.

[11-13] In addition to seeking an injunction against his housing conditions, Nesbitt sought a declaratory judgment. Thus, we must next determine whether declaratory judgment is also moot. A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.[14] At the time that the declaration is sought, there must be an actual justiciable issue from which the court can declare law as it applies to a given set of facts.[15] A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[16]

In *Rath v. City of Sutton*,[17] the plaintiff, Marlowe Rath, brought an action for declaratory relief seeking to enjoin the expenditure of public funds pursuant to a contract he claimed was illegal. Rath argued that notwithstanding completion of the project and payment of all funds, relief was still available, because a taxpayer had a right to recover the funds expended under an illegal contract. Rath rightfully contended that a "'suit that seeks damages for harm caused by past practices is not rendered moot by the cessation of the challenged conduct.'"[18] However, Rath did not seek to recover the funds

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[14] *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

[15] *Board of Trustees v. City of Omaha*, 289 Neb. 993, 858 N.W.2d 186 (2015).

[16] *Id.*

[17] *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

[18] *Id.* at 274, 673 N.W.2d at 880. See, also, *CMM Cable Rep. v. Ocean Coast Properties, Inc.*, 48 F.3d 618 (1st Cir. 1995); *Curtis Indus., Inc. v. Livingston*, 30 F.3d 96 (8th Cir. 1994).

that may have been illegally expended under the contract, but only sought injunctive and declaratory relief. We held that in order to be entitled to recoup illegally expended funds, Rath was required to specifically request such relief in his petition. We further held that a declaration by this court on the legality of the contract would be advisory, because it would have no effect on the parties *in this case*, and that therefore, Rath's request for declaratory relief was moot.

In the instant matter, Nesbitt did not seek monetary damages regarding conditions of confinement. As a result, his claim for declaratory judgment would suffer from the same infirmities as a claim for injunctive relief. In this case, a declaratory judgment would not undo what has already been completed, but would be nothing more than advisory, and "declaratory relief cannot be used to obtain a judgment which is merely advisory."[19] Nesbitt's request for declaratory judgment is also moot.

More directly upon the issue of prisoner litigation, in *Johnston v. Nebraska Dept. of Corr. Servs.*,[20] we considered an inmate's claim concerning placement within a prison facility. Sean Johnston, an inmate at the NSP, was placed on administrative confinement after a misconduct report was filed against him. The director of the DCS affirmed the placement decision, despite the misconduct report being dismissed for lack of evidence. Johnston then sought judicial review of the director's decision, alleging that the decision violated the Due Process Clauses of the federal and state Constitutions. The district court dismissed Johnston's action on the ground that a classification decision is not subject to review under the Administrative Procedure Act. On appeal from the district court's order, the State filed a motion to dismiss, alleging that Johnston had been removed from administrative confinement and transferred to another facility where he was placed into the general population. We granted the State's motion, holding that an inmate's

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[19] *Galyen v. Balka*, 253 Neb. 270, 276, 570 N.W.2d 519, 524 (1997).

[20] *Johnston, supra* note 3.

transfer from administrative confinement status to the general population moots any argument related to the inmate's initial placement in administrative confinement.[21]

Nearly 20 years ago, in *Smith v. Hundley*,[22] the U.S. Eighth Circuit Court of Appeals considered an issue nearly identical to Nesbitt's. An inmate at the Iowa State Penitentiary, Duane Joseph Smith, filed suit against the state prison officials under 42 U.S.C. § 1983 (1994). Smith sought injunctive and declaratory relief, claiming his First Amendment rights were violated because he was precluded from purchasing items necessary to practice his "Seax-Wicca faith."[23] During the legal proceedings, Smith was transferred to another facility. The court held that an inmate's claims for declaratory and injunctive relief to improve prison conditions become moot when he or she is transferred to another facility and no longer subject to those conditions.[24]

Here, Nesbitt's claims for injunctive relief and declaratory judgment rest upon his allegation that overcrowding, cell assignments, flooding, and inadequate showering conditions negatively affect his unique physical ailments. Because Nesbitt has been transferred to another facility and is no longer subject to those conditions, his claims do not rest upon existing facts. Thus, as to him, it is no longer necessary to consider the issue of whether a court can review and countermand Nesbitt's housing conditions at the NSP.

[14-16] Though we conclude that Nesbitt's claims for declaratory judgment and injunctive relief are moot, an appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting

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[21] *Id.*

[22] *Smith v. Hundley*, 190 F.3d 852 (8th Cir. 1999).

[23] *Id.* at 853.

[24] *Smith v. Hundley, supra* note 22. See, also, *Gladson v. Iowa Dept. of Corrections*, 551 F.3d 825 (8th Cir. 2009); *Martin v. Sargent*, 780 F.2d 1334 (8th Cir. 1985); *Wycoff v. Brewer*, 572 F.2d 1260 (8th Cir. 1978).

the public interest or when other rights or liabilities may be affected by its determination.[25] This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.[26] An application of the public interest exception to the mootness doctrine is inappropriate when the issues presented on appeal do not inherently evade appellate review.[27]

We decline to apply the public interest exception in this case. It is clear that the issues raised by Nesbitt are capable of repetition, as other inmates are subject to the complained-of housing conditions at the NSP. If a similar claim is brought, appellate judicial review is likely to occur. However, Nesbitt has not demonstrated a reasonable likelihood that he will be subject to the housing conditions existing at NSP, as he is no longer residing in that facility. In addition, Nesbitt's allegations detailing how the housing conditions affect his unique personal medical condition render the dispute less public in nature and more private in nature. As a result, we decline to apply the public interest exception to Nesbitt's claims. Therefore, no exception applies, and we must dismiss Nesbitt's appeal as moot.

Class Action

[17,18] Nesbitt further contends that his complaint is filed in his own behalf and on behalf of all others similarly situated. Class actions are authorized under Neb. Rev. Stat. § 25-319 (Reissue 2016), which provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to

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[25] *Al-Ameen v. Frakes*, 293 Neb. 248, 876 N.W.2d 635 (2016).

[26] *Id.*

[27] *Johnston, supra* note 3.

bring them all before the court, one or more may sue or defend for the benefit of all." In order to justify class action treatment, there must exist "'both a question of common or general interest *and* numerous parties so as to make it impracticable to bring all the parties before the court.'"[28] In determining whether a class action is properly brought, considerable discretion is vested in the trial court.[29]

In *Miller v. City of Omaha*,[30] we stated that an action may not be maintained as a class action by a plaintiff on behalf of himself or herself and others unless he or she has the power as a member of the class to satisfy a judgment on behalf of all members of the class.

Because Nesbitt's claims for injunctive relief and declaratory judgment are moot, he lacks commonality with members of the purported class on whose behalf he sought to litigate similar claims. The district court did not err in concluding that because Nesbitt could not maintain his individual cause of action against the appellees, he was unqualified to represent the purported class.

Pleadings

[19] Nesbitt argues that his "pro se" complaint should be held to a less stringent standard and that he set forth short, plain statements of his claims for relief. Because we conclude that Nesbitt's claims are moot, we do not reach this pleading issue. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[31]

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[28] *Lynch v. State Farm Mut. Auto. Ins. Co.*, 275 Neb. 136, 144, 745 N.W.2d 291, 298 (2008) (emphasis in original) (quoting *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994)).

[29] *Lynch, supra* note 28.

[30] *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998).

[31] *Woodmen of the World v. Nebraska Dept. of Rev.*, 299 Neb. 43, 907 N.W.2d 1 (2018).

CONCLUSION

We conclude that Nesbitt's claims for injunctive relief and declaratory judgment are moot, as he is no longer subject to the housing conditions of which he complains. Regarding his claim for certification of a class action, because his underlying claims are moot and have been dismissed, Nesbitt lacks commonality with members of the purported class on whose behalf he sought to litigate similar claims. And in regard to his argument that he has stated claim upon which relief may be granted if tested under lenient pleading standards, we decline to reach the issue, as it is not necessary to adjudicate this dispute.

Appeal dismissed.

Funke, J., participating on briefs.
Wright and Stacy, JJ., not participating.

Nebraska Supreme Court
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Jeanne E. Wiedel, appellee, v. Mark E. Wiedel, appellant.

911 N.W.2d 582

Filed May 18, 2018. No. S-17-349.

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. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. In addition, a court should consider the income and earning capacity of each party and the general equities of the situation.
3. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.
4. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. The ultimate criterion is one of reasonableness.
5. ____: ____. An appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record.
6. **Alimony: Child Support.** A party's alimony obligation is to be set according to the income he or she has available after his or her child support obligations, if any, have been accounted for.

7. **Alimony: Rules of the Supreme Court: Presumptions.** An alimony award which drives the obligor's net monthly income below the basic subsistence limitation set forth in the Nebraska Child Support Guidelines is presumptively an abuse of discretion unless the court specifically finds that conformity with the basic subsistence limitation would work an unjust or inappropriate result in that case.
8. **Child Support.** When determining whether the payment of certain childcare expenses will reduce the obligor's net income below the basic subsistence limitation, a court is not to consider costs that are entirely speculative.
9. **Alimony.** Alimony is not a tool to equalize the parties' income, but a disparity of income or potential income might partially justify an alimony award.
10. ____. The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support. Above all else, the duration of an alimony award must be reasonable.

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

Joseph H. Murray, P.C., L.L.O., of Germer, Murray & Johnson, for appellant.

Sheri Burkholder, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, and Stacy, JJ., and Moore, Chief Judge, and Arterburn, Judge, and Doyle, District Judge.

Stacy, J.

Mark E. Wiedel appeals from a decree of dissolution, assigning error to the amount and duration of the alimony award. Finding no abuse of discretion, we affirm.

I. BACKGROUND

Mark and Jeanne E. Wiedel were married in April 2000 and divorced in March 2017. They have three children, triplets,

born in 2004. When the parties separated in October 2014, Mark, who farms land in Nebraska and Kansas, remained in the marital home in Hubbell, Nebraska. Jeanne, who works at a health clinic in nearby Hebron, Nebraska, moved to an apartment in Hebron. Throughout their separation, the parties voluntarily followed a shared parenting time schedule.

In August 2015, Jeanne filed a complaint for dissolution of marriage in the Thayer County District Court. Pursuant to temporary orders, Mark and Jeanne shared temporary joint legal and physical custody of their children, and followed a "week-on-week-off" parenting schedule. Mark was ordered to pay temporary child support of $768 per month and temporary alimony of $2,500 per month.

Shortly before trial, the parties executed a property settlement agreement (PSA) that addressed the division of their assets and debts. They also executed a custody agreement and parenting plan providing for joint legal and physical custody of the children, with a week-on-week-off parenting time schedule.

The parties could not reach agreement on the issues of child support, allocation of child tax credits, or alimony. In January 2017, trial was held on these contested issues. Mark and Jeanne were the only witnesses.

1. Trial

At the outset of trial, the parties offered into evidence the PSA and the parenting plan. Both parties testified the parenting plan was in the best interests of the children and asked the court to approve it. Similarly, both parties testified the PSA was fair and reasonable, and they asked the court to approve it and incorporate it into the decree. Summarized, the PSA provided that each party should be awarded all bank accounts, stocks, bonds, and retirement accounts in his or her name. Additionally, Mark was to be awarded:

- The marital residence;
- All farmland owned by the parties in Nebraska and Kansas;

- All rights, title, and interest in the farming operations of Wiedel Brothers, LLC, and another limited liability company;
- All grain, growing crops, machinery, equipment, and property related to the farming operation; and
- Three vehicles—a 2015 GMC Sierra pickup, a 2001 Grand Prix, and a 1988 Kawasaki motorcycle.

In addition, Mark agreed to pay all debts in his name and all debts incurred by the parties during the course of the marriage, except Jeanne's student loan and her Discover credit card debt.

Under the PSA, Jeanne was to be awarded:

- A 2015 GMC Acadia;
- Two lots in Hubbell;
- All rights, title, and interest to a business known as Rose Creek Investment Group, LLC; and
- A judgment in the amount of $265,000, to be paid by Mark no later than March 10, 2017 (described in the PSA as an "equity adjustment").

The PSA did not provide values for any of the identified personal or real property, nor did it indicate the balance of any of the accounts awarded or the debts assumed. Instead, the PSA simply recited the parties were "familiar with the extent of all property owned by the parties . . . , either separately or jointly, and accumulated since their marriage, and both are satisfied that they know the present value of that property."

(a) Jeanne's Testimony

Jeanne testified she did not work outside the home for several years after the triplets were born. She eventually returned to the workforce and, at the time of trial, was employed full time at a medical clinic in Hebron, earning $13.80 per hour. Her annual income in 2016 was about $30,000. She has a small retirement account of less than $6,000. Before trial, she tried to purchase a home but was denied a mortgage due to her low

income. Jeanne testified that assuming the trial court approved the PSA, she planned to use the $265,000 judgment to purchase a home.

Jeanne acknowledged that under the PSA, Mark was getting "significantly more net assets" than she, but Jeanne asked the court to approve the PSA and testified she believed it was fair and reasonable. Jeanne explained that the only real estate she was receiving under the PSA was "the sewing shop," which she described as a "small building in Hubbell." No further evidence was adduced regarding the sewing shop.

Jeanne has rheumatoid arthritis. To manage her pain and symptoms, she takes several prescription medications, one of which costs $4,500 per month. And even after reaching her annual insurance deductible limit, Jeanne pays $120 per month in copays for prescription medication.

Jeanne offered two proposed joint custody child support calculations. Both worksheets listed Jeanne's total monthly income as $2,283. Mark's total monthly income was listed as $16,067 on one worksheet and as $12,456 on the other. Under Jeanne's worksheets, Mark would owe monthly child support of either $1,685 or $1,362, respectively.

Jeanne asked the court to award each party one child tax exemption and to alternate the third exemption between the parties in even and odd years. Regarding alimony, Jeanne estimated her monthly expenses totaled $5,364 and her monthly income was $2,283. She asked the court to order Mark to pay alimony of $3,500 per month for a period of 15 years.

(b) Mark's Testimony

Mark testified he derives income from three sources: (1) Wiedel Brothers, LLC; (2) farm rent paid to Mark by Wiedel Brothers; and (3) a hay farm he operates by himself. Mark testified that he and his brother formed Wiedel Brothers in 2011 to operate their farming business. They each own 50 percent of the business and share equally in the profits and losses.

The court received into evidence the parties' joint tax returns from 2013 through 2015, as well as the tax returns for Wiedel Brothers for the same years. The gross income reported by Wiedel Brothers was $1,782,789 in 2013, $1,390,680 in 2014, and $1,477,322 in 2015. The parties' joint tax returns show Wiedel Brothers income of $220,639 in 2013, $113,990 in 2014, and $36,280 in 2015 (the year the divorce action was filed). Mark attributed this income fluctuation to declining grain prices. But he also testified that regardless of Wiedel Brothers' income in a particular year, he always draws $6,000 per month (or $72,000 per year) from the business.

Mark also testified that in late 2014 or early 2015, he inherited an additional 576 acres of farmland from his uncle. He estimated the inherited land had a value of about $1.5 million. Mark testified, over objection, that the total value of the real estate he was receiving under the PSA was approximately $2.5 million. There was no testimony regarding the value of any of the other assets or debts addressed in the PSA.

Mark testified that once the decree was entered, he planned to sell some of the farm property he was awarded and use the proceeds to (1) pay the $265,000 judgment to Jeanne, (2) pay off the debts he agreed to assume in the PSA, and (3) pay off the mortgage on the marital home he was to receive under the PSA. Mark estimated that selling some of the property would reduce his farm rental income by about $20,000 annually but would allow him to become basically "debt free."

Mark testified that as part of his farming operation, Wiedel Brothers sometimes prepays for chemicals, seed, or fuel in order to take a tax deduction. In 2015, Wiedel Brothers' tax returns showed it deducted $100,000 more in chemicals than in either of the prior 2 years. Mark also testified that the business stores grain, but no evidence was adduced regarding the estimated amount or value of such grain. Mark admitted that storing grain allows him to control when he receives income.

At trial, Mark offered his own joint custody child support calculation. His proposed worksheet listed Jeanne's total monthly income as $2,500 and his total monthly income as $6,786.56. In calculating his income, Mark used a 3-year average of his farm income that included a straight-line depreciation deduction. Using that approach, Mark estimated his income was $209,165 in 2013, $25,865 in 2014, and $9,286 in 2015, resulting in a 3-year average income of $81,438.67. Using that average income figure, Mark's joint custody worksheet showed he would owe monthly child support of $876. Mark asked the court to award him two child tax exemptions and award Jeanne one.

Mark estimated that his monthly expenses (including his temporary child support and alimony payments) totaled $7,111. On cross-examination, Mark admitted that his plan to sell farmland and pay off his debts would reduce his monthly expenses. Mark also admitted that an award of alimony would be appropriate, but asked that it be set at $500 per month for a period of 5 years.

2. Decree

The court entered a decree of dissolution that approved the parties' joint parenting plan, finding it was in the best interests of the children. The decree also approved the PSA, finding it was fair, reasonable, and not unconscionable, and the court incorporated the PSA into the decree.

Regarding child support, the court accepted Mark's income estimates, adopted his proposed child support calculation, and ordered him to pay monthly child support of $876. The decree also ordered Mark to pay 70 percent, and Jeanne to pay 30 percent, of the children's uninsured medical expenses and their expenses related to clothing, schooling, and extracurricular activities. Mark was ordered to pay Jeanne alimony of $2,500 per month for 10 years.

Mark moved for a new trial or, alternatively, to alter or amend the judgment, challenging only the alimony award.

The court overruled Mark's motion, and he timely appealed. We moved the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

II. ASSIGNMENT OF ERROR

Mark assigns the district court abused its discretion by awarding Jeanne alimony of $2,500 per month for 10 years.

III. STANDARD OF REVIEW

[1] In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.[2] This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.[3]

IV. ANALYSIS

[2] In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.[4] In addition, a court should consider the income and earning capacity of each party and the general equities of the situation.[5]

[3-5] The purpose of alimony is to provide for the continued maintenance or support of one party by the other when

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

[2] *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018).

[3] *Id.*

[4] *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015). See, also, Neb. Rev. Stat. § 42-365 (Reissue 2016).

[5] *Anderson v. Anderson, supra* note 4.

the relative economic circumstances make it appropriate.[6] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.[7] The ultimate criterion is one of reasonableness.[8] An appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record.[9]

In this appeal, Mark does not claim Jeanne failed to show a need for alimony, nor does he suggest this is an inappropriate case for alimony. Instead, he argues the amount of the alimony award was unreasonably high and the duration of the award unreasonably long. We find no merit in either argument.

1. Alimony Amount Is Not Unreasonable

In challenging the amount of the award, Mark relies heavily on the fact the trial court adopted his child support worksheet, which calculated his total monthly income at $6,786.56. Using that monthly income figure, Mark argues he will not be able to meet his regular monthly expenses after paying $2,500 in alimony, $876 in child support, and 70 percent of other child-related expenses. He argues the trial court abused its discretion in setting the alimony amount, and he suggests it will force him to live at or below the poverty line.

[6,7] A party's alimony obligation is to be set according to the income he or she has available after his or her child

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[6] *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004); § 42-365.

[7] *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004); *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

[8] *Id.*

[9] *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

support obligations, if any, have been accounted for.[10] And an alimony award which drives the obligor's net monthly income below the basic subsistence limitation set forth in the Nebraska Child Support Guidelines[11] is presumptively an abuse of discretion unless the court specifically finds that conformity with the basic subsistence limitation would work an "'unjust or inappropriate'" result in that case.[12]

Currently, the basic subsistence limitation under the Nebraska Child Support Guidelines is $1,012 net monthly income.[13] Mark contends that the combination of his child support obligations and his alimony obligation will reduce his net monthly income below this amount. Our de novo review of the record does not support this contention.

Using the income calculations from the child support worksheet adopted by the court, which no party challenges, Mark's total monthly income is $6,786.56; after taxes, his net monthly income is $5,056.56. After accounting for his monthly child support obligation of $876 and his monthly alimony payment of $2,500, Mark is left with net monthly income of $1,680.56, an amount above the basic subsistence limitation.[14]

[8] Mark points out that he was also ordered, under the decree, to pay 70 percent of the children's unreimbursed medical expenses, as well as expenses related to the children's clothing, schooling, and extracurricular activities. His point is well taken, but there was no evidence offered at trial regarding the estimated amount of such expenses, and in the absence of such evidence, Mark's share of these expenses is entirely speculative.[15] When determining whether the payment of certain

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[10] *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007).

[11] See Neb. Ct. R. § 4-218 (rev. 2018). Accord *Gress v. Gress, supra* note 10.

[12] See *Gress v. Gress, supra* note 10, 274 Neb. at 702, 743 N.W.2d at 81.

[13] See § 4-218.

[14] *Id.*

[15] See *Gress v. Gress, supra* note 10.

childcare expenses will reduce the obligor's net income below the basic subsistence limitation, a court is not to consider costs that are entirely speculative.[16] Consequently, the record does not support Mark's claim that the combination of his child support and alimony obligations will reduce his net monthly income below the basic subsistence limitation.

Moreover, other evidence in the record supports the reasonable conclusion that Mark has the financial ability to pay the child support, child-related expenses, and alimony ordered in the decree and still meet his other regular monthly expenses. We note the monthly amount of alimony ordered in the decree is the same amount Mark paid in temporary alimony throughout the pendency of the dissolution action. And there was no evidence at trial suggesting any sort of financial strain on his monthly budget as a result of his temporary support payments.

Additionally, under the PSA approved by the court, Mark received the marital home and income-producing farmland valued at approximately $2.5 million. Some of this farmland was inherited, but in weighing a request for alimony, the court may take into account all of the property owned by the parties when entering the decree, whether accumulated by their joint efforts or acquired by inheritance.[17] The fact that Mark has been awarded income-producing farmland valued in excess of $2 million is not irrelevant to the alimony determination.[18] Nor is it irrelevant that he plans to sell some of the farmland to become "debt free."

[9] Finally, we cannot overlook evidence that Mark's income as a self-employed farmer, and his earning potential, is significantly higher than Jeanne's. Alimony is not a tool to equalize the parties' income, but a disparity of income or potential

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[16] *Id.*

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

[18] See *Binder v. Binder*, 291 Neb. 255, 864 N.W.2d 689 (2015).

income might partially justify an alimony award.[19] Jeanne's monthly income was deemed to be $2,500, and there was no evidence suggesting her earning potential was higher.

Mark, on the other hand, is a self-employed farmer. According to the tax returns, Mark's share of the income from Wiedel Brothers varied from about $220,000 the year before the parties separated to about $36,000 the year the divorce was filed. But even in less profitable years, Mark always drew $72,000 annually from the business. Mark testified that Wiedel Brothers was storing grain at the time of trial, and he admitted that allows him to control when he receives income. He also admitted that his farming operation sometimes prepays for chemicals, seed, or fuel to take a tax deduction. And in the year the divorce action was filed, Wiedel Brothers' tax returns showed that the deduction for chemicals was about $100,000 higher than in prior years. We do not highlight this evidence to suggest that Mark has intentionally underreported or manipulated his income, but, rather, to point out that the district court had ample evidence from which to conclude that Mark's farming income, and his earning potential, was sufficient to support a monthly alimony award of $2,500.

2. Duration of Alimony Is Not Unreasonable

[10] Mark argues the district court abused its discretion in ordering alimony for a period of 10 years. Regarding the duration of an alimony award, we have recognized that the primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support.[20] Above all else, the duration of an alimony award must be reasonable.[21]

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[19] *Anderson v. Anderson, supra* note 4.

[20] *Id.*

[21] See *id.*

Mark and Jeanne were married for 14 years before they separated. They share joint custody of three minor children, all of whom still reside at home. Given the length of the parties' marriage, the ages of their minor children, and Jeanne's chronic medical condition and high medication costs, we cannot say the trial court abused its discretion in ordering alimony for a period of 10 years.

V. CONCLUSION

On this record, we find no abuse of discretion in either the amount or duration of the alimony award. We affirm the district court's decree.

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

State of Nebraska, appellee, v. Colton W. Sievers, appellant.

911 N.W.2d 607

Filed May 18, 2018. No. S-17-518.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.
3. **Constitutional Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Search and Seizure.** Temporary detention of individuals during the stop of a moving automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.
4. **Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.
5. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Special law enforcement concerns, such as a police roadblock, checkpoint, or other detention made for the gathering of information, will sometimes justify the stop of a vehicle without individualized suspicion.
6. **Search and Seizure: Arrests.** Reasonableness of seizures that are less intrusive than a traditional arrest involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the

seizure advances the public interest, and the severity of the interference with individual liberty.

7. **Constitutional Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** For purposes of determining the reasonableness, under the Fourth Amendment, of a vehicle stop made without reasonable suspicion, a central concern in balancing the public interest and the interference with individual liberty is to ensure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. 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, and Stacy, JJ., and Moore, Chief Judge, and Arterburn, Judge, and Doyle, District Judge.

Doyle, District Judge.

Colton W. Sievers appeals from his conviction for felony possession of a controlled substance. The issue presented is whether the stop of Sievers' vehicle for the purpose of gathering information about the presence of stolen firearms and other criminal activity at the residence he drove from, for which a search warrant was being sought, violated Sievers' constitutional right to be free from unreasonable searches and seizures. We determine that the stop of Sievers' vehicle was reasonable and affirm the decision of the district court.

BACKGROUND

In the early morning of February 22, 2016, the York County Sheriff's Department received a report of a burglary at a rural York, Nebraska, residence, where a large John Deere gun safe had been stolen. The safe contained a Ruger

9-mm semiautomatic pistol, several shotguns, jewelry, approximately $30,000 in cash, legal documents, and gold coins. Law enforcement officials immediately began an investigation. Two suspects were identified, and on February 24, the York County Sheriff's Department obtained arrest warrants and arrested the suspects the next day. Investigators interviewed the suspects, and one of them confessed to the burglary and agreed to cooperate with investigators.

The burglar informant told York County investigators he took the safe to a residence in Lincoln, Nebraska; cut it open; and traded gold coins and money for methamphetamine. The informant stated the safe and firearms would still be at the Lincoln residence.

The next day, on February 26, 2016, officers transported the informant to Lincoln, at which time, a York County sheriff's deputy, Paul Vrbka, met with Sgt. Duane Winkler, a supervisor with the Lincoln-Lancaster County Narcotics Task Force, to confirm the location of the building which contained the stolen property. Following the informant's directions, Vrbka, Winkler, and the informant drove down an alley in a residential Lincoln neighborhood. The investigators and the informant stopped, and the informant pointed out the residence, located next to the alley. The residence was a single-story garage-type outbuilding on the same property but located to the rear of the main house, and was described by the investigators as the "target address."

Vrbka and Winkler observed a black Volkswagen Beetle parked in an offstreet driveway next to the outbuilding. The informant stated the Volkswagen was owned by the resident of the target address, who was a "'big methamphetamine dealer.'" The informant stated that when he delivered the stolen safe to the target address, he had witnessed the resident use a digital measuring scale to sell his accomplice 2 ounces of methamphetamine for $3,000 in cash. He stated the resident had between 6 to 10 ounces of methamphetamine in the house at that time and that he had gone to her house to

purchase methamphetamine on a prior occasion. Investigators in the task force confirmed that the license plate attached to the Volkswagen was registered to the person residing at the target address. With the informant's assistance, investigators obtained a photograph of the suspected methamphetamine dealer, which matched the driver's license photograph of the registered owner of the Volkswagen.

Winkler then set up "pre-warrant investigation" surveillance units to monitor and observe activity at the residence. Winkler informed plainclothes and uniformed officers that stolen items had been transported to the residence, that drugs had been purchased there, and that more drugs may be present. Winkler advised the surveillance officers that they were to help prevent evidence from leaving the target address before the investigation was completed. The officers exercised a higher level of caution due to the possible presence of firearms.

Plainclothes narcotics officers were located near and in sight of the target address, including Eric Schilmoeller, a deputy sheriff for the Lancaster County Sheriff's office who was driving an unmarked van. Two Lincoln Police Department uniformed "gang officers," Max Hubka and Cole Jennings, were recruited to participate in the surveillance. The gang officers made contact with the plainclothes narcotics officers and discussed the investigation.

At approximately 5 p.m., on February 26, 2016, the gang officers, in full police uniform, parked their marked police cruiser out of view of the target residence two blocks away. The gang officers were positioned to be available to assist the plainclothes narcotics officers, including using the marked police cruiser with overhead emergency lights to stop a vehicle that left the area if so directed.

During this time, Vrbka and Winkler were in the process of preparing an affidavit for a search warrant for the residence and a camper-style vehicle located on the same property. Once surveillance units were in place, Vrbka and Winkler left

the scene in order to present the warrant to a judge. Winkler continued to monitor the radio and supervise the surveillance officers, who were communicating with each other and Winkler.

Schilmoeller drove the unmarked van through the alley behind the target residence and observed a "white work type pickup truck" parked next to the Volkswagen. The truck had an open bed with a ladder rack and a large, closed toolbox against the truck's cab. The vehicles were parked side-by-side in the back yard of the target residence. The investigators recorded the license plates for both vehicles.

At 5:20 p.m., Schilmoeller observed the truck begin to drive away from the outbuilding via the alley. The truck turned onto a residential street and turned left to drive north on 10th Street. Schilmoeller notified other members of the task force and asked Winkler how to proceed. Winkler advised the officers to make a traffic stop to prevent the truck from leaving with any stolen items. According to Winkler, who was no longer at the scene under surveillance, there was a need to "both stop the [truck] and search it for any items taken from the burglary in York County." While following the truck, the officers verified the truck had the same license plate as the truck that was parked next to the Volkswagen. The gang officers activated the cruiser's overhead emergency lights and stopped the truck. The stop occurred five blocks from the target address and was made without the observation of a traffic or other law violation.

Hubka observed the truck had only one occupant and saw the driver lean over and reach toward the center console area. Hubka considered the driver's actions to be "furtive movements," and consequently, he maintained a heightened security alert in case the driver was hiding something or reaching for a weapon. The officers testified they were "extra assertive" as they contacted the driver of the truck—in part because of the possible presence of a firearm. They ordered the driver, Sievers, to put his hands on the steering wheel and to not

move as they helped remove him from the vehicle. The gang officers searched the interior driver's side of the truck and did not locate any weapons, narcotics, paraphernalia, or any stolen items.

The narcotics officers, who were following the truck in their unmarked vehicle, arrived simultaneously. Schilmoeller took over contact with Sievers, walked him to the cruiser, and sat him in the back of the cruiser with the door open and began questioning him. Sievers claims the officers had their guns drawn at this time, but not pointed at him. Sievers claims he was handcuffed during the officer's questioning. None of the officers remember any guns being drawn, and only Schilmoeller remembered when Sievers was handcuffed, which he stated occurred after the questioning was completed.

Schilmoeller informed Sievers he was not under arrest, but was being detained due to a stolen property and narcotics investigation underway at the residence he had just driven from. Sievers admitted he had just been inside that residence and had just smoked marijuana before leaving, but "that was it." Schilmoeller attempted to obtain Sievers' consent to search the truck several times, but Sievers refused, stating that there were no illegal items inside the truck and that the truck belonged to his boss. Schilmoeller relayed to Winkler Sievers' admission that he had smoked marijuana at the target address and that Sievers had denied the request to search the truck.

As the truck was leaving, and at the same time he instructed the officers to stop the truck, Winkler also instructed another group of officers to "lock down" the residence to prevent anyone inside from destroying evidence. Winkler was concerned the person in the truck may have had an opportunity to contact a person inside the residence by cell phone. Those officers "knocked and announced and ordered any occupants to come to the door." After 30 seconds, they observed movements inside the residence which they believed indicated the destruction of evidence, at which point they forced entry and took the

resident into custody. At that time, the officers observed several items of drug paraphernalia in plain view.

The officers at the residence relayed the information to Winkler, who radioed Schilmoeller to inform him about the presence of drug paraphernalia in the residence. Winkler advised Schilmoeller to search the truck.

Schilmoeller searched all areas of the truck and located two small plastic bags containing 3.1 grams of methamphetamine inside of a soda pop can found near the center console. He then arrested Sievers, and he testified that he placed Sievers in handcuffs at that time. The search warrant was signed approximately 1½ hours later.

Sievers was charged by information with possession of a controlled substance, methamphetamine, a Class IV felony. He was arraigned and pleaded not guilty.

Sievers filed a motion to suppress evidence obtained from the stop. The court heard testimony from Hubka and Jennings, the gang officers who conducted the stop; Schilmoeller, the narcotics officer who questioned Sievers and conducted the search of the truck; Winkler, the supervisor who ordered the stop and search of the truck and the search of the target residence; and Sievers. Vrbka, the author of the warrant affidavit, did not testify.

The officers explained their knowledge of the situation at different points in the investigation, their process of relaying information to each other, and how they reacted based on their discovery of new information as the investigation progressed. None of the officers who testified, however, observed Sievers inside the residence, leave the residence, put anything into the truck, or enter the truck. The informant had not provided any information about Sievers or the truck.

Sievers asserted the officers had no way of knowing whether he had been in the residence prior to the stop. Schilmoeller disagreed, stating he had observed that the truck was unoccupied, he observed the truck leave, and when the truck was stopped, Sievers was driving the truck. But Schilmoeller admitted that

at the time of the stop, the only reason he had to believe that Sievers had been in the target address was the fact the truck was parked in the driveway, next to the Volkswagen, and that he had observed it drive away from the residence. Schilmoeller admitted he was not in a position to see if someone came from the residence and got into the truck.

The trial court overruled the motion to suppress, stating it found the officers' testimony to be credible. The court stated that "there was an ongoing investigation and the officers had reasonable cause to believe that a crime had been committed and had reasonable suspicion to justify the stop even though the information was not complete or precise."

The matter proceeded to a stipulated bench trial. Sievers renewed his motion, which the court overruled. The court found Sievers guilty and sentenced him to serve 90 days in the county jail, with 3 days' credit for time served and 1 year's postrelease supervision. Sievers appeals.

ASSIGNMENT OF ERROR

Sievers assigns the trial court erred in determining reasonable suspicion existed to justify his stop and detention.

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]

ANALYSIS

[2-4] The issue presented is whether the suspicionless stop of Sievers to gather information about stolen property and

[1] *State v. Baker*, 298 Neb. 216, 903 N.W.2d 469 (2017).

possible criminal activity at the residence he drove from, for which a search warrant was being sought, violated Sievers' Fourth Amendment rights. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.[2] Temporary detention of individuals during the stop of a moving automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.[3] Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.[4]

There is no dispute in this case that a seizure of Sievers occurred when he was stopped by police. We note that Sievers has challenged only the initial stop by police; neither the probable cause search of the truck nor Sievers' arrest are at issue in this appeal.

[5] Even a brief, limited governmental intrusion for the purpose of investigation must be justified at its inception by a showing of reasonable suspicion.[5] A seizure for the purpose of seeking information when police are investigating criminal activity that might pose a danger to the public, however, may be reasonable under the Fourth Amendment even in the absence of reasonable articulable suspicion of criminal conduct.[6] The U.S. Supreme Court has explained that "special law enforcement concerns," such as a police roadblock, checkpoint, or other detention made for the gathering of information, will

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[2] *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014).

[3] See, *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

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

[5] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[6] *State v. Woldt*, 293 Neb. 265, 876 N.W.2d 891 (2016). See, *U.S. v. Brewer*, 561 F.3d 676 (7th Cir. 2009); *Gipson v. State*, 268 S.W.3d 185 (Tex. App. 2008); *State v. Garrison*, 911 So. 2d 346 (La. App. 2005); *Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935 (1982).

sometimes justify a stop of a vehicle "without individualized suspicion."[7] "Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual."[8] In *Illinois v. Lidster*,[9] the U.S. Supreme Court scrutinized a highway checkpoint that was set up to solicit information from motorists regarding a fatal hit-and-run accident. The Court found that a suspicionless, "information-seeking" stop made pursuant to the checkpoint was constitutional.[10] The Court emphasized the "primary law enforcement purpose [behind the checkpoint] was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others."[11]

The facts of *Lidster* concerned a checkpoint set up 1 week after the accident, at the same time of night and in the same location. The checkpoint was "designed to obtain more information about the accident from the motoring public."[12] The Court distinguished an "information-seeking" stop, like the stop in *Lidster*, from the checkpoint program at issue in *Indianapolis v. Edmond*,[13] which involved a vehicle checkpoint established for the purpose of discovery and interdiction of drug crimes, an objective which the Court said served a "'general interest in crime control.'"[14] The Court found that

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[7] *Illinois v. Lidster*, 540 U.S. 419, 424, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004).

[8] *Id.*, 540 U.S. at 424-25.

[9] *Lidster, supra* note 7.

[10] *Id.*, 540 U.S. at 426.

[11] *Id.*, 540 U.S. at 423 (emphasis in original).

[12] *Id.*, 540 U.S. at 422.

[13] *Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).

[14] *Lidster, supra* note 7, 540 U.S. at 424.

the prohibition in *Edmond* on searches conducted pursuant to a "'general interest in crime control'" did "not refer to every 'law enforcement' objective" and stated that "special law enforcement concerns will sometimes justify highway stops without individualized suspicion."[15]

[6,7] Although a suspicionless information-seeking stop is not per se unreasonable, that does "not mean the stop is automatically, or even presumptively, constitutional. It simply means that [a court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances."[16] In determining whether the stop of Sievers was reasonable, we apply the three-part balancing test outlined in *Brown v. Texas*,[17] which recognizes that warrantless seizures without reasonable suspicion may be reasonable under certain circumstances.

> The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. . . .
>
> A central concern in balancing these competing considerations in a variety of settings has been to [en]sure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. . . . To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's

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[15] *Id.*, citing *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990).

[16] *Id.*, 540 U.S. at 426.

[17] *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

> legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.[18]

In *Lidster*, the U.S. Supreme Court applied the balancing test from *Brown* and found that the suspicionless checkpoint stop at issue was reasonable.[19] We have also addressed the constitutionality of checkpoint stops. In *State v. Crom*,[20] we cited *Brown* and found that a motorist has a reasonable expectation of privacy which is not subject to arbitrary invasions solely at the unfettered discretion of police officers in the field. We found the checkpoints at issue were unconstitutional, because they were not administered pursuant to an official plan and the officers were therefore free to subject motorists to arbitrary invasion at their unfettered discretion.[21]

More recently, in *State v. Piper*,[22] we applied *Brown* and cited *Lidster* in determining that the stop of a vehicle at a highway checkpoint conducted by the Nebraska State Patrol was reasonable. We noted that in *Michigan Dept. of State Police v. Sitz*,[23] the U.S. Supreme Court approved the use of sobriety checkpoints intended to prevent drunk driving. We considered the purpose of the checkpoint, the degree of intrusion, and the discretion of the officers. We found the stop was reasonable, because the checkpoint was intended to target alcohol violations, the degree of intrusion was minimal, and the checkpoint was authorized by an approved plan and conducted in a manner that complied with the plan and did not allow

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[18] *Id.*, 443 U.S. at 50-51 (citations omitted).

[19] *Lidster, supra* note 7.

[20] *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986).

[21] *Id.*

[22] *Piper, supra* note 2.

[23] *Sitz, supra* note 15.

the officers to exercise unfettered discretion in administering the checkpoint.[24]

We addressed the constitutionality of an information-gathering stop of a vehicle that did not involve a checkpoint or roadblock in *State v. Woldt*.[25] In that case, an officer was investigating a report of knocked-over traffic cones when, while picking up the cones, he heard squealing tires, and he then stopped a vehicle he thought might be involved. After the first vehicle pulled over and stopped near the police cruiser, a second vehicle that the officer had seen driving within a car length or less of the first vehicle parked across the street from the police cruiser. The officer approached the first vehicle and smelled the odor of alcohol and observed signs that the driver might have been impaired. The second vehicle reversed as if to drive away, but stopped when the officer signaled the driver to do so.

The officer wanted to speak with the second driver about the first driver's activities. The officer then observed the second driver was impaired, and the second driver was then arrested, charged, and convicted of driving under the influence. In applying the test from *Brown*, we determined the stop was reasonable because of the following: The circumstances presented a grave public concern; driving under the influence, which can rise to the level of a Class II felony, presents a threat to other citizens on the road; the stop advanced the public interest, because it was reasonable to conclude the second driver would have relevant information and the stop would have allowed the officer to obtain the driver's contact information and a witness statement; and the interference with the driver's liberty was slight, because he had already stopped.[26]

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[24] *Piper, supra* note 2.

[25] *Woldt, supra* note 6.

[26] *Id.*

Since *Lidster*, courts have applied the special law enforcement concerns rationale to non-checkpoint stops and found such stops reasonable.[27] In *U.S. v. Brewer*,[28] the Seventh Circuit applied *Lidster* and upheld a stop of a vehicle based upon a report of gunfire when it was the only vehicle seen driving from an apartment complex renowned for criminal activity. The court found that even though there was no evidence the driver had committed any law violations, the stopping officer was "not acting randomly in deciding that the only car emerging from the apartment complex moments after he heard shots from within it should be intercepted."[29]

The court further observed, "It was a natural surmise that whoever fired the shots had left the complex, and the street that the defendant's vehicle was driving on was . . . the only street leading from it, and he was driving away from rather than towards it . . . and, sure enough, there was no other traffic."[30]

The court balanced the dangerousness of the crime against the intrusion on the occupants of the vehicle and explained the vehicle stopped

> was the only vehicle on the road at that late hour in this high crime area, and it was pulled over and stopped for only moments before the officers making the stop learned that the SUV had been seen at the site of the shooting and that the occupants may have been involved in the shooting.[31]

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[27] See, e.g., *Brewer, supra* note 6; *Gipson, supra* note 6; *State v. Mitchell*, 145 Wash. App. 1, 186 P.3d 1071 (2008); *State v. Watkins*, 207 Ariz. 562, 88 P.3d 1174 (Ariz. App. 2004). See, also, *State v. Pierce*, 173 Vt. 151, 787 A.2d 1284 (2001) (applying *Brown* factors pre-*Lidster*); *In re Muhammad F.*, 94 N.Y.2d 136, 722 N.E.2d 45, 700 N.Y.S.2d 77 (1999) (same).

[28] *Brewer, supra* note 6.

[29] *Id*. at 679.

[30] *Id*. at 678.

[31] *Id*. at 679.

This case presents a seizure that is less intrusive than a traditional arrest. Thus, the application of the *Brown* balancing test is appropriate.

Gravity of Public Concern

Under the first prong of the test from *Brown*, a court should consider the gravity of the public concern served by the seizure. The public concern presented by the facts of this case is the officers' investigation of the York County burglary, as well as their investigation of a distributor of large quantities of methamphetamine.

The criminal investigation produced evidence that stolen property was inside the target residence, including firearms, jewelry, approximately $30,000 in cash, and gold coins. The resident's receipt of stolen property constitutes theft.[32] The value of the stolen items in this case exceeded $5,000, which constitutes a Class IIA felony.[33] In addition, there is the apparent concern that a semiautomatic pistol and shotguns were stolen and unaccounted for. In the context of the investigation, these weapons could have been used in connection with narcotics transactions, which presents safety risks to police officers and the public. Further, the knowing receipt, retention, or possession of a stolen firearm is a Class IIA felony.[34]

In the officers' testimony, they articulated specific facts which led them to believe that methamphetamine was being sold from the residence. The officers learned from the informant, whose reliability has not been called into question,[35] and whose information was only 5 days old at the time, that between 6 and 10 ounces of methamphetamine were at the residence. The possession with the intent

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[32] See Neb. Rev. Stat. § 28-510 (Reissue 2016).

[33] See Neb. Rev. Stat. § 28-518(1) (Reissue 2016).

[34] See Neb. Rev. Stat. § 28-1212.03 (Reissue 2016).

[35] See *State v. Bray*, 297 Neb. 916, 902 N.W.2d 98 (2017).

to distribute this amount of methamphetamine constitutes a Class IB felony.[36]

The fact that the truck was stopped so that police could ask the motorist for information about a recent burglary and the presence of stolen property and narcotics weighs against the conclusion that the stop was constitutionally unreasonable.[37]

We conclude that the circumstances here involved ongoing criminal activity which presented a grave public concern.

Degree to Which Seizure Advances Public Interest

As to the second factor of the *Brown* test, a court should consider the degree to which the seizure advances the public interest. Courts have recognized that motorist stops may significantly advance the investigation of serious crimes in cases where motorists are stopped soon after the crime and in the vicinity where the crime occurred.[38] The investigative value of such a stop is significant, because the stopped motorists "might well have been in the vicinity of the crime at the time it occurred."[39]

At the time, the officers were preparing to execute a search warrant on the target residence. Vrbka and Winkler first identified the location of the house with assistance from the informant, who stated that the resident of the house was the owner of the Volkswagen parked at the residence and that he had witnessed the resident sell $3,000 worth of methamphetamine 5 days prior. He said that the resident had more to sell and that officers could also find the gun safe in the living room hidden under a blanket.

When the task force first identified the residence, the truck was not present. A short time later, when Schilmoeller arrived

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[36] See Neb. Rev. Stat. § 28-416(1) and (10)(a) (Supp. 2015).

[37] See *State v. Gorneault*, 918 A.2d 1207 (Me. 2007).

[38] *State v. LaPlante*, 26 A.3d 337 (Me. 2011).

[39] *Lidster, supra* note 7, 540 U.S. at 427.

on scene, he observed the unoccupied truck parked next to the Volkswagen. Thereafter, the target address was under police surveillance without interruption for 20 to 30 minutes until Schilmoeller saw the truck leave. Given the highly specific location of the truck, parked next to a small building suspected of containing narcotics and stolen firearms, and parked next to the suspect's vehicle on an offstreet driveway, the officers were reasonable to infer that Sievers had just been inside the residence and had made contact with the resident and that therefore, he could have information pertinent to the investigation.

The officers' testimony made clear they were faced with a dynamic situation in which drugs or firearms could soon be moved before the imminent acquisition and execution of a search warrant. Shortly before the stop, Winkler set up surveillance units in order to prevent the movement of stolen property. The stop was made pursuant to the specific information-seeking purpose of determining whether the lone vehicle observed leaving the residence contained property sought in the investigation.

Both the stop and ensuing investigation were diligently carried out. The reasonableness of the stop is supported by the presence of stolen firearms and other property; the use of the stolen property to purchase methamphetamine; the large store of methamphetamine at the target address, which to the officers' knowledge had not yet been moved or destroyed; and the short period in which the felonies were occurring. Society's legitimate interests required the seizure based on special law enforcement concerns of specific, known, ongoing crimes, as opposed to a general interest in crime control.

This conclusion is further supported by the U.S. Supreme Court's decision in *Illinois v. McArthur*,[40] which found lawful a temporary detention made near a house suspected of criminal

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[40] *Illinois v. McArthur*, 531 U.S. 326, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001).

activity while officers were seeking a search warrant for the house. The Court found the temporary detention was tailored to the need of ensuring against the destruction of evidence in the house and was properly limited in time and scope. The Court said that the warrantless seizure was not per se unreasonable, because it involved a specially pressing or urgent law enforcement need, and that because the law enforcement concerns outweighed the individual privacy concerns, the stop was lawful.[41] The Court explained it had "upheld temporary restraints where needed to preserve evidence until police could obtain a warrant" and noted it had found no case in which it had "held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time."[42]

Here, the information-seeking stop of Sievers was limited in time and scope based on the task force's "pre-warrant investigation" of the residence and tailored to the need to ensure against the loss of stolen properly while police obtained a search warrant for the residence.

Based on the circumstances here, we conclude the stop advanced the public interest.

Severity of Interference With Individual Liberty

As to the last factor, we recognize the stop of Sievers restrained his liberty. Hubka activated his police cruiser's emergency lights to pull over Sievers while Sievers was operating his truck. Sievers' stop was more likely to cause alarm or anxiety than a roadblock, because upcoming roadblocks are clearly visible and Sievers did not have advanced notice that he would be stopped.[43] We reiterate, however, this fact

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[41] *Id.*

[42] *Id.*, 531 U.S. at 334.

[43] See *LaPlante, supra* note 38.

does not render the stop per se unreasonable. "The Fourth Amendment does not treat a motorist's car as his castle."[44] In *Lidster*, the Court found the stop of a vehicle along a public road was no greater of an intrusion than an officer who approaches a person on the street to question the individual. The Court said the stop

> [a]nd the resulting voluntary questioning of a motorist is as likely to prove important for police investigation as is the questioning of a pedestrian. Given these considerations, it would seem anomalous were the law (1) ordinarily to allow police freely to seek the voluntary cooperation of pedestrians but (2) ordinarily to forbid police to seek similar voluntary cooperation from motorists.[45]

The balance under *Brown v. Texas* is between the public interest and an individual's right to personal security free from "'arbitrary interference by law officers.'"[46] The test is grounded in the reasonableness of the official conduct and the presence of limitations on official discretion. In this case, it is undisputed that the officers had established probable cause that felonies were occurring at the residence. Such determination was based on specific, objective facts provided by the informant and police surveillance, "indicating that society's legitimate interests require[d] the seizure of the particular individual."[47]

The "mission" of the stop was limited in scope. The stop was focused on gathering information about the presence of drugs and specific stolen property, and as the stop of the truck ensued, it almost immediately yielded further evidence of criminal conduct. Hubka testified that as he approached the truck, he observed Sievers' making furtive movements consistent with hiding evidence or reaching for a

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[44] *Lidster, supra* note 7, 540 U.S. at 424.

[45] *Id.*, 540 U.S. at 426.

[46] *Brown, supra* note 17, 443 U.S. at 50.

[47] See *id.*, 443 U.S. at 51.

weapon. Deliberately furtive actions are a strong indication of mens rea.[48]

As noted, the sole issue presented is the reasonableness of the initial stop. The fact that the officers were "extra assertive" when they contacted Sievers is not probative of the reasonableness of the initial stop, because the stop of the vehicle disclosed other reasons to escalate the detention of Sievers.[49]

There is no indication the officers did anything other than pursue a plan tailored to seeking information of ongoing crimes at the residence to be searched. The stop was a direct effort to temporarily maintain the status quo so that evidence of stolen property and narcotics at the target address could be preserved while officers concluded the final steps to obtain and execute a search warrant.

BALANCING *BROWN* FACTORS

In balancing the *Brown* factors, on our de novo review, we find that Sievers was lawfully stopped. Officers sought to temporarily stop and question the driver of the truck for the purpose of investigating specific and known felonies, as well as the presence of narcotics and firearms. The grave public concern at issue heavily weighs in favor of the reasonableness of the stop.

The stop of Sievers to see if he had any information about the target residence or stolen property advanced the task force's investigation. Police knew Sievers' truck had just arrived at the target address and was parked in the driveway to the outbuilding, behind a primary residence, next to a vehicle owned by a suspected dealer of methamphetamine. After surveilling the scene without interruption for 20 to 30 minutes, the officers saw the truck moving from the residence. The

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[48] See *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968).

[49] See *U.S. v. Casares-Cardenas*, 14 F.3d 1283 (8th Cir. 1994).

officers were reasonable to conclude the driver of the truck had information to provide.

Finally, although the stop was an intrusion upon Sievers' liberty, the initial stop was not unnecessarily prolonged and the interference is not enough to counterbalance the officers' need to resolve grave and immediate threats to the public.

The critical mass of special law enforcement concerns presented in this case justifies the application of a rare exception to the rule against suspicionless searches and seizures. We do so only after ensuring that the officers' conduct was narrow in scope and that Sievers' privacy interests were not subject to arbitrary invasions at the unfettered discretion of officers in the field.

Although our reasoning differs from that of the district court, when all the factors are weighed, we conclude that the stop was reasonable under *Brown*.[50]

CONCLUSION

Based on the foregoing reasons, we conclude the stop of Sievers was lawful. The judgment of the district court is affirmed.

Affirmed.

Wright and Funke, JJ., not participating.

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[50] *Brown, supra* note 17.

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

Aimee Freeman, appellant, v. Hoffman-La Roche, Inc., and Roche Laboratories, Inc., appellees.

911 N.W.2d 591

Filed May 18, 2018. No. S-17-800.

1. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews de novo whether the trial court applied the correct legal standards for admitting an expert's testimony.
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. **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. **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.
5. **Trial: Expert Witnesses.** Under the framework established by *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), if an expert's opinion involves scientific or specialized knowledge, a trial court must determine whether the reasoning or methodology underlying the testimony is valid (reliable). It must also determine whether that reasoning or methodology can be properly applied to the facts in issue.
6. ____: ____. A trial court can consider several nonexclusive factors in determining the reliability of an expert's opinion: (1) whether a theory

or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community.

7. **Expert Witnesses.** Absent evidence that an expert's testimony grows out of the expert's own prelitigation research or that an expert's research has been subjected to peer review, experts must show that they reached their opinions by following an accepted method or procedure as it is practiced by others in their field.
8. **Courts: Expert Witnesses.** The objective of the trial court's gatekeeping responsibility is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.
9. **Evidence: Proof.** Failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

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

Jeffrey A. Silver, and Walter G. Campbell, Jr., and Noreek Davitian, of Krupnick, Campbell, Malone, Buser, Slama, Hancock & Liberman, P.A., and Michael D. Hook, of Hook, Bolton, Mitchell, Kirkland & McGhee, P.A., for appellant.

Jill Vinjamuri Gettman, of Gettman & Mills, L.L.P., Michael X. Imbroscio and Paul W. Schmidt, of Covington & Burling, L.L.P., and Colleen M. Hennessey, of Peabody & Arnold, L.L.P., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Riedmann, Judge, and Martinez, District Judge.

Cassel, J.

I. INTRODUCTION

In this product liability action, the district court excluded the claimant's expert's testimony regarding causation. Summary judgment for the manufacturer and distributor followed. On

appeal, the claimant asserts that the exclusion exceeded the court's "gatekeeping" function. Because the record supports the court's conclusion that the expert's methodology was unreliable and conclusion-driven, we find no abuse of discretion in the exclusion and affirm the judgment.

II. BACKGROUND

Aimee Freeman brought a product liability action against Hoffman-La Roche, Inc., and Roche Laboratories, Inc. (collectively Roche), alleging that she developed a chronic medical condition and other side effects as a result of ingesting Accutane. Accutane, also known as isotretinoin, is a pharmaceutical drug manufactured and distributed by Roche for the treatment of chronic acne.

Freeman initially alleged that she suffered from ulcerative colitis—a type of inflammatory bowel disease (IBD)—which is a chronic condition characterized by ulceration of the colon and rectum. However, the expert witnesses generally agreed that Freeman had actually developed Crohn's disease—another type of IBD—which causes chronic inflammation and ulcers in any part of the gastrointestinal tract and tends to extend beyond and penetrate all layers of the gastrointestinal tract wall. Both ulcerative colitis and Crohn's disease share many of the same symptoms. But, as Freeman acknowledges, "there are differences in the clinical presentation of the disease[s] and the triggers statistically associated for developing [them]."[1]

As a material element for her product liability claims, Freeman was required to prove her injury was proximately caused by Roche's actions or inactions in manufacturing and distributing isotretinoin.[2] In other words, she had to show that ingesting isotretinoin could cause the development of Crohn's

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[1] Brief for appellant at 6.

[2] See, *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000); *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

disease and that her ingestion of isotretinoin did in fact cause her to develop the disease.[3] In order to meet this burden of proof, Freeman intended to call Dr. David B. Sachar as an expert witness to render opinions on the general and specific causation of her Crohn's disease.

Before trial, Roche filed a motion in limine seeking to preclude Sachar's testimony and challenged his opinions under the *Daubert*/*Schafersman* framework.[4] They did not suggest that Sachar was unqualified to testify as an expert; rather, they alleged that his opinions on causation were not based upon a properly applied and reliable methodology.

After conducting a *Daubert*/*Schafersman* hearing, the district court entered a 42-page order precluding Sachar from testifying. In its order, the court summarized the admitted evidence as well as the conclusions derived from the evidence. It also highlighted the key testimony of each of the experts concerning the evidence presented. In reviewing Sachar's analysis of and reliance on the different types of evidence, the court found Sachar's methodology was unreliable due to his inconsistent approach criticizing studies adverse to his theory. It further found that his "unabashedly cherry-pick[ing] supporting studies from an overwhelming contrary body of literature indicated, in no uncertain terms, his methodology was conclusion-driven." Additional facts and findings from the hearing and order are set forth in our analysis below.

After the court sustained the motion in limine, Roche filed a motion for summary judgment. The district court found that with the exclusion of Sachar's testimony, Freeman had no admissible expert evidence to establish a causal association between Accutane and IBD. Because Freeman could not

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[3] See *King v. Burlington Northern Santa Fe Ry. Co., supra* note 2.

[4] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

raise a genuine dispute of material fact on causation without expert testimony, the court granted the motion for summary judgment.

Freeman timely appealed.

III. ASSIGNMENTS OF ERROR

Freeman assigns, restated and combined, that the district court erred in (1) concluding that her expert witness' opinions were not based upon valid reasoning or methodology; (2) precluding the testimony of her expert witness; and (3) granting summary judgment in favor of Roche on the issue of general causation when her expert witness' testimony, if allowed into evidence, would create an issue of fact on that issue.

IV. STANDARD OF REVIEW

[1-3] An appellate court reviews de novo whether the trial court applied the correct legal standards for admitting an expert's testimony.[5] When the trial court has not abdicated its *Schafersman*[6] gatekeeping function, an appellate court reviews the trial court's decision to limit or exclude the evidence for an abuse of discretion.[7] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[8]

[4] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[9]

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[5] *King v. Burlington Northern Santa Fe Ry. Co., supra* note 2.

[6] *Schafersman v. Agland Coop, supra* note 4.

[7] *Hemsley v. Langdon*, 299 Neb. 464, 909 N.W.2d 59 (2018).

[8] *Putnam v. Scherbring*, 297 Neb. 868, 902 N.W.2d 140 (2017).

[9] *Edwards v. Hy-Vee*, 294 Neb. 237, 883 N.W.2d 40 (2016).

V. ANALYSIS

1. Exclusion of Expert Testimony

Freeman argues that the district court deviated from its proper gatekeeping function and improperly determined the weight and credibility of Sachar's testimony. She does not contend that the court abdicated its role,[10] but, rather, that it required too much.[11] She suggests that Sachar's opinions were based on good grounds and should have been admitted to be evaluated by a jury. We disagree.

[5] Under our *Daubert*/*Schafersman* framework, if an expert's opinion involves scientific or specialized knowledge, a trial court must determine whether the reasoning or methodology underlying the testimony is valid (reliable).[12] It must also determine whether that reasoning or methodology can be properly applied to the facts in issue.[13]

[6] A trial court can consider several nonexclusive factors in determining the reliability of an expert's opinion: (1) whether a theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community.[14] But, as we have previously stated, different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.[15]

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[10] See *Hemsley v. Langdon, supra* note 7.

[11] See *King v. Burlington Northern Santa Fe Ry. Co., supra* note 2.

[12] *State v. Braesch*, 292 Neb. 930, 874 N.W.2d 874 (2016).

[13] *Id.*

[14] *Id.*

[15] See *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006).

(a) Accepted Methodology

[7] Absent evidence that an expert's testimony grows out of the expert's own prelitigation research or that an expert's research has been subjected to peer review, experts must show that they reached their opinions by following an accepted method or procedure as it is practiced by others in their field.[16]

In this case, Sachar acknowledged that he had not written or published his opinions concerning isotretinoin use and Crohn's disease—limited to the colon or as a whole—despite writing over 220 published papers on IBD and approximately 60 books or book chapters on gastroenterology. He reached his opinion by employing what we have characterized as a "weight-of-the-evidence methodology,"[17] by reviewing data from different scientific fields, including animal tests, case reports, and epidemiological studies.

We have already determined that the weight-of-the-evidence methodology is a generally accepted method of determining causation.[18] Therefore, the focus shifted to whether the method was reliably applied. We limit our discussion to the factors that help to inform this analysis.

(b) Consistent Standards

Sachar opined that isotretinoin use was "a risk factor for the onset, development, triggering, [and] exacerbation of ulcerative colitis." And although he recognized that no study specifically determined that the same could be said for Crohn's disease, he theorized that isotretinoin would also be a risk factor for Crohn's disease of the colon, which he suggested was the appropriate diagnosis for Freeman's condition.

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[16] *State v. Braesch, supra* note 12.

[17] See *King v. Burlington Northern Santa Fe Ry. Co., supra* note 2, 277 Neb. at 221, 762 N.W.2d at 39.

[18] See *id.*

In reaching this conclusion, Sachar discredited all but one of the epidemiological studies finding no significant relation between isotretinoin use and IBD, because they did not distinguish between IBD as a whole and ulcerative colitis and Crohn's disease. Similarly, he found those studies that reported no association between isotretinoin use and Crohn's disease "wastes everybody's time," because they did not separately consider the different manifestations of Crohn's disease. However, Sachar acknowledged that the scientific community has yet to agree that a distinction between the different manifestations of Crohn's disease is necessary when studying Crohn's disease as a whole. And although he admitted that Crohn's disease has a different clinical presentation and different causes than ulcerative colitis, Sachar relied on the one epidemiological study concerning ulcerative colitis as "the closest surrogate we have to Crohn's disease of the colon."

Based upon this reasoning, Sachar disregarded what the other two expert witnesses found to be the most probative evidence. And one of those experts testified that Sachar's reasons were not supported by the scientific community. Significantly, Sachar did not require the same narrow focus on Crohn's disease of the colon in data from other scientific sources. In fact, in reviewing case reports, Sachar relied upon case reports of Crohn's disease and did not limit his examination to only those cases where disease of the colon was specifically reported. This suggests that Sachar was unduly critical of the majority of the studies which were adverse to his theory. And as the district court noted, it indicates that his methodology was conclusion-driven.

[8] While other factors may also suggest that Sachar's methodology was unreliably applied, we need not address them. The objective of the trial court's gatekeeping responsibility is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the

courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.[19] Clearly, cherrypicking studies from an overwhelmingly contrary body of literature without valid, supporting reasons for why the other studies were disregarded does not meet the standard of intellectual rigor required of expert witnesses. Accordingly, we cannot find that the district court abused its discretion in excluding Sachar's testimony.

2. Summary Judgment

[9] Two principles of law control our review of the summary judgment that followed. For one of them, we recall the well-known standard applicable to summary judgments, which we already have stated above. The other is a corollary of the first: Failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.[20]

Freeman was required to establish causation to prevail at trial. Without Sachar's expert testimony, she could not meet this burden of proof. At oral argument, Freeman's counsel seemed to suggest otherwise. Specifically, counsel stated, "Roche, in their internal documents, admits there's an association—a causal association. The document I'm referring to is signed off by their Global Head of Safety. . . . Their very label on this drug says Accutane is associated with inflammatory bowel disease." To the extent that these documents are included in our record, we find no admission of a causal association. In fact, the cited document mentioned only an association, not a causal association. Similarly, the label states merely that "Accutane has been temporally associated with inflammatory bowel disease." And an association does not necessarily equate to causation.

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[19] See *Schafersman v. Agland Coop, supra* note 4.

[20] *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015).

Because there was no genuine issue of fact as to the element of causation, Roche was entitled to judgment as a matter of law.

VI. CONCLUSION

The district court did not abuse its discretion in excluding the expert testimony after finding that the expert's methodology was unreliable and conclusion-driven. With the exclusion of this expert testimony, there remained no issue of material fact. Consequently, the district court did not err in granting summary judgment in favor of Roche. We affirm.

Affirmed.

Nebraska Supreme Court
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State of Nebraska, appellee, v. Darwin E. Brown, appellant.

912 N.W.2d 241

Filed May 25, 2018. Nos. S-17-442 through S-17-444.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is 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. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
3. ____: ____. An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
4. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
5. ____. 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.

Appeals from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, Bradley A. Sipp, and, on brief, Jennifer M. Houlden for appellant.

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

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Harder and Noakes, District Judges.

Miller-Lerman, J.

NATURE OF CASE

Cases Nos. S-17-442 through S-17-444 have been consolidated before us on appeal. In each of these three appeals, Darwin E. Brown appeals his conviction and sentence in the district court for Lancaster County for driving under the influence. With regard to each conviction, Brown was found to have had two prior convictions as defined by Neb. Rev. Stat. § 60-6,197.02(1)(a) (Cum. Supp. 2016). Brown claims, inter alia, that a prior conviction in Missouri should not have been used for purposes of enhancing his sentences for these convictions. Because we conclude that the Missouri conviction was valid for use as a prior conviction in each of these cases, we affirm Brown's convictions and sentences.

STATEMENT OF FACTS

In each of these three cases, the State filed an information against Brown in the district court for Lancaster County alleging that he committed the crime of driving under the influence (hereinafter DUI) in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010). The dates of the charged offenses were July 19, 2015, and January 16 and May 6, 2016. The State also alleged in each information that at the time of the offense, Brown had a breath alcohol concentration of .15 grams or above of alcohol per 210 liters of breath. The State further alleged in each information that at the time of the offense, Brown had two prior convictions as defined by § 60-6,197.02: one for an offense that occurred on December 1, 2013, in Nebraska and one for an offense that occurred on December 17, 2003, in Missouri.

Pursuant to a plea agreement, Brown pled guilty to the three DUI charges and, in exchange, the State refrained from filing additional charges and from charging a separate DUI offense, which was pending in the county court, as a third offense

rather than as a second offense. At the plea hearing, the State gave a factual basis as to each charge, which factual basis was generally that on the alleged date, Brown was subjected to a traffic stop by a law enforcement officer, that the officer saw signs of impairment and conducted preliminary tests, and that a breath test performed after Brown was transported to jail showed that he had an alcohol concentration in excess of .15. The court accepted Brown's pleas and found him guilty of the charged offenses.

At an enhancement hearing, the district court received evidence of the two alleged prior offenses. At the hearing, the court found that the Nebraska conviction was a valid prior conviction for purposes of enhancement. The court reserved ruling on the Missouri conviction; but at the sentencing hearing, the court found that the Missouri conviction was a valid prior conviction for purposes of enhancement. The court concluded that as to each of the current offenses, Brown had two prior DUI convictions, including the Missouri conviction, and that he had a breath alcohol concentration in excess of .15. Therefore, under Neb. Rev. Stat. § 60-6,197.03(6) (Supp. 2013 & Cum. Supp. 2014), each offense was a Class IIIA felony.

The court sentenced Brown to consecutive terms of imprisonment for 3 to 5 years for the conviction of the July 2015 incident, for 3 to 3 years for the conviction of the January 2016 incident, and for 3 to 3 years for the conviction of the May 2016 incident. Because the July 2015 incident occurred before the August 30, 2015, effective date of statutory changes made by 2015 Neb. Laws, L.B. 605, a higher maximum penalty of 5 years' imprisonment applied to that conviction. However, the two other convictions for the offenses which occurred after August 30, 2015, were subject to a maximum penalty of 3 years' imprisonment because of changes made by L.B. 605. Further, Brown's sentences for the convictions of the January and May 2016 offenses were not subject to postrelease supervision, because the court imposed the sentences in those cases consecutively to the sentence for the July 2015 offense. In *State v. Chacon*, 296 Neb. 203, 894 N.W.2d

238 (2017), we cited Neb. Rev. Stat. § 29-2204.02(4) (Reissue 2016), which provides:

> For any sentence of imprisonment for a Class III, IIIA, or IV felony for an offense committed on or after August 30, 2015, imposed consecutively or concurrently with (a) a sentence for a Class III, IIIA, or IV felony for an offense committed prior to August 30, 2015, or (b) a sentence of imprisonment for a Class I, IA, IB, IC, ID, II, or IIA felony, the court shall impose an indeterminate sentence within the applicable range in section 28-105 that does not include a period of post-release supervision, in accordance with the process set forth in section 29-2204.

Section 29-2204.02(4) became effective April 20, 2016, and we held in *Chacon* that § 29-2204.02(4) applied to a sentence that was not final on the effective date of the statute. Section 29-2204.02(4) applied to the sentencing in these cases, which sentencing occurred on April 4, 2017. In addition to the sentences of imprisonment in each of these cases, the court ordered that Brown's driver's license be revoked for 15 years.

Brown appeals his three convictions and sentences. We consolidated the three appeals.

ASSIGNMENTS OF ERROR

In each of these appeals, Brown claims that the district court erred when it used the Missouri conviction as a prior conviction to enhance his sentences for the present DUI convictions. He also claims the court imposed excessive sentences.

STANDARDS OF REVIEW

[1] The meaning of a statute is 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. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

[2,3] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017).

An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id*.

ANALYSIS

Use of Missouri Conviction as a Prior Conviction Was Not In Error.

Brown first claims that the district court erred when it used the Missouri conviction as a prior conviction to enhance his sentences for the present DUI convictions. We conclude that the use of the Missouri conviction as a prior conviction was not in error.

Section 60-6,197.03 sets forth penalties for DUI convictions under § 60-6,196. The promulgated penalties include enhanced sentences for offenders who have had prior convictions. In these cases, Brown's convictions were sentenced as Class IIIA felonies pursuant to § 60-6,197.03(6) which applies when the defendant "has had two prior convictions and, as part of the current violation, had a [blood or breath alcohol] concentration" in excess of .15. Section 60-6,197.02(1)(a)(i)(C) provides that for purposes of sentencing for a violation of § 60-6,196, a prior conviction includes, inter alia, "[a]ny conviction under a law of another state if, at the time of the conviction under the law of such other state, the offense for which the person was convicted would have been a violation of . . ." § 60-6,196 or one of the other enumerated Nebraska DUI-related statutes.

Brown argues that his Missouri conviction for driving while intoxicated (DWI) in 2003 would not necessarily have been a DUI in Nebraska, because the Missouri statute under which he was convicted provided a lower threshold for intoxication than under Nebraska law. Brown relies in part on our decision in *State v. Mitchell*, 285 Neb. 88, 95, 825 N.W.2d 429, 434 (2013), in which we held that a Colorado conviction for "driving while ability impaired" (DWAI) was not a prior DUI conviction for enhancement purposes, because the

threshold for proving a DWAI in Colorado was the "slightest degree" of impairment and was lower than the threshold for proving DUI in Nebraska.

The evidence presented by the State in these cases indicated that Brown's 2003 conviction in Missouri was for "Dwi - Alcohol" pursuant to Mo. Rev. Stat. § 577.010 (West 2003), which provided that "[a] person commits the crime of '**driving while intoxicated**' if he operates a motor vehicle while in an intoxicated or drugged condition." Another Missouri statute, Mo. Rev. Stat. § 577.001(2) (West 2003), defined "'**intoxicated condition**'" as being "under the influence of alcohol, a controlled substance, or drug, or any combination thereof."

At the time of Brown's Missouri conviction, § 60-6,196(1) (Supp. 2003) provided that it was "unlawful for any person to operate or be in the actual physical control of any motor vehicle . . . [w]hile under the influence of alcoholic liquor or of any drug." Comparing the language of the relevant statutes in Missouri and Nebraska, we determine that a conviction for the offense of DWI under the Missouri statutes would have established a DUI violation under § 60-6,196.

A conviction under the Missouri statutes required that one "operates a motor vehicle while in an intoxicated or drugged condition," see § 577.010, and defined "intoxicated condition" as being "under the influence of alcohol, a controlled substance, or drug, or any combination thereof," see § 577.001(2). Reading the two statutes together, a conviction for DWI in Missouri required proof that one "operate[d] a motor vehicle while . . . under the influence of alcohol, a controlled substance, or . . . any combination thereof." This statutory language setting forth the offense of DWI in Missouri was substantially the same as the language of § 60-6,196(1), which defined proof of DUI to include that one "operate[d] . . . any motor vehicle . . . [w]hile under the influence of alcoholic liquor or of any drug." Both the Missouri and the Nebraska statutory schemes effectively required that one

operate a motor vehicle while "under the influence" of alcohol or a drug. Although the Missouri statute referred to the offense as "DWI" rather than "DUI," it included essentially the statutory elements that were necessary to establish DUI under § 60-6,196 in Nebraska.

Brown's argument looks beyond the statutory language and relies on court interpretations of the two states' statutes. He notes that Missouri courts clarified that "'under the influence of alcohol'" meant "'any intoxication that in any manner impairs the ability of a person to operate an automobile.'" *State v. Edwards*, 280 S.W.3d 184, 189 (Mo. App. 2009). He compares Missouri case law to cases in which this court has stated that the Nebraska statutory phrase "'under the influence of alcoholic liquor or of any drug'" requires the ingestion of alcohol or drugs in an amount sufficient to impair to "any appreciable degree" the driver's ability to operate a motor vehicle in a prudent and cautious manner. *State v. Falcon*, 260 Neb. 119, 123, 615 N.W.2d 436, 439 (2000). Brown contends that Missouri and Nebraska required different levels of impairment and that Missouri's standard of impairment "'in any manner'" was a lower threshold than Nebraska's requirement of impairment to "'any appreciable degree.'" Briefs for appellant at 10. He likens the Missouri standard of impairment "in any manner" to the Colorado statutory language referring to impairment to the "slightest degree" that we found in *State v. Mitchell*, 285 Neb. 88, 825 N.W.2d 429 (2013), to be a lower threshold than Nebraska's standard of impairment to "'an appreciable degree.'" Briefs for appellant at 13.

Contrary to Brown's analysis, the starting point in a comparison of another state's statutorily defined offense to Nebraska's statutory DUI offenses should be to compare the statutory language in the other state to the language of the relevant Nebraska statute. The definition of "[p]rior conviction" under § 60-6,197.02(1)(a)(i)(C) includes a conviction in another state when "the offense for which the person was convicted would have been a violation of" § 60-6,196 or one of the other

enumerated Nebraska DUI-related statutes. We read this definition as requiring an initial comparison of the other state's statutory definition of the offense to Nebraska's statutory definition of a DUI-related offense. If it is clear that the offense as statutorily defined in the other state would have been a violation of the relevant Nebraska statute, no further inquiry is required. In the present case, as we determined above, the minimum requirements for a conviction under the Missouri statutes under which Brown was convicted would have been a violation of § 60-6,196.

This focus on statutory language and the statutory elements of the offenses in the two states was recognized in *Mitchell*, wherein we stated that the defendant's Colorado "conviction of DWAI was a determination that his conduct met the minimum requirement for violation of the DWAI statute" and that the conviction made no other determination. 285 Neb. at 94, 825 N.W.2d at 434. We stated that it was the fact of conviction under the other state's statutorily defined offense, and "not the record of a defendant's conduct at the time of the arrest, that is relevant to our analysis." *Id*. We therefore concluded that punishment for the Nebraska conviction could not be enhanced solely "because the facts of his arrest and conviction in Colorado *could* support the higher requirement for a Nebraska DUI," *id.*, when the minimum requirements to establish the Colorado offense would not support a conviction for DUI in Nebraska.

The analytical lesson from *Mitchell* directs us to focus initially on a comparison of statutes and only if the outcome is unclear do we then expand the inquiry to case law interpretation of the statutes. And trivial differences in statutory language do not necessarily make the comparison unclear. In *Mitchell*, this initial comparison did not show that conduct meeting the minimum requirement of the Colorado DWAI statute would constitute a violation of the Nebraska statute, § 60-6,196. The Colorado DWAI statutes required only that "a person has consumed alcohol . . . that affects the person to the

slightest degree." See Colo. Rev. Stat. Ann. § 42-4-1301(g) (West Cum. Supp. 2017). Because this statutory language did not clearly establish a violation of § 60-6,196(1), which required that the defendant be "under the influence of alcoholic liquor or of any drug," we looked to Nebraska case law interpreting § 60-6,196 to see whether evidence of being affected "to the slightest degree" would nevertheless constitute being "under the influence of alcoholic liquor" under Nebraska statutory law. Because case law required impairment to "any appreciable degree" rather than to "the slightest degree," we concluded that a conviction establishing the minimum requirements for DWAI in Colorado did not constitute a violation of § 60-6,196.

Compared to the Colorado statute in *State v. Mitchell*, 285 Neb. 88, 825 N.W.2d 429 (2013), if one met the minimum statutory requirements of the offense of DWI in the Missouri statutes discussed above, one would also be in violation of § 60-6,196. Both statutory schemes used the standard of being "under the influence" of alcohol. We conclude that the Missouri and Nebraska statutes require the same elements, and the fact that case law in each state may describe that standard with slightly different language does not inform or change our determination.

One key factor in our decision in *Mitchell* was that in addition to the DWAI statute at issue, Colorado had a separate DUI subsection that required a higher level of impairment than was required for DWAI. See § 42-4-1301(f). We found Colorado's distinction between DUI and DWAI relevant to our determination that conviction for DWAI in Colorado did not establish DUI under § 60-6,196. Brown attempts to apply this aspect of *Mitchell* to his advantage and notes that Missouri also had a statute, Mo. Rev. Stat. § 577.012 (West 2003), that set forth an offense of "'driving with excessive blood alcohol content,'" which required that the person have a certain level of alcohol in his or her blood. Brown argues that the existence of this separate statute in Missouri is similar to Colorado's

statutory distinction between DWAI and DUI and indicates that a conviction under Missouri's DWI statute would not be a violation of § 60-6,196. However, the existence of § 577.012 does not support Brown's argument. Instead, it shows that Missouri's statutory scheme is similar to § 60-6,196, which provides that one can commit DUI by, inter alia, being "under the influence" pursuant to subsection (1)(a) or by having a specified concentration of alcohol in one's blood or breath pursuant to subsections (1)(b) and (c). The difference between Nebraska's and Missouri's statutory scheme is merely that Nebraska includes in one statute what Missouri included in more than one statute. Missouri's separate statutes, which each correspond to a separate part of § 60-6,196, do not inform our analysis in the same way that Colorado's two subsections, which set forth different levels of impairment, compelled our analysis in *Mitchell*.

We conclude that Brown's conviction for DWI in Missouri would have constituted a violation of § 60-6,196. We therefore conclude that the district court's determination that the Missouri conviction was a prior conviction for purposes of enhancing the current offenses was not in error.

District Court Did Not Abuse Its Discretion in Sentencing Brown.

Brown also claims that the court imposed excessive sentences. We conclude that the district court did not abuse its discretion in sentencing Brown.

After an enhancement hearing, each of Brown's offenses in this appeal was determined to be a Class IIIA felony under § 60-6,197.03(6). With regard to the conviction of the offense that occurred in July 2015, the statutory range for a Class IIIA felony included imprisonment for a maximum of 5 years. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014). For the convictions of the offenses that occurred in January and May 2016, the statutory range for a Class IIIA felony included imprisonment for a maximum of 3 years. § 28-105 (Supp.

2015). As noted above, Brown's sentences for the convictions of the January and May 2016 offenses were not subject to postrelease supervision requirements under L.B. 605, because the court imposed those sentences consecutively to the sentence for the conviction of the July 2015 offense. The sentences of imprisonment for 3 to 5 years for the conviction of the July 2015 incident, for 3 to 3 years for the conviction of the January 2016 incident, and for 3 to 3 years for the conviction of the May 2016 incident are therefore within statutory limits, so we next consider whether the sentences were an abuse of discretion.

[4,5] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Cerritos-Valdez*, 295 Neb. 563, 889 N.W.2d 605 (2017). 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. *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018). Additionally, when deciding if it is appropriate to withhold a sentence of imprisonment and grant probation, a sentencing court is guided by the statutory grounds set forth in Neb. Rev. Stat. § 29-2260 (Reissue 2016).

Brown notes that the court imposed the maximum sentence of imprisonment in each case and ordered the sentences to be served consecutively. He argues that the court focused almost exclusively on his history of committing DUI's and did not give adequate consideration to mitigating factors both when it determined the length of his sentences and when it decided against imposing a sentence of probation instead of imprisonment. He acknowledges his history and his problems with alcoholism, but he argues that the court ignored his rehabilitative

needs, his life circumstances, his employment history, and his willingness to enter pleas in these cases.

With regard to Brown's willingness to enter pleas, we note that as part of the plea agreement, the State agreed to refrain from filing additional charges and from enhancing the penalty in a separate case pending in county court. Although the court did not extensively discuss mitigating factors, such factors were presented to and considered by the court. The court's comments at sentencing indicated that to the extent mitigating factors were present, the court found them to be substantially outweighed by concerns regarding the seriousness of Brown's offenses and the danger he presented to the community. The court noted that including the pending case in county court and the three cases in this appeal, Brown had been arrested for driving drunk four times within a year and that at least in the three cases on appeal, he had an alcohol concentration well over .15.

We do not think the court considered inappropriate factors, nor did it fail to consider mitigating factors. The court determined that factors such as the seriousness of the offense and the danger Brown posed to the community favored the imposition of a long term of imprisonment; such determination was within the court's discretion. We conclude that the district court did not abuse its discretion in sentencing Brown in these cases.

CONCLUSION

We conclude that the court's use of the Missouri conviction as a prior conviction in these cases was not in error. We further conclude that the district court did not abuse its discretion in sentencing Brown in these cases. We therefore affirm Brown's convictions and sentences in these consolidated appeals.

Affirmed.

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. Rodney A. Halstead, respondent.

912 N.W.2d 240

Filed May 25, 2018. No. S-17-530.

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 the respondent, Rodney A. Halstead, on February 15, 2018. The court accepts the respondent's voluntary surrender of his license and enters a judgment of disbarment.

STATEMENT OF FACTS

The respondent was admitted to the practice of law in the State of Nebraska on September 25, 1991. On November 3, 2017, we suspended the respondent's license to practice law in the State of Nebraska for 1 year. *State ex rel. Counsel for Dis. v. Halstead*, 298 Neb. 149, 902 N.W.2d 701 (2017).

On February 15, 2018, the respondent filed a voluntary surrender of license to practice law, in which he stated that on May 23, 2017, formal charges were filed against him by the Counsel for Discipline alleging that he had a conflict of

interest with multiple clients when he entered into a business relationship with them without proper protections for the clients, that he converted client funds before completing any work for a client, and that he failed to refund the unearned portion of the client funds when his representation was terminated.

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 the 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, the respondent has waived all proceedings against him in connection therewith. We further find that the 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 the respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the allegations being made against him. The court accepts the respondent's voluntary surrender of his license to practice law, finds that the respondent should be disbarred, and hereby orders him disbarred from the practice of law in the

State of Nebraska, effective immediately. The 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, the 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

In re Guardianship of S.T., a minor child. Gabe N. Stalder, appellant, v. Anne T. and Andrew T., appellees.

912 N.W.2d 262

Filed May 25, 2018. No. S-17-600.

1. **Child Custody: Jurisdiction: Appeal and Error.** The question whether jurisdiction should be exercised under the Uniform Child Custody Jurisdiction and Enforcement Act is entrusted to the discretion of the trial court and is reviewed by an appellate court de novo on the record for abuse of discretion.
2. ____: ____: ____. In considering whether jurisdiction exists under the Uniform Child Custody Jurisdiction and Enforcement Act, a jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires an appellate court to reach a conclusion independent from the trial court.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Child Custody: Jurisdiction.** Jurisdiction over a child custody proceeding is governed exclusively by the Uniform Child Custody Jurisdiction and Enforcement Act.
6. **Child Custody: Guardians and Conservators: Words and Phrases.** Under the Uniform Child Custody Jurisdiction and Enforcement Act, the term "child custody proceeding" is defined to include a proceeding for guardianship of a minor.
7. **Child Custody: Jurisdiction: States.** For a state to exercise jurisdiction over a child custody dispute, it must either be the "home state" as defined by the Uniform Child Custody Jurisdiction and Enforcement Act or fall under limited exceptions to the home state requirement specified by the act. Generally speaking, Neb. Rev. Stat. § 43-1238(a)(1)

(Reissue 2016) grants jurisdiction to the "home state" of the child and § 43-1238(a)(2) through (4) sets out the "exceptions" under which a court will have jurisdiction, even if it is not in the child's "home state."

8. **Jurisdiction: Appeal and Error.** When a trial court lacks 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.

Appeal from the County Court for Richardson County: Curtis L. Maschman, Judge. Judgment vacated, and cause remanded with directions.

Melanie A. Kirk, of Johnson, Flodman, Guenzel & Widger, for appellant.

Andrew T., pro se.

No appearance for appellee Anne T.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Steinke, District Judge.

Stacy, J.

Gabe N. Stalder petitioned the county court to be appointed guardian of his then 7-year-old niece, S.T., alleging her parents were not properly caring for her. After an evidentiary hearing, the court denied the petition, finding Stalder had failed to prove by clear and convincing evidence that S.T.'s parents were unfit. Stalder appealed. Because we find the county court lacked jurisdiction over the guardianship proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),[1] we vacate the judgment and remand the matter with directions to dismiss.

BACKGROUND

Andrew T. and Anne T. are the natural parents of S.T., born in November 2009 in Beatrice, Nebraska.

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[1] Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2016).

Shortly after S.T.'s birth, Andrew and Anne moved with S.T. to a home in Humboldt, Nebraska. They lived together in Humboldt until February 27, 2017, when they moved to Emporia, Kansas.

A few days later, on March 1, 2017, Anne's brother, Stalder, filed a petition for temporary and permanent guardianship of S.T. in the county court for Richardson County, Nebraska. In his petition, Stalder claimed S.T.'s parents were unsuitable to care for her. He sought an ex parte order appointing him as S.T.'s temporary guardian and an expedited hearing on his request for appointment as S.T's permanent guardian. Based on the allegations in the petition, the court appointed Stalder as temporary limited guardian for S.T. and set the matter for an evidentiary hearing on April 12.

Evidentiary Hearing

At the evidentiary hearing, Stalder called three witnesses: Andrew, Anne, and himself. Andrew and Anne were self-represented and called no witnesses. Generally, Andrew and Anne testified that S.T. was healthy and cared for. Stalder presented evidence questioning the propriety of her education, the condition of the family home in Nebraska, and the effect of Andrew's antigovernment views on S.T.'s emotional and physical health.

The evidence was undisputed that on February 10, 2017, Andrew signed a 1-year lease on property in Emporia. And on February 27, Andrew, Anne, and S.T. moved to Emporia and were still living there at the time of the evidentiary hearing.

Order Denying Guardianship

The county court entered an order denying Stalder's petition for permanent guardianship and terminating his temporary limited guardianship.

Before addressing the merits, the court acknowledged that jurisdiction over the guardianship proceeding was governed by the UCCJEA. It found the evidence was uncontroverted that S.T. resided with Andrew and Anne in Nebraska until

February 27, 2017, at which point they moved to Kansas. The court then concluded, without further analysis, that the UCCJEA "defines Nebraska as the 'home state' under the facts in this action."

Addressing the merits, the court noted that because Andrew and Anne objected to the guardianship of their child, the parental preference doctrine required Stalder to prove parental unfitness by clear and convincing evidence. The court explained that "[a]bsent such proof, the constitutional dimensions of the relationship between parent and child require a Court to deny a request for guardianship." The court found that Stalder had presented limited evidence regarding the health and well-being of S.T. and that most of the evidence focused on the "antigovernment" beliefs and actions of Andrew. After discussing the evidence, the court concluded Stalder had failed to meet his burden of showing parental unfitness. The court denied Stalder's petition for permanent guardianship and dissolved the temporary guardianship.

Stalder timely appealed, and Andrew cross-appealed. We moved the case to our docket on our own motion.[2]

ASSIGNMENTS OF ERROR

Stalder assigns, restated and consolidated, that the county court erred in finding he failed to meet his burden of proving that S.T.'s parents were unfit.

In Andrew's purported cross-appeal, he does not specifically assign error to any ruling made by the trial court.[3] Instead, he claims that Stalder's behavior in seeking the guardianship was generally unlawful.

STANDARD OF REVIEW

[1] The question whether jurisdiction should be exercised under the UCCJEA is entrusted to the discretion of the trial

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

[3] See Neb. Rev. Stat. § 25-1919 (Reissue 2016) and Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2014).

court and is reviewed by an appellate court de novo on the record for abuse of discretion.[4]

[2] In considering whether jurisdiction exists under the UCCJEA, a jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires an appellate court to reach a conclusion independent from the trial court.[5]

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[6]

ANALYSIS

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[7] Here, the threshold issue we must address is whether the county court had jurisdiction under the UCCJEA to hear and determine the guardianship petition.

Jurisdiction and UCCJEA

[5,6] Jurisdiction over a child custody proceeding is governed exclusively by the UCCJEA.[8] Under the UCCJEA, the term "[c]hild custody proceeding" is defined to include a proceeding for guardianship of a minor.[9] The trial court correctly recognized the UCCJEA was applicable to the guardianship proceeding filed by Stalder, but on this record, we cannot agree with the trial court's finding that Nebraska was S.T.'s "home state" on the date the guardianship proceeding was commenced.

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[4] *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006).

[5] See *Carter v. Carter*, 276 Neb. 840, 758 N.W.2d 1 (2008). See, also, *In re Interest of Violet T.*, 286 Neb. 949, 840 N.W.2d 459 (2013).

[6] *In re Interest of Violet T., supra* note 5.

[7] *Karo v. Nau Country Ins. Co.*, 297 Neb. 798, 901 N.W.2d 689 (2017).

[8] *Carter v. Carter, supra* note 5.

[9] § 43-1227(4). Accord *In re Guardianship of David G.*, 18 Neb. App. 918, 798 N.W.2d 131 (2011).

Jurisdiction to make an initial child custody determination is governed by § 43-1238 of the UCCJEA, which provides in part:

> (a) Except as otherwise provided in section 43-1241 [regarding temporary emergency jurisdiction], a court of this state has jurisdiction to make an initial child custody determination only if:
>
> (1) this state is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;
>
> (2) a court of another state does not have jurisdiction under subdivision (a)(1) of this section, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is a more appropriate forum under section 43-1244 or 43-1245, and:
>
> (A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and
>
> (B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;
>
> (3) all courts having jurisdiction under subdivision (a)(1) or (a)(2) of this section have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under section 43-1244 or 43-1245; or
>
> (4) no court of any other state would have jurisdiction under the criteria specified in subdivision (a)(1), (a)(2), or (a)(3) of this section.
>
> (b) Subsection (a) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

[7] For a state to exercise jurisdiction over a child custody dispute, it must either be the home state as defined by the UCCJEA or fall under limited exceptions to the home state requirement specified by the UCCJEA.[10] Generally speaking, § 43-1238(a)(1) grants jurisdiction to the home state of the child and § 43-1238(a)(2) through (4) sets out the exceptions under which a court will have jurisdiction, even if it is not in the child's home state.[11]

Here, because the county court found Nebraska was the home state under the UCCJEA, it did not address any of the exceptions under § 43-1238(a)(2) through (4). Moreover, the record developed by the parties lacks any evidence upon which we might conduct a de novo review of the applicability of any of the home state exceptions. We therefore necessarily limit our analysis to whether the county court correctly found Nebraska was the home state under § 43-1238(a)(1).

The UCCJEA defines "[h]ome state" as

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.[12]

As used in the UCCJEA, "[c]ommencement" of a proceeding means "the filing of the first pleading in a proceeding."[13] Thus, the operative date for the home state analysis in this case is March 1, 2017.

Pursuant to § 43-1238(a)(1), the county court would have jurisdiction under the UCCJEA if S.T.'s home state was

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[10] See, *Carter v. Carter, supra* note 5; § 43-1238(a)(2) through (4).

[11] See *Carter v. Carter, supra* note 5.

[12] § 43-1227(7).

[13] § 43-1227(5).

Nebraska on March 1, 2017, or if S.T.'s home state was Nebraska within 6 months before March 1, 2017, *and* "the child is absent from [Nebraska] but a parent or person acting as a parent continues to live in [Nebraska]." Neither alternative is satisfied here.

It was undisputed that Andrew and Anne moved with S.T. to Kansas on February 27, 2017. So when the first pleading was filed on March 1, S.T. had not lived in Nebraska for the immediately preceding 6 consecutive months. Although § 43-1227 includes periods of "temporary absence" in the calculation of the 6-month period, there was no evidence the move to Kansas was temporary. Andrew signed 1-year lease, and the family was still living in Kansas at the time of the evidentiary hearing. On this record, Nebraska was not S.T.'s home state on March 1, 2017.

Moreover, although Nebraska may have been S.T.'s home state within 6 months before the guardianship was commenced, there was no evidence that either of S.T.'s parents continued to reside in Nebraska after the family moved to Kansas on February 27, 2017, and there was no evidence that a person "acting as a parent" continued to reside in Nebraska.[14]

Section 43-1227(13) defines a "[p]erson acting as a parent" as one who "has had physical custody for a period of six consecutive months . . . within one year immediately before the commencement" of the proceeding and "has been awarded legal custody by a court or claims a right to legal custody." Stalder, who continued to reside in Nebraska, could not be considered "acting as a parent" under § 43-1227(13), because he never had physical custody of S.T., nor was he ever awarded her legal custody. Stalder's temporary limited guardianship gave him limited authority only to access S.T.'s educational, medical, and other such records; make inquiries about S.T.'s residence and the conditions of that residence; and to see and speak with S.T. and her

[14] See § 43-1238(a)(1).

caregivers. It did not grant even limited rights of physical or legal custody.

On this record, Nebraska was not S.T.'s home state under either of the alternatives in § 43-1238(a)(1). We therefore must find the county court lacked jurisdiction under the UCCJEA over this guardianship proceeding.

[8] When a trial court lacks 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.[15] As such, our disposition of this case does not permit us to reach the merits of the guardianship proceeding.

CONCLUSION

We conclude the county court lacked jurisdiction over the guardianship proceedings under the UCCJEA, and we therefore lack jurisdiction over this appeal. We must vacate the judgment of the county court and remand the matter with directions to dismiss the guardianship proceeding.

Judgment vacated, and cause
remanded with directions.

Wright, J., not participating.

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[15] See *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017).

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

Kenneth D. Priesner and Laurie Wrage Priesner, appellants, v. Jim L. Starry and Bayview Townhouses, appellees.

912 N.W.2d 249

Filed May 25, 2018. No. S-17-713.

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. **Receivers: Judgments: Appeal and Error.** An order giving directions to a receiver will not be disturbed on review in the absence of an abuse of discretion.
3. **Appeal and Error.** An appellate court considers only arguments that are both specifically assigned and specifically argued in the appellate brief.
4. **Jurisdiction: Final Orders: Time: Appeal and Error.** A notice of appeal must be filed with 30 days of the entry of a final order or judgment.
5. **Final Orders: Appeal and Error.** Any issue decided in a prior final order that neither party timely appealed from is foreclosed from review in an appeal from a subsequent final order or final judgment in the case.
6. **Jurisdiction: Time: Appeal and Error.** A party's failure to timely appeal from a final order prevents an appellate court from exercising jurisdiction over the issues that were raised and decided in that order.
7. **Receivers: Final Orders: Legislature: Jurisdiction: Appeal and Error.** The Legislature has mandated by the plain language of Neb. Rev. Stat. § 25-1090 (Reissue 2016) that orders placing property into receivership, giving directions relating to the receiver's powers over the property, and disposing of receivership property are final for purposes of appellate jurisdiction under Neb. Rev. Stat. §§ 25-1911 and 25-1912 (Reissue 2016).
8. **Final Orders: Appeal and Error.** There is no "second bite at the apple" when it comes to an appellant's opportunity to appeal a final order.

9. **Receivers: Words and Phrases.** A receiver is "the arm of the court."
10. **Receivers: Judgments: Appeal and Error.** If the court has not abused its discretion in the giving of the directions to the receiver, an appellate court will not disturb actions by the receiver that were in conformity with those directions.

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

Jeffrey S. Armour, of Armour Law, P.C., L.L.O., for appellants.

Gary F. Burke, of Law Office of Gary F. Burke, L.L.C., for appellee Jim L. Starry.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Harder and Noakes, District Judges.

Harder, District Judge.

NATURE OF CASE

This case involves protracted litigation by the minority owners of a condominium against the majority owner, who repeatedly failed to comply with the declaration of covenants, conditions, and restrictions. The court eventually appointed a receiver to sell the condominium at a public sale after determining that the co-owners would "never be able to work together." The condominium was offered at a public sale. The plaintiffs appeal from the court's subsequent order confirming the sale.

BACKGROUND

Kenneth D. Priesner and Laurie Wrage Priesner own one of four condominium units in the Bayview Townhouses, a condominium. They purchased the unit in 1983, when the condominium was built, and they have lived there since.

Jim L. Starry purchased the remaining three units and a detached garage in 1994 and 1995. He lives in Colorado and rents the units out.

The Priesners and Starry are members of the Bayview Townhouse Association (Association). The condominium is governed by a "Declaration of Covenants, Conditions and Restrictions of Bayview Townhouses" (Declaration).

Under the Declaration, Starry had control over the Association as the majority owner. Since Starry obtained his majority ownership in 1995, the Association ceased having meetings, collecting assessments, and maintaining the common elements of the condominium.

In 2013, the Priesners filed a complaint against Starry and the Association for damages and specific performance. The action concerned conversion of Association and insurance funds, failure to maintain proper insurance, and Starry's negligent repair of the condominium roof in 1997, which eventually resulted in the need to replace the roof and siding.

On February 24, 2014, the court awarded the Priesners compensation for interior damage to the Priesners' unit resulting from Starry's negligent repair of the roof, as well as the Priesners' share of insurance proceeds that Starry had received but never utilized for repairs. The court ordered a lien on Starry's units in the amount of damages awarded. The court ordered specific performance against Starry to purchase blanket property and liability insurance, hold an association meeting, elect a board of directors, and prepare an annual budget that would include the removal and replacement of the roof and siding.

The court then set forth:

> In the event the parties are unable to reach an agreement on any of the requirements set forth in this paragraph, or for the payment of the costs associated herewith, either party may apply to this Court for the appointment of a receiver to manage the condominium . . . and/or to sell the condominium . . . at public sale.

The 2014 judgment was affirmed as modified by the Nebraska Court of Appeals in an unpublished memorandum opinion filed February 25, 2015, in case No. A-14-330. The

Court of Appeals held that the district court had erred in not awarding to the Priesners the portion of the converted insurance proceeds attributable to damage to the Priesners' shed. It found no reversible error in the court's order of specific performance that determined the Priesners would share the costs for replacing the roof and siding in proportion to their unit interest. The Court of Appeals noted in this regard that the Priesners had, like Starry, failed to request meetings, notify the Association of necessary repairs or upkeep, or paid any Association dues.

After the 2014 judgment, the Priesners eventually began acting as a quorum pursuant to their rights under the Declaration when Starry repeatedly failed to call for or attend Association meetings. By October 2015, the Association had apparently filed liens against Starry's units for Starry's share of special assessments to repair and replace the roof and siding of the condominium.

But the Association did not foreclose on these liens pursuant to Neb. Rev. Stat. § 76-874 (Cum. Supp. 2016). Instead, in October 2015, the Priesners filed an application for injunctive relief, under the same docket number as the 2014 judgment. Starry had apparently satisfied the damages portion of the judgment. The Priesners alleged, however, that Starry had failed to comply with the order of specific performance. The Priesners asked that Starry be enjoined from acting on behalf of the Association or conducting construction work on the exterior of the condominium, alleging that Starry had unilaterally arranged for unqualified workers to replace the siding and the roof.

The court granted the Priesners a temporary injunction and restraining order during the pendency of their application for injunctive relief.

In response, Starry filed an application for the appointment of a receiver, noting that he was temporarily enjoined from holding Association meetings or acting for the benefit of the condominium. The court initially denied the motion until it

was able to conduct a hearing on the Priesners' contempt allegation. At the hearing, Starry renewed his motion to appoint a receiver, explaining that he wished to resolve the dispute between the parties by selling the condominium.

March 14, 2016, Order to Sell All Units and Common Areas

In a journal entry file stamped March 14, 2016, the court found that Starry was not in contempt of the 2014 judgment and "sustain[ed] [Starry's] oral motion to appoint a [r]eceiver to sell all of the units and common areas" of the condominium. The court found that the parties would "never be able to work together" to operate the Association for their mutual benefit. The court set a hearing for April 4 to determine who should be appointed as receiver.

The receiver was selected by the court, and a journal entry was filed on July 13, 2016, stating that the receiver was appointed. A detailed "Order Appointing Receiver" was issued on July 14, the same day the receiver executed his oath. An amended order appointing the receiver was filed on August 2 to correct scrivener's errors.

August 2, 2016, Order Appointing Receiver With Directions

The operative order of appointment described that the court had ordered the sale of the property at a public sale. The property was described as "four (4) townhouse units and collective common elements."

The order stated that the receiver should immediately take charge, manage, operate, or discontinue all or part of the operations in his sole discretion and appoint such managers or management companies, leasing agents, listing agents, accountants, attorneys, and other professionals as he deemed appropriate and necessary to assist in the management, operation, or discontinuance of its operations, and protection and operation of the property according to the Declaration.

The order set forth that the receiver had all powers and authority reasonably necessary to accomplish his purposes.

The order set forth numerous powers, including, but not limited to (1) taking charge and possession of the property subject to the Declaration and all improvements thereto and all personal property used or associated therewith, regardless of where such property is located; (2) repairing, replacing, maintaining, and protecting the receivership property and paying for ordinary and necessary maintenance thereto, including deferred maintenance and taking such other steps as the receiver deems appropriate to prevent waste; (3) incurring indebtedness to the extent required to perform his duties as receiver in securing such indebtedness by granting a lien on the receivership property that is prior and superior to any lien other than the mortgage and tax liens; (4) using "income, rents, and receipts from the Receivership Property," for the payment of, in order of priority, administrative expenses, the receiver's fees and costs, the receiver's attorney and consultant fees and costs, expenses of the receivership, any debts secured by a lien, principal and interest payments, and "only after paying all expenses of the Receivership and all arrearages in principal and interest shall the Receiver pay pre-Receivership debts and/or liens of any nature and only after a determination is made by the Receiver that such pre-Receivership debts and /or liens of any nature are properly payable"; (5) making determinations as to the nature and validity of any prereceivership property debt or lien of any nature assessed according to the Declaration and whether it is properly payable or dischargeable by the receiver; and (6) doing "any and all acts necessary and convenient or incidental" to "see to the sale of the Property at Public Sale."

November 15, 2016, Order To Sell Without Replacing Roof and Siding

The court issued a written order on November 15, 2016, following a hearing in which the receiver described that the parties appeared financially incapable of paying the deposits

required to replace the condominium roof and siding as ordered in the prior judgment. The order set forth that the "Receiver is authorized to sell all units of the [condominium] at public sale, as he cannot obtain funding to make repairs" and "[t]he property can be sold not subject to any prior orders regarding work required to be performed prior to the sale."

February 8, 2017, Order Acknowledging Repairs

A status hearing was subsequently held in February 2017, at which point the receiver expressed his intention to conduct substantial repairs on one of Starry's units that was in a dilapidated state. The receiver noted that he had to evict the tenant living there. The court issued an order on February 8, 2017, noting that the receiver had given "a verbal update of the Receiver's anticipated repairs, and proposed sale date."

Order Releasing All Liens by Priesners and Association

In anticipation of the public sale, on May 2, 2017, the court issued an order declaring that any liens upon the condominium by the Priesners individually or on behalf of the Association were to be released and "will attach solely to any proceeds of . . . Starry . . . after the sale." The court explained that the receiver's fees and expenses would be determined at a later hearing.

June 28, 2017, Order Confirming Sale

The public sale took place on May 22, 2017. Thereafter, the Priesners filed a motion to set an evidentiary hearing "to receive evidence on the matter of approving or denying the May 22, 2017 sale of the Townhouses and on the matter of repair and receiver related costs and the distribution of proceeds." The receiver, for his part, requested a hearing "confirming the sale of the property, releasing liens between the parties, and any other order to facilitate the closing of the real property." The Priesners then moved for a court-ordered

appraisal of each of the condominium units, payment by the receiver of property damage to the Priesners' windows allegedly caused by the receiver's contractor, and the appointment of an "uninterested closing agent" in the event the court approved the public sale.

A hearing was held on June 14, 2017. Exhibits were entered into evidence by the receiver showing $1,080 in mowing expenses for the condominium, $688.53 in sewage-related expenses for the condominium, $11,205 in receiver fees, $812 in costs related to the public sale, and $10,628.38 in repairs and maintenance of one of Starry's units. Invoices totaling over $10,000 in repairs and maintenance of Starry's unit, as well as $1,080 in mowing, were from ASAP Construction, Inc.

The court accepted into evidence an itemized invoice of the receiver's time spent in his duties as receiver for the condominium, up to the time of the hearing, which totaled $11,205 in fees. The receiver testified that the work performed was generally attributable to both Starry's and the Priesners' units. He believed that it made sense to simply distribute the total invoice to the parties in proportion to their unit shares. But the receiver admitted upon examination by the Priesners' counsel that approximately $800 of his charges were for time mostly attributable to Starry's units.

The receiver testified at the hearing as to the bidding process leading up to the sale of the condominium. The receiver stated that initial bids were for the units individually. Then the Priesners' unit was offered separately from Starry's combined units. Finally, bidders were offered to bid on the condominium as a whole. A summary including each bid was entered into evidence.

When the bids were for the units individually, no one bid on Starry's units. The Priesners were the only bidders for their unit, bidding $12,000. There were three bids by two bidders on the separate garage, with the Priesners placing the largest bid at $4,000.

When the bidders could bid on Starry's combined units and the Priesners' individual unit separately, there were three bids

by two bidders on the Priesners' unit. The largest bid on the Priesners' unit was $30,000, by the Priesners. There were five bids by three bidders on all of Starry's combined units, plus the garage. The highest bid was $128,000.

After that, the bidding for the condominium as a whole took place. Bidders were informed that the opening bid had to exceed $158,000, the total of the previous bidding for the Priesners' unit separately from Starry's combined units. Two bidders placed nine bids. The winning bid was $177,000.

The receiver proposed distributing the proceeds of the public sale, after payment of liens and receivership fees and expenses, in proportion to the respective unit interests with the caveat that proportionate deduction from those proceeds be limited to his fees, costs relating to the public sale, and maintenance of the common areas of the condominium.

The receiver suggested that the expenses attributable to the repair and maintenance of Starry's units be deducted solely from Starry's share of the sale proceeds. In addition, the receiver suggested that Starry and the Priesners would be responsible, out of their respective shares, for their respective mortgage liens and property taxes. Starry had a mortgage lien against his properties in the amount of $101,243.97. The Priesners had a mortgage lien in the amount of approximately $11,000. Real estate taxes for Starry's properties were a total of $2,873.10, while the Priesners' real estate taxes were $882.94.

The receiver also asked that the court reiterate its prior ruling that any previous liens or claims by the Priesners or the Association were released and would be dealt with "personally." In this regard, the receiver made reference to a lien filed by the Association against Starry. But no lien was offered into evidence by either party in any of the hearings.

The court filed a journal entry on June 28, 2017. The order ratified and confirmed the public sale and sustained the Priesners' request to use an independent closing agent. The court directed the receiver to pay out of the sale proceeds of the public sale all real estate taxes, closing costs, mortgage

liens, and the receiver's fees and expenses up to that date and as reflected in the exhibit entered into evidence at the hearing. Those expenses included a bill from ASAP Construction in the amount of $11,105.17. Any remaining funds would be paid into the registry of the court.

The court explained that after the receiver had filed the final report of income and expenses and his remaining fees, a final hearing would be held. If any funds remained after the receiver had been fully paid and discharged, "the Court will again consider [the Priesners'] request to present evidence from an appraiser as to the fair market value of each of the five units as of May 22, 2017 and [the Priesners'] request for payment to repair the window."

The court's order set forth that "[a]ll other claims by either party or the Association against any party to this action are released, and will be filed in a separate proceeding."

Finally, the court stated that its order was interlocutory and not immediately appealable.

The Priesners appeal the June 28, 2017, order.

ASSIGNMENTS OF ERROR

The Priesners assign that the district court erred in (1) ratifying and confirming in all respects the sale of the condominium; (2) finding that there was active bidding at the sale; (3) finding that a subsequent sale would not generate a greater amount; (4) ordering payment by the receiver of his fees and expenses, including ASAP Construction's bill for its work on Starry's unit; (5) releasing all other claims by either party or the Association against any party, to be filed in a separate proceeding; and (6) ordering that its order shall be interlocutory.

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.[1]

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[1] *In re Interest of Zachary B.*, 299 Neb. 187, 907 N.W.2d 311 (2018).

[2] An order giving directions to a receiver will not be disturbed on review in the absence of an abuse of discretion.[2]

ANALYSIS

[3] On appeal, we consider only arguments that are both specifically assigned and specifically argued in the appellate brief.[3] Considering what was specifically assigned and argued, the Priesners' assignments of error can be distilled into four broad contentions. First, the Priesners argue that the court erred in ordering the sale of the condominium as a whole, including their unit. Second, and alternatively, they challenge the method of the sale, because the receiver did not offer up the condominium as a whole for bids before offering the units individually. Third, the Priesners challenge the distribution of the sale proceeds to pay receiver fees and expenses attributable solely to Starry's units. Finally, the Priesners contest the release of any Association liens on the property.

However, before reaching the merits of these contentions, it is our duty to determine whether we have jurisdiction in this appeal over each of the issues presented.[4] Neb. Rev. Stat. § 25-1911 (Reissue 2016) gives this court jurisdiction to review a "judgment rendered or final order made by the district court." Neb. Rev. Stat. § 25-1912 (Reissue 2016) further provides that appeals from a judgment rendered or final order made by the district court is not perfected unless a notice of intention to prosecute an appeal is filed with the district court within 30 days of the judgment or final order, as provided under that statute.

[4-6] Under these statutes, to vest an appellate court with jurisdiction, a notice of appeal must be filed with 30 days of

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[2] See *State, ex rel. Sorensen, v. Nebraska State Bank*, 124 Neb. 449, 247 N.W. 31 (1933).

[3] See *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

[4] See, e.g., *In re Interest of Zachary B., supra* note 1; *Ginger Cove Common Area Co. v. Wiekhorst*, 296 Neb. 416, 893 N.W.2d 467 (2017).

the entry of a final order or judgment.[5] Furthermore, any issue decided in a prior final order that neither party timely appealed from is foreclosed from review in an appeal from a subsequent final order or final judgment in the case.[6] A party's failure to timely appeal from a final order prevents an appellate court from exercising jurisdiction over the issues that were raised and decided in that order.[7]

Neb. Rev. Stat. § 25-1902 (Reissue 2016) generally defines a final order as 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." However, Neb. Rev. Stat. § 25-1090 (Reissue 2016) more specifically addresses orders appointing receivers, giving them further directions, and disposing of property. Section 25-1090 states in relevant part that "[a]ll orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the Court of Appeals in the same manner as final orders and decrees." Under Neb. Rev. Stat. § 25-1087 (Reissue 2016), every order appointing a receiver must contain special directions with respect to the receiver's powers and duties and the court may give further directions as may become proper in the further progress of the cause.

Since its passage in 1867, we have held that orders appointing receivers, giving them further directions, and disposing of property are final orders pursuant to § 25-1090, without additionally determining whether they would be final under

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[5] See *Tilson v. Tilson*, 299 Neb. 64, 907 N.W.2d 31 (2018).

[6] See, e.g., *Ginger Cove Common Area Co. v. Wiekhorst, supra* note 4; *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013); *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008); *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997). See, also, *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

[7] See, e.g., *In re Interest of Zachary B., supra* note 1; *Pinnacle Enters. v. City of Papillion, supra* note 6.

§ 25-1902.[8] Section § 25-1090 has been described as the more specific statute concerning the finality of such orders and thus controlling over the more general description of final orders found in § 25-1902.[9]

[7] Section 25-1090 was enacted the same year as § 25-1902. We have explained that finality under § 25-1902 depends most fundamentally on whether the right affected by the order could effectively be vindicated through an appeal from the final judgment, or instead would be significantly undermined or irrevocably lost by postponing appellate review.[10] We have observed that receiverships are a harsh and drastic remedy, not to be implemented lightly.[11] Though no legislative history is available, the Legislature presumably determined that orders placing property into receivership, giving directions relating to the receiver's powers over the property, and disposing of receivership property, affect rights that would be significantly undermined by postponing appellate review. The Legislature has mandated by the plain language of § 25-1090 that orders placing property into receivership, giving directions relating to the receiver's powers over the property, and disposing of receivership property are final for purposes of appellate jurisdiction under §§ 25-1911 and 25-1912.

The order presently appealed, confirming the public sale, is a final order under § 25-1090 because it is both an order

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[8] See, *Robertson v. Southwood*, 233 Neb. 685, 447 N.W.2d 616 (1989); *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989); *Lewis v. Gallemore*, 173 Neb. 441, 113 N.W.2d 595 (1962); *State v. Fawcett*, 58 Neb. 371, 78 N.W. 636 (1899). See, also, *Floral Lawns Memorial Gardens Assn. v. Becker*, 284 Neb. 532, 822 N.W.2d 692 (2012); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001); *Dickie v. Flamme Bros.*, 251 Neb. 910, 560 N.W.2d 762 (1997); *Sutton v. Killham*, 22 Neb. App. 257, 854 N.W.2d 320 (2014).

[9] See *Sutton v. Killham, supra* note 8.

[10] See, e.g., *Ginger Cove Common Area Co. v. Wiekhorst, supra* note 4; *In re Adoption of Madysen S.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

[11] *Floral Lawns Memorial Gardens Assn. v. Becker, supra* note 8.

disposing of receivership property and it gives the receiver directions. The district court's statement that the order was not directly appealable is of no effect.

Nevertheless, we do not have jurisdiction in this appeal from the June 28, 2017, order over every argument raised in the Priesners' appellate brief. The Priesners admit that they did not timely appeal prior orders placing their property into the receivership and giving directions relating to the receiver's powers over such property.

Selling Priesners' Unit and Condominium as Whole

Upon our review of the record, we find that we lack jurisdiction to consider the Priesners' challenge in this appeal to the court's direction to sell their unit and to sell the condominium as a whole. That issue was determined by the July 14, 2016, order appointing the receiver with direction, which stated that the receiver had all powers and authority reasonably necessary to accomplish the receiver's purpose of selling the property at a public sale. The property was described as "four (4) townhouse units and collective common elements." This description clearly encompassed the Priesners' unit and the possible sale of the condominium as a whole. The "property" directed to be sold was described in the singular, wholly encompassing both the personally owned units and the common areas.

The Priesners in fact admitted at oral argument that they did not appeal this order, because they did not feel at the time that the sale would necessarily be disadvantageous to them. We cannot address the order now simply because the sale did not turn out as the Priesners had hoped. Because the Priesners did not appeal from the order of appointment directing the receiver to sell the entire condominium, we express no opinion as to the propriety of such an order in this case. We lack jurisdiction over any issue raised in this appeal concerning the propriety of the order to sell the condominium, including the Priesners' unit.

Release of Liens

For similar reasons, we cannot address the Priesners' argument regarding the court's release of alleged liens they and the Association had against the condominium as a whole or any of its units. In an order dated May 2, 2017, the court rejected the Priesners' offer to buy the condominium without a public sale and directed the receiver to proceed with a public sale. Relating to that future public sale, the court ruled that any liens claimed by the Priesners individually or on behalf of the Association "are released and will attach solely to any proceeds of . . . Starry . . . after the sale." This order followed a hearing in which the receiver had expressed concern over the public sale in light of liens registered on the property.

[8] The May 2, 2017, release of the liens was part of the directions to the receiver to continue with the planned sale. It was therefore final under § 25-1090. Because the Priesners did not timely appeal this order of further direction to the receiver, we are foreclosed from addressing it now in the appeal from the order confirming the sale. The order was not revived by the fact that the court reiterated in its order confirming the sale that those liens were released. There is no "second bite at the apple" when it comes to an appellant's opportunity to appeal a final order.[12]

We find no impediment to addressing the Priesners' remaining two arguments challenging the order of the bidding process and the distribution of sale proceeds to pay ASAP Construction for work performed on Starry's unit and for the receiver's time spent managing Starry's unit and preparing it for sale. We first address the bidding process.

Order of Bidding

The Priesners assert that the bidding process was unfair because the condominium units were offered individually before the bids were received for the condominium as a

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[12] See, e.g., *In re Interest of Zachary B., supra* note 1; *Pinnacle Enters. v. City of Papillion, supra* note 6.

whole. The Priesners do not assert that there were insufficient bidders or that there was not active bidding. Rather, the Priesners complain that they did not know what amount for their individual bid on their property would be sufficient to outbid bidders when the condominium was offered as a whole subsequent to the offers by individual units. As a result of such lack of information, which they allege was inherent to the order of bidding, the Priesners allege they lost their property when they bid too low. Had the bidding process started with the condominium as a whole, the Priesners argue they could have tailored their bid on their individual unit to ensure it would have been the winning bid.

At the hearing on June 14, 2017, the Priesners presented little evidence as to the maximum amount they were able to bid or how they determined what amount to bid. Other than general principles of equity, the Priesners present no law indicating that a condominium should be offered at a public sale as a whole first and then by unit—as opposed to the other way around. The Priesners assert that they should not have been expected to "conspire" with another bidder in order to be the successful bidder under the method that the bidding was conducted.[13] But even if the order of bidding had been conducted the other way around, the Priesners do not explain how they would know the bid amounts by the other bidders on the other individual units, in order to be able to tailor a bid that, in combination with the individual bids for the other units, would exceed the prior highest bid on the condominium as a whole.

The order of the sale was within the receiver's broad powers as set forth in the district court's orders. Though the Priesners rely on a statement during a hearing in which the judge apparently envisioned offering the condominium as a whole and then the units individually, that was not stated as a directive. More importantly, that statement was never memorialized in any order of direction to the receiver.

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[13] Brief for appellants at 18.

[9,10] A receiver is "'the arm of the court.'"[14] If the court has not abused its discretion in the giving of the directions to the receiver, we will not disturb actions by the receiver that were in conformity with those directions.[15] We find no abuse of discretion in the broad powers conferred by the court upon the receiver concerning the manner in which he conducted the public sale.

Payment From Proceeds of Costs and Fees Associated With Starry's Unit

The Priesners' last argument is that the court erred in its June 28, 2017, order by directing the payment of work performed on Starry's units from the sale proceeds of the condominium.

The Priesners argue that this work should not be paid from the public sale proceeds because the work was unauthorized and outside the scope of the powers conferred through the order of appointment with direction. According to the Priesners, the court's order of appointment limited the receiver's authority to the exterior unit structures and common areas, and the receiver lacked any power to manage Starry's tenants or repair Starry's individual units.

We disagree. The order of appointment with direction described the property as the "four (4) townhouse units and collective common elements." Nothing in the order limited the receiver's authority to the "exterior" of the units.[16] To the contrary, the order described the receiver's power to hire leasing agents and take charge of personal property "regardless of where such property is located."

The Priesners also assert that the work on Starry's unit was contrary to the court's order of further direction on November 15, 2016, which the Priesners assert was an order to sell

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[14] *State v. Bank of Rushville*, 57 Neb. 608, 610, 78 N.W. 281, 282 (1899).

[15] *Id.*

[16] See brief for appellants at 22.

the property "as-is."[17] But the November 15 order stated: "Receiver is authorized to sell all units of the [condominium] at public sale, as he cannot obtain funding to make repairs" and "[t]he property can be sold not subject to any prior orders regarding work required to be performed prior to the sale." The only work required by any prior order at that time was the 2014 judgment ordering the siding and roof replacement. The November 15 order did not refer to the repairs on Starry's unit that were later discovered and deemed by the receiver necessary to make the condominium sellable at a public sale. Nor did the November 15 order generally mandate that the property was to be sold "as-is."

The Priesners further assert that the receiver should not be paid for work performed on Starry's units because the receiver failed to comply with the court's original directive to serve "as custodian of the Declaration for the benefit of all parties subject to the Declaration." The Priesners' argument in this regard is somewhat unclear. They seem to reiterate the argument that the receiver was limited through this directive to the common areas and exterior of the units. But even if the unit owners had no authority under the Declaration over each other's units, the receiver's powers were not limited in the order of appointment with direction to the powers conferred under the Declaration. As already discussed, the order of appointment with direction gave the receiver broad powers over the property to be sold.

Additionally, the Priesners argue that the receiver did not comply with the court's directive to act as custodian of the Declaration for the benefit of all parties, because the receiver spent time and money on Starry's units, but not on the Priesners' unit. The Priesners do not assert, however, that their unit required any attention in order to maintain it until the sale or in order to make it sellable. Thus, we find no merit to this argument.

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[17] *Id.* at 21.

Finally, the Priesners take issue with the necessity of the repairs to one of Starry's units. The receiver had explained to the court that the unit contained water damage, extensively damaged drywall, and mold throughout. We find that the receiver's determination that these repairs were necessary to make the unit sellable was within the broad scope of the receiver's powers to act toward the ultimate goal of selling the condominium at a public sale.

In sum, the Priesners fail to set forth sufficient reasons for this court to reverse the district court's judgment that, in a public sale of the condominium as a whole, it was appropriate to pay from the singular proceeds of the sale work performed on one of the units with the purpose of ensuring that the property as a whole was sellable. While we sympathize with the Priesners' assertions that they should not have to subsidize Starry's neglect, that predicament fundamentally stems from the court's order to sell the property as a whole. As discussed, the issues we may reach in this appeal are limited by the Priesners' failure to timely challenge prior final orders. We also observe that the inequity claimed by the Priesners may still be addressed in a future hearing determining the distribution of the remaining sale proceeds.

CONCLUSION

For the foregoing reasons, we affirm the lower court's order confirming the public sale.

Affirmed.

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

Peter Zelenka, appellee and cross-appellant, v. Jason D. Pratte, appellant and cross-appellee.

912 N.W.2d 723

Filed June 1, 2018. No. S-17-086.

1. **Actions: Conversion: Replevin: Appeal and Error.** Actions for conversion and replevin are law actions. In an action at law tried to the bench, a district court's factual findings and disposition have the same effect as a jury verdict and will not be set aside unless clearly wrong.
2. **Replevin: Proof.** In a replevin case, the plaintiff has the burden to prove by a preponderance of the evidence that at the time of the commencement of the action (1) he was the owner of the property sought, (2) he was entitled to immediate possession of the property, and (3) the defendant wrongfully detained it.
3. **Gifts: Intent.** To make a valid inter vivos gift, there must be an intention to transfer title to property, delivery by the donor, and acceptance by the donee.
4. **Gifts: Proof.** The person asserting the gift must prove all the essential elements by clear, direct, positive, express, and unambiguous evidence.
5. **Gifts: Intent.** The donor must have a present donative intent and a clear and unmistakable intent to make a gift.
6. **Gifts.** Ordinarily, actual delivery is necessary where the subject of the gift is capable of manual delivery, but where actual manual delivery cannot be made, the donor may do that which, under the circumstances, will in reason be considered equivalent to actual delivery.
7. ____. Generally, the exercise by the donee of dominion over the property which is the subject of a gift, or an assertion of a right to the property by the donee, generally will constitute an acceptance.
8. ____. Ordinarily, for a gift to be delivered, it must be shown that the owner parted with dominion and control over the gift.
9. **Gifts: Parties.** Delivery of a gift can take place through a third party.
10. **Gifts.** The subsequent possession of a gift by the donor, while it may call for an explanation, is not necessarily incompatible with the donee's

dominion over the property, and will not necessarily operate to make the gift ineffectual.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed in part, and in part reversed and remanded with directions.

Ryan J. Lewis and Thomas C. Dorwart, of Govier, Katskee, Suing & Maxell, P.C., L.L.O., for appellant.

Jill M. Mason, of Kinney Mason, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Riedmann, Judge, and Martinez, District Judge.

Stacy, J.

Peter Zelenka filed this action against Jason D. Pratte, alleging Pratte was in possession of personal property belonging to Zelenka. The primary dispute involved a French bulldog, which Zelenka claimed he received as a gift from Pratte. After a bench trial, the district court found Zelenka proved the dog was a gift and ordered the dog be returned to Zelenka. With respect to the other items of personal property, the court found Zelenka had failed to meet his burden of proof. Pratte appeals, and Zelenka cross-appeals. We affirm in part, and in part reverse and remand with directions.

I. FACTS

Pratte and Zelenka were involved in a romantic relationship from 2010 until 2015. They lived together in a house owned by Pratte from July 2011 until they separated in June 2015. At that time, Zelenka moved out of the residence. He took only a few items of personal property with him, believing the move was temporary to allow the parties to work on their relationship.

When Zelenka returned the following week, he discovered Pratte had changed the locks on the house. Zelenka was unable to retrieve items of personal property he claims were his,

including home furnishings, electronics, housewares, and a French bulldog named "Princess Pot Roast," which the parties refer to as "Pavlov."

In March 2016, Zelenka filed a complaint against Pratte in the Douglas County District Court. The complaint primarily alleged a claim for conversion. Pratte filed an answer generally denying the allegations.

A 2-day bench trial was held in January 2017. The parties advised the court they had reached an agreement regarding certain items of personal property, and pursuant to that agreement, the court ordered those items returned to Zelenka. The parties presented evidence regarding the remaining disputed items of personal property. Most of the evidence focused on Pavlov.

1. Pavlov

Both parties claimed to be the owner of Pavlov. The evidence was uncontroverted that Pratte paid for Pavlov, but Zelenka claimed he was given Pavlov as a birthday gift. Pratte denied this. In support of Zelenka's claim that Pavlov was a gift, he offered his own testimony, testimony from his mother, and testimony from Pavlov's breeder.

Zelenka testified that several weeks before his birthday, Pratte surprised him by taking him to a local dogbreeder to pick out a puppy as a birthday gift. According to Zelenka, Pratte also gave him the option of waiting to select a puppy "if [he] wasn't ready." But after interacting with the puppies, Zelenka selected one and named it Pavlov. Zelenka did not take Pavlov home that day. Instead, he returned later, without Pratte, and took possession of the puppy.

Zelenka's mother also testified that her son received Pavlov as a birthday gift from Pratte. When asked how she knew the puppy was a birthday gift, Zelenka's mother testified Pratte told her so.

Pavlov's breeder was called as a witness. She testified that Pratte contacted her by telephone and said he was

looking for a puppy as a gift for his boyfriend. He said he wanted his boyfriend to choose the puppy. She scheduled a time for Pratte and Zelenka to come look at the litter of five puppies. Ultimately, Zelenka picked out the puppy that Pratte purchased. According to the breeder, she then had the puppy spayed and microchipped at a local veterinary clinic, after which Zelenka returned alone to pick up the puppy. At that time, the breeder provided Zelenka with the adoption contract, registration forms for the American Kennel Club, and photographs of the puppy. The breeder confirmed that it was her understanding the puppy was a gift from Pratte to Zelenka.

Pratte testified that he did not intend Pavlov to be a gift for anyone. According to Pratte, he contacted the breeder and told her he was looking for a companion dog for his other dog, a Labrador retriever. He then went to the breeder's house alone to assess whether any of her puppies would be a good companion for his dog. He acknowledged that he later returned to the breeder with Zelenka and allowed Zelenka to select a puppy. But Pratte claimed he had already assessed the puppies' temperaments to narrow the options, and he then allowed Zelenka to choose from those options, because he wanted Zelenka to feel included in his decision to add another dog to their household. Pratte testified that he paid for Pavlov, and the dog has always lived at his residence.

2. Other Personal Property

Both parties testified about the various other items of personal property in dispute. These included a "Dyson animal vacuum," a couch, a shelf, table lamps, outdoor pots, a deep freezer, several souvenirs from Africa, paintings, and patio furniture. Zelenka testified that he purchased each of these items for his personal use and not as a gift for Pratte. He testified about where and why the items were purchased and how he paid for them. He often used cash and had very little documentation to demonstrate ownership or proof of

purchase. Pratte generally offered contradictory testimony and documentation as to the purchase and ownership of the other items of property. He admitted Zelenka paid for a few of the disputed items, but claimed Zelenka purchased the items as gifts for him.

3. District Court Order

At the close of the evidence, the district court ruled from the bench. Regarding Pavlov, the court expressly found the testimony of Zelenka was more credible and was corroborated by the testimony of the breeder and Zelenka's mother. The court found Zelenka had "sustained his burden of proof that . . . Pavlov was a gift" from Pratte and ordered Pratte to return Pavlov to Zelenka within 48 hours. As to the other items of personal property, the district court found Zelenka had failed to meet his burden of proof and ordered the property to remain with Pratte.

The court subsequently entered judgment in accordance with its ruling from the bench and ordered each party to pay his own attorney fees and costs. Pratte timely appealed, and Zelenka cross-appealed.

II. ASSIGNMENTS OF ERROR

Pratte assigns the district court erred in finding Zelenka met his burden of proving Pavlov was a gift. On cross-appeal, Zelenka assigns the district court erred in finding he failed to meet his burden of proof with respect to the other items of personal property.

III. STANDARD OF REVIEW

[1] Actions for conversion and replevin are law actions.[1] In an action at law tried to the bench, a district court's factual

[1] See, *Gallner v. Larson*, 291 Neb. 205, 865 N.W.2d 95 (2015) (conversion); *Allemang v. Kearney Farm Ctr.*, 251 Neb. 68, 554 N.W.2d 785 (1996) (replevin).

findings and disposition have the same effect as a jury verdict and will not be set aside unless clearly wrong.[2]

IV. ANALYSIS

1. Conversion or Replevin

Before addressing the parties' assignments of error, it is necessary to clarify the nature of the action tried to the court. Zelenka's complaint styled his action as one for conversion, but both parties tried the action as one seeking replevin. Generally, the measure of damages for conversion is the fair market value of the converted property at the time and place of the conversion,[3] while the object of a replevin action is to recover specific personal property.[4]

Here, although the complaint was not styled as one for replevin, the parties tried the case as one seeking the return of specific personal property and neither party offered evidence regarding the fair market value of the disputed property. Throughout the trial, and in closing argument, Zelenka specifically asked the trial court for the immediate return of the personal property, including Pavlov. Pratte did not object that replevin relief was being sought, and on appeal, he does not assign error to the nature of the relief ordered by the court.

Because the parties and the trial court treated this action as one for replevin, it would have been preferable for Zelenka to move to conform the pleadings to the evidence. But under Nebraska's pleading rules, his failure to formally seek amendment is not dispositive.

Neb. Ct. R. Pldg. § 6-1115(b) provides in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be

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[2] See *id.*

[3] NJI2d Civ. 4.27.

[4] *Pinnacle Bank v. Darlan Constr. Co.*, 270 Neb. 978, 709 N.W.2d 635 (2006). See, also, Neb. Rev. Stat. § 25-1093 (Reissue 2016).

> treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Here, despite styling the complaint as one for conversion, the parties tried the action as one for replevin and treated the case in all respects as if replevin had been raised in the pleadings. We conclude the parties impliedly consented to try this action as one for replevin, and pursuant to § 6-1115(b), we therefore treat this action as one in which replevin was raised in the pleadings.[5]

[2] In a replevin case, the plaintiff has the burden to prove by a preponderance of the evidence that at the time of the commencement of the action (1) he was the owner of the property sought, (2) he was entitled to immediate possession of the property, and (3) the defendant wrongfully detained it.[6]

2. Pavlov

In this case, Zelenka claimed Pavlov was his personal property, gifted to him by Pratte. Zelenka further claimed that after he moved out of Pratte's house, Pratte wrongfully refused to return Pavlov to him. The district court found Zelenka proved Pavlov was a gift from Pratte. On this record, we agree.

[3,4] To make a valid inter vivos gift, there must be an intention to transfer title to property, delivery by the donor, and acceptance by the donee.[7] The person asserting the gift must prove all the essential elements by clear, direct, positive,

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[5] See *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 815, 708 N.W.2d 235, 243 (2006) ("[e]ven when a party does not move for leave to amend pleadings, a court may constructively amend pleadings on unpleaded issues in order to render a decision consistent with the trial").

[6] *Packett v. Lincolnland Towing*, 227 Neb. 595, 419 N.W.2d 149 (1988).

[7] See *Ferer v. Aaron Ferer & Sons Co.*, 273 Neb. 701, 732 N.W.2d 667 (2007).

express, and unambiguous evidence.[8] We address each element in turn.

(a) Donative Intent

[5] The donor must have a present donative intent and a clear and unmistakable intent to make a gift.[9] Here, the breeder from whom Pavlov was purchased testified that Pratte contacted her about purchasing a puppy as a gift for his boyfriend. Zelenka and his mother both testified that Pavlov was given to Zelenka as a birthday gift from Pratte. Although Pratte denied Pavlov was a gift, the district court expressly found Zelenka's testimony on this issue was more credible and was corroborated by the testimony of the breeder and Zelenka's mother. On this record, there is clear and unmistakable evidence of Pratte's donative intent.

(b) Delivery and Acceptance

[6,7] Ordinarily, actual delivery is necessary where the subject of the gift is capable of manual delivery, but where actual manual delivery cannot be made, the donor may do that which, under the circumstances, will in reason be considered equivalent to actual delivery.[10] And generally, the exercise by the donee of dominion over the property which is the subject of a gift, or an assertion of a right to the property by the donee, generally will constitute an acceptance.[11]

[8] Here, the evidence shows that both delivery and acceptance of the gift occurred when Zelenka picked Pavlov up from the breeder and took possession of the dog. Ordinarily, for a gift to be delivered, it must be shown that the owner parted with dominion and control over the gift.[12] But in this case, the

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[8] *Id.*

[9] See *id.*

[10] *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

[11] 38 Am. Jur. 2d *Gifts* § 28 (2010).

[12] *Id.*, § 19.

breeder, and not Pratte, had dominion and control over Pavlov before the gift was made.

[9] We have recognized that delivery can take place through a third party,[13] and here, the evidence was uncontroverted that once Pavlov was ready to be adopted, the breeder relinquished possession directly to Zelenka and gave Zelenka the necessary paperwork to prove ownership of Pavlov. Zelenka accepted both the dog and the paperwork and thereafter generally held himself out as the owner of the dog.

[10] Pratte argues there was insufficient evidence of delivery and acceptance, because it was uncontested that after Zelenka took possession of Pavlov, he kept the dog at Pratte's house. But this fact is not incompatible with Zelenka's dominion and control over Pavlov, especially since Zelenka moved from an apartment into Pratte's home shortly thereafter. This court has recognized that the subsequent possession of a gift by the donor, while it may call for an explanation, is not necessarily incompatible with the donee's dominion over the property, and will not necessarily operate to make the gift ineffectual.[14] Here, the fact that Pavlov was kept at Pratte's home after the gift was made is adequately explained by the fact that, for much of the relevant time period, Pratte and Zelenka were living together as a couple. We reject Pratte's suggestion that this fact operates to make the gift ineffectual.

We conclude Zelenka met his burden of proving Pavlov was a gift from Pratte. Pratte's assignment of error to the contrary is without merit.

3. Cross-Appeal Regarding Other Personal Property

As noted, the parties both offered testimony as to the other items of personal property. The district court found Zelenka failed to meet his burden of proof as to these items. After

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[13] See *Kennedy v. Nelson*, 125 Neb. 185, 249 N.W. 546 (1933).

[14] *Id.*

reviewing the evidence adduced and testimony received, we affirm in part, and in part reverse and remand with directions.

(a) Niche Couch, Niche Table Lamps, and French Bulldog Lamp

Zelenka testified that during the relationship, he purchased a leather couch and two table lamps from a store named "Niche," and he purchased a French bulldog table lamp from a national retail store. Zelenka testified he purchased these items for his own use, and not as gifts for Pratte.

Pratte agreed Zelenka purchased these items. He testified, however, that all of the items were gifted to him by Zelenka. Regarding the Niche lamps and the French bulldog lamp, Pratte offered no evidence going to the essential elements of donative intent, acceptance, or delivery. Because the undisputed evidence was that these lamps were purchased by Zelenka, and because Pratte failed to adduce evidence of the essential elements to support his claim they were gifts, the district court erred in finding Zelenka failed to meet his burden of proof with respect to these three lamps.

In support of his claim that the leather couch was a gift from Zelenka, Pratte offered, and the court received, exhibit 27. That exhibit is a printout of a social media post made by Pratte in October 2012. The post includes a photograph of a fully furnished living room with a leather couch, side chairs, a coffee table, an entertainment center, and related furnishings. The caption to this post reads "Early birthday surprise!!! Check out this amazing f**king living room!!! Love you Peter Zelenka!" The string of responses to this post includes one from Zelenka stating, "Its not quite finished but its a good start!" According to Pratte, these social media comments were referencing the fact that Zelenka had redecorated their living room as a birthday surprise for Pratte.

As the one claiming the leather couch was a gift, Pratte had the burden to prove the essential elements of donative intent, delivery, and acceptance by clear, direct, positive, express, and

unambiguous evidence.[15] Here, the social media posting and Pratte's limited testimony about it were insufficient to establish the leather couch was a gift. Pratte conceded as much on cross-examination when he admitted that Zelenka's comment in exhibit 27 "doesn't acknowledge intent, delivery, and acceptance" regarding the leather couch.

On this record, we conclude Pratte failed to meet his burden of proving the Niche leather couch, the Niche lamps, and the French bulldog lamp were gifts. Because the evidence was uncontroverted that Zelenka purchased these items and that Pratte refused to return them, the trial court erred in concluding Zelenka had failed to meet his burden of proof. Consistent with the manner in which the parties tried this case, these three items should be returned to Zelenka.

(b) Other Items of Personal Property

We agree that Zelenka failed to meet his burden of proof with respect to the other items of personal property. The record shows the parties offered contradictory evidence with respect to the ownership of these other items of property, each asserting he was the respective purchaser. For example, Zelenka adduced evidence that his mother gave him $500 to purchase a Dyson animal vacuum and that he did so, but Pratte had a receipt demonstrating he purchased a Dyson animal vacuum. Zelenka testified he purchased patio furniture with cash and put it together without Pratte's knowledge, while Pratte testified he purchased the patio furniture, Zelenka was with him at the time of purchase, and they worked together to construct the furniture. Zelenka testified he purchased the African souvenirs with cash, while Pratte produced a receipt indicating he had purchased the souvenirs. Contradictions appear in the evidence with respect to all the other items of personal property as well.

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[15] *Ferer v. Aaron Ferer & Sons Co., supra* note 7.

The district court's findings in this case have the same effect as a jury verdict and will not be set aside unless clearly wrong.[16] Due to the contradictory nature of the evidence regarding the other items of personal property, there is no basis on which to set aside the district court's finding that Zelenka failed to meet his burden of proving ownership.

V. CONCLUSION

For the foregoing reasons, we affirm in part, and in part reverse and remand with directions to enter judgment consistent with this opinion.

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

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[16] See *Gallner v. Larson, supra* note 1.

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

State of Nebraska, appellee, v. Sydney L. Thieszen, appellant.

912 N.W.2d 696

Filed June 1, 2018. No. S-17-539.

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: Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.
4. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
5. **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.
6. **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.

7. ____. 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 York County: James C. Stecker, Judge. Affirmed.

Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Vaughan, District Judge.

Cassel, J.

I. INTRODUCTION

A court sentenced Sydney L. Thieszen to life imprisonment for a murder he committed at age 14. Pursuant to *Miller v. Alabama*,[1] Thieszen obtained postconviction relief. The court resentenced Thieszen to 70 years' to life imprisonment. Because we find no abuse of discretion by the court, we affirm Thieszen's sentence.

II. BACKGROUND

1. Crime and Direct Appeal

The facts and circumstances pertaining to Thieszen's crimes are set out in greater detail in our decision resolving his direct appeal.[2] In 1987, 14-year-old Thieszen shot and killed

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[1] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

[2] See *State v. Thieszen*, 232 Neb. 952, 442 N.W.2d 887 (1989).

his 12-year-old sister, Sacha L. Thieszen. The State charged Thieszen with first degree murder and use of a firearm in the commission of a felony. Pursuant to a plea bargain, Thieszen pled guilty to second degree murder and the use of a firearm charge. In 1988, the district court imposed a sentence of life imprisonment for second degree murder and a consecutive sentence of 80 to 240 months' imprisonment for the firearm conviction.

On appeal, Thieszen claimed that the district court abused its discretion in refusing to transfer his case to juvenile court and in imposing an excessive sentence on the firearm charge. We disagreed. We recognized that there was evidence Thieszen could possibly be successfully rehabilitated during the approximately 4 years that the juvenile court maintained jurisdiction over him, but that the record also supported the court's findings that the crime was violent and that Thieszen may require treatment beyond the age of majority.[3] We noted that the sentence for the firearm conviction was within the statutory limits, and we could not say that the court abused its discretion in imposing it.[4]

2. First Postconviction and Retrial

In 1994, Thieszen filed a motion for postconviction relief, alleging that the operative information was defective because it failed to allege he acted with malice. The district court sustained the motion and vacated Thieszen's convictions.

The State then filed a second amended information which charged Thieszen with first degree murder and use of a firearm to commit a felony. A jury convicted Thieszen of the charges. The court again imposed sentences of life imprisonment for the murder conviction and a consecutive term of 80 to 240 months' imprisonment for the use of a firearm conviction.

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[3] See *id.*

[4] See *id.*

3. Second Postconviction

(a) Initial Proceedings

In 2013, Thieszen filed a motion for postconviction relief pursuant to the decision in *Miller*.[5] The district court vacated Thieszen's life sentence, and the State appealed. We affirmed the judgment and remanded the cause for resentencing.[6]

(b) Mitigation Hearing

In March 2017, the district court received extensive evidence during a mitigation hearing.

Thieszen was born into an abusive environment. His natural mother was an alcoholic. On one occasion while she was intoxicated, she tried to burn Thieszen's eyes out with a lighter. She stomped on him at one time. When Thieszen was 2 or 3 years old, she threw him in a swimming pool. She tried to run his hand through a meat grinder. Thieszen's natural mother also smashed his toys as punishment and locked him in closets. When Thieszen was approximately age 4, he was removed from his natural mother's custody due to abuse and neglect.

After multiple foster care placements, Thieszen was placed with Edwin and Joyce Thieszen. Edwin and Joyce adopted Thieszen when he was 9 years old. At that time, Edwin and Joyce had three biological children and two other adopted children. Initially, Thieszen wanted to keep his distance from the family. But after approximately 1 year, he became very lovable and outgoing.

Although Edwin and Joyce offered a stable and structured environment, it may not have been a nurturing one. A doctor who evaluated Thieszen in connection with the adoption process expressed some reservation that the family's strong religious beliefs may be too restrictive for a child with Thieszen's background. Edwin and Joyce believed in corporal punishment

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[5] *Miller v. Alabama, supra* note 1.

[6] See *State v. Thieszen*, 295 Neb. 293, 887 N.W.2d 871 (2016).

for rule violations. Edwin testified that he spanked the children when no other punishment worked and that he used his hand, a belt, a hose, or "whatever was handy."

When Thieszen was 12 years old, there was "a sudden drastic change in his behavior." His report cards reflected much lower grades, he ceased performing his chores properly, and he began shooting holes in the family's buildings and machinery. In January 1986, Thieszen began seeing Sandra Kroeker, a counselor, due to concerns about his poor grades and dishonesty. Kroeker felt that there was a great correlation between Thieszen's adolescent behavior and the abusive relationship Thieszen had with his natural mother. Kroeker diagnosed Thieszen with a conduct disorder. She testified that Thieszen was immature in his ability to formulate and maintain relationships, to express himself, to engage in effective decisionmaking, and to control impulses.

In December 1986, the family learned that Thieszen had been sexually molesting one of the family's foster children. After that point, Thieszen did not feel loved or wanted by his family. And he felt ostracized at school because the children there knew of his sexual assault on his foster sister.

There was also evidence of voyeuristic behavior. One of Thieszen's sisters testified that she noticed him watching her as she sunbathed. He pried open the doorjamb on the bathroom and would consistently be outside the bathroom door while she was showering or changing. At one point, Thieszen entered her bedroom during the middle of the night and lifted her bed covers.

By the time Thieszen was 13 or 14 years old, he did not have a good relationship with Joyce. He did not feel comfortable discussing issues with her. One of Thieszen's classmates testified that Thieszen often spoke about killing Joyce.

On the day of the murder, Thieszen wanted to run away from home because he knew he was going to be punished for a wrongdoing. When Sacha tried to stop Thieszen, he hit her with a wooden rod, which caused bleeding. Sacha ran up

the stairs to the bathroom, and as she was leaning over the sink, Thieszen shot her in the back of the head. He put her body in the bathtub and shot her twice more. Thieszen then took the family's van and left. He was apprehended in Kansas days later.

The court received the testimony of two psychiatrists that had been offered in connection with Thieszen's request to transfer his criminal case to juvenile court. One psychiatrist opined that Thieszen was competent to stand trial and that he was sane at the time of the offense. He found significance in the type of abuse that Thieszen had experienced as a very small child and the number of foster homes that he had been in prior to adoption. He testified that Thieszen had a conduct disorder, meaning that he displayed behavior that was not socially acceptable. The other psychiatrist, who interviewed Thieszen in December 1987, testified that Thieszen was not psychotic and was of average to slightly above-average intelligence.

Dr. Kayla Pope, a board-certified child and adolescent psychiatrist, testified at the mitigation hearing. She testified that neuroscience research demonstrated that adolescent brains were different from adult brains. Adolescent brains were in "developmental transition" and were "characterized by novelty seeking, risk taking, poor judgment and increased submission to peer pressure." Pope explained that the prefrontal cortex, which was the last part of the brain to develop, was the part of the brain that overrides impulsive behavior and allows the weighing of the risks and benefits of the decisions one makes. Pope testified that there are significant differences between the brains of a 14-year-old and a 17-year-old. According to Pope, adolescents "are thinking in the moment" and lack the ability to see the long-term consequences of their actions.

Pope testified that high levels of stress can impact brain development. Early trauma would impair a child's developmental process. According to Pope, abuse by Thieszen's natural mother would interfere with the formation of a secure

attachment and would make Thieszen "untrusting" and "emotionally and behaviorally very disregulated not knowing how to respond to his environment." Pope testified that Thieszen's early trauma and multiple placements in foster care affected "how he would see the world and how he would respond to the world." And due to Thieszen's experience of being abused by his natural mother, Pope testified that corporal punishment would be very inappropriate and would likely bring up prior trauma and "make [Thieszen] more reactive as opposed to helping him calm down and think through the situation."

Pope reported that there was ample evidence that Thieszen was impetuous beyond what was normal for his chronological age. She testified that Thieszen was very immature, impulsive, and unable to calm himself at the time of the murder. Pope believed Thieszen was behaving in an impulsive way at the time of the murder and that he did not appreciate the consequences of what he was doing. She reported that Thieszen "struggled to modify his behavior in light of the consequences he faced." She noted that Edwin stated Thieszen would repeatedly misbehave and would say that he did not know why he did the things he did. As to Thieszen's intellectual capacity, Pope testified that he had a very high IQ. But she explained that intelligence is the ability to know things and to figure things out; it is not a marker for development or maturity.

Pope performed a comprehensive mental health evaluation. With regard to Thieszen's prenatal history, Pope had concern that his natural mother may have used drugs and alcohol while pregnant, which would impact Thieszen's brain development and behavior. She testified that Thieszen had no significant medical history and no substance abuse history prior to the murder.

Pope testified that Thieszen had many infractions during his first few years in prison, but that there was a "precipitous drop" in those infractions as he aged. She saw no evidence that Thieszen engaged in aggression or violent sexual

behavior while incarcerated. Pope testified that Thieszen did not meet criteria for any mental health issue. She did not believe Thieszen had an antisocial personality disorder, stating that there was no evidence of any antisocial behavior in the past 30 years. Pope testified that Thieszen had earned his diploma through the GED program, had taken additional coursework, and had been helping other inmates with their academic pursuits. Although there was evidence that Thieszen had engaged in substance abuse while in prison, his last infraction for it was in 2000. Pope testified that Thieszen had over 200 misconduct reports, but that many were for minor violations, such as tattooing activities or having items not permitted in his cell. Records showed that as of January 18, 2017, Thieszen had only four misconduct reports in the previous 5 years. Of those reports, the most serious offense was possessing or receiving unauthorized articles, for which Thieszen received 7 days of room restriction.

Pope testified that Thieszen had formed several significant relationships that he had kept for several years. This demonstrated his ability to form a support network and to cultivate relationships that would help sustain him in the community. And Pope testified that it was remarkable Thieszen had such ability, because he had difficulty forming attachments early in development, and that his ability to form such relationships now is an indication of his emotional maturity. Pope testified that Thieszen expressed remorse for the crime.

Dr. Kirk Newring performed a psychological evaluation of Thieszen. On a diagnostic tool to assess violence risk and psychopathy, Thieszen scored a 12, which was higher than the community average of 6, but lower than the typical inmate score of 22. Newring testified that individuals with scores below 20 typically are not considered psychopathic. Newring administered a personality inventory, which did not reveal any major mental health problems. A tool to measure intelligence showed that Thieszen had an average to above-average IQ. Based on a violence risk assessment, Newring placed Thieszen

at a low risk for future acts of violence. A violence risk assessment tool showed that Thieszen "had some protective factors present, which is predictive of a favorable response to community transition." Those factors were intelligence, empathy, coping skills, and self-control.

Newring's diagnostic impressions were adjustment disorder with anxiety and antisocial personality disorder. Newring explained that Thieszen met the criteria for a diagnosis of antisocial personality disorder but cautioned that Thieszen had not shown any of that criteria in the last decade.

Newring did not administer any sex offender assessment tools because Thieszen, from the age of 18, had no sex-related misconduct reports or charges. According to Newring, Thieszen reported engaging in physical intimacies with female staff members over the course of his incarceration. Newring testified that those relationships would be potentially unhealthy if they were still occurring, but that Thieszen described them as "historical."

In 2014, Newring administered a self-report measure to assess the likelihood of substance abuse dependence. Based on the testing, Newring had concerns that Thieszen would meet criteria for cannabis use disorder.

Newring testified that Thieszen expressed remorse, regret, and sorrow for his crime. According to Newring, Thieszen "was likely in a very emotionally aroused situation and not able to do rational, cognitive thinking that we would expect to see in a cold logic situation." Newring explained that an emotionally aroused 14-year-old is different from a coldly logical 14-year-old and that a 14-year-old is much different from an 18-year-old. Newring asked Thieszen what, if anything, would he change, and Thieszen answered that he would have told the judge he did not want to be adopted by Edwin and Joyce.

A corrections officer at the prison who sees Thieszen on nearly a daily basis testified that Thieszen was "[p]robably" a good inmate. According to the officer, Thieszen did not cause trouble and was respectful to corrections officers and other

inmates. The officer further testified that Thieszen "just always does everything he's supposed to do" and that "[i]f you tell him to do something, he does it." According to the officer, Thieszen knits, crochets, exercises, and paints. He testified that Thieszen has many visitors. Five individuals wrote letters in strong support of Thieszen. A few of those individuals attached pictures of Thieszen's artwork and craftwork.

(c) Resentencing

At the time of resentencing, Thieszen was 44 years old and had been incarcerated since 1987. Before imposing a sentence, the court addressed the factors set forth in Neb. Rev. Stat. § 28-105.02(2) (Reissue 2016). The court sentenced Thieszen to 70 years' to life imprisonment for first degree murder, to be served consecutively to the sentence he was currently serving of 80 to 240 months' imprisonment for the firearm conviction.

Thieszen filed a timely appeal.

III. ASSIGNMENTS OF ERROR

Thieszen assigns, reordered, that the district court abused its discretion in (1) failing to strike certain letters from the presentence report, (2) allowing improper victim impact testimony at the sentencing hearing, (3) imposing an excessive sentence, (4) imposing a de facto sentence of life imprisonment without parole in the absence of a finding of irreparable corruption, and (5) imposing a disproportionate sentence upon him.

IV. 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.[7] 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.[8]

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[7] *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018).

[8] *Id.*

V. ANALYSIS

1. Letters in Presentence Report

During the resentencing hearing, Thieszen's counsel asked that a number of letters in the presentence report be stricken. He did not believe it was appropriate for the court to receive letters from anonymous sources, and the court responded that it would not consider anonymous letters. Thieszen's counsel also requested that the court not consider specific information in letters that was baseless or inflammatory. The court stated that it would give such a letter "the weight and credibility that it's due and disregard any portions not supported by the record."

On appeal, Thieszen argues that the court abused its discretion by overruling his objections to letters which were submitted by anonymous sources, which contained baseless information, or which were intended to intimidate the judge and encourage the imposition of an inappropriate sentence. We disagree for two main reasons.

First, to some extent, the court granted the relief Thieszen requested. The court stated that it would not consider unsigned letters. The presentence report shows that the court struck a number of letters. With regard to letters to which Thieszen objected but which the court did not strike, the court stated that it would give each letter the weight and credibility it was due and that it would disregard portions that were not supported by the record.

[3] Second, a sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.[9] We cannot say that the court abused its broad discretion in declining to strike all of the letters to which Thieszen objected.

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[9] *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

2. Victim Impact Testimony

The State informed the court that one of Thieszen's sisters wished to read a letter to the court under Neb. Rev. Stat. § 81-1848 (Cum. Supp. 2016). Thieszen's counsel objected on the basis that the sister is not a "victim" under the statute. But the court stated that it would "give her an opportunity to read her letter as an immediate family member."

A statute sets forth rights for victims of crimes.[10] Such a victim has the right to submit a written impact statement at sentencing or to read his or her impact statement at sentencing.[11] But the statute gives such rights to "victims" as defined by Neb. Rev. Stat. § 29-119 (Reissue 2016). Under § 29-119(2)(b), a victim in the case of a homicide is "the nearest surviving relative under the law as provided by section 30-2303 but does not include the alleged perpetrator of the homicide."

Thieszen contends that the court abused its discretion in allowing improper victim impact testimony. Because Thieszen's parents are alive, Thieszen contends that they, but not his sister, had the right to read their impact statements at sentencing.

We rejected a similar challenge in *State v. Galindo*.[12] In that case, the defendant objected to victim impact statements on the ground that not all of the family representatives qualified as a "nearest surviving relative" under § 29-119. The sentencing court overruled the objection, and we found no error. We stated: "The definition of 'victim' upon which [the defendant] relies merely provides for a baseline right, under the [Nebraska Crime Victim's Reparations Act], to give a victim impact statement. The [act] does not seek to limit the sentencing court's traditional discretion to consider evidence from a variety of sources."[13] Because we continue to believe this

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[10] See § 81-1848.

[11] See § 81-1848(1)(d)(vii).

[12] *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

[13] *Id.* at 670, 774 N.W.2d at 245.

reasoning is sound, we decline Thieszen's invitation to overrule that aspect of *Galindo*.

The court did not abuse its discretion in allowing an oral statement from Thieszen's sister. The State advised the court that the victims as defined in § 29-119—i.e., Edwin and Joyce—"are elderly, they live out of state and for various reasons don't want to participate in the process." It was not untenable for the court to allow the victims' daughter to be heard instead. This assignment of error lacks merit.

3. Excessiveness of Sentence

Thieszen's primary complaint on appeal is that his sentence is excessive for various reasons. The court imposed a sentence of 70 years' to life imprisonment. The sentence is within the statutory limits of 40 years' to life imprisonment.[14] But Thieszen contends that the court abused its discretion in imposing the sentence.

Thieszen begins by comparing his sentence to that imposed in *State v. Jackson*.[15] In that case, the victim died of multiple gunshot wounds. The State filed identical informations against the defendant and two others, charging each with first degree murder and use of a deadly weapon during the commission of a felony. At the time of the murder, the defendant was nearly 18 years old. A jury found the defendant guilty of murder but not guilty of the weapon charge, and the court imposed a sentence of life imprisonment. Because the defendant was under 18 years old at the time of the murder, he was later resentenced to 60 to 80 years' imprisonment. Thieszen points out that he was younger than the defendant in *Jackson*, but that the defendant in *Jackson* received a lesser sentence.

[4] The lesser sentence imposed in *Jackson* does not persuade us that Thieszen's sentence constitutes an abuse of discretion. Significantly, there were questions about the defendant's

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[14] See § 28-105.02(1).

[15] *State v. Jackson*, 297 Neb. 22, 899 N.W.2d 215 (2017).

level of participation in *Jackson*. Here, there is no dispute that Thieszen murdered Sacha. But more importantly, we do not "'color match'" sentences.[16] It would be virtually impossible to find two murder cases which are the same in all respects.[17] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[18] The fact that a different offender with a different background received a lesser sentence for a crime committed under different circumstances does not mean that Thieszen's sentence was excessive.

[5-7] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[19] 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.[20] Because Thieszen 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

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[16] See *State v. Ellis*, 281 Neb. 571, 613, 799 N.W.2d 267, 302 (2011).

[17] *Id.*

[18] *State v. Castaneda*, 295 Neb. 547, 889 N.W.2d 87 (2017), *cert. denied* 583 U.S. 835, 138 S. Ct. 83, 199 L. Ed. 2d 54.

[19] *State v. Russell, supra* note 7.

[20] *Id.*

of a comprehensive mental health evaluation of the defendant conducted by an adolescent mental health professional licensed in Nebraska.[21]

The district court considered the pertinent sentencing factors. It recognized that Thieszen was 14 years old at the time of the offense and that at the time of resentencing, he was divorced and had employment through "prison industries." In considering factors under § 28-105.02(2), the court acknowledged that evaluations showed Thieszen was impetuous and immature at the time of the offense. However, the court noted that Thieszen purchased shells prior to the crime and that because his gun had been taken away from him, there "was no valid reason for [him] to purchase or possess shells except to carry out previous threats to [his] family." The court observed that Thieszen's natural mother was abusive and that he was raised in an abusive environment until age 4. The court stated that Edwin and Joyce raised Thieszen in a structured environment, that they disciplined Thieszen to correct his behavior, but that Thieszen did not modify his behavior after being caught doing something wrong. The court noted that Thieszen had above-average intellectual capacity. It recognized that Thieszen had never been hospitalized for any mental health reason and that Newring indicated Thieszen was well adjusted. We cannot say that the court abused its discretion in its assessment of the factors.

We are cognizant of factors militating against Thieszen's culpability for the crime. According to Pope, Thieszen's traumatic early childhood likely influenced his emotional and cognitive development. There was evidence that Thieszen was struggling mentally and emotionally prior to the murder and that the only treatment provided was occasional therapy sessions. According to Pope, "these factors would have interfered with [Thieszen's] ability to make rational decisions, appropriately consider risks and consequences, and to regulate his

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[21] See *id.*

behavior and impulses above and beyond the limitations that are associated with adolescence." Pope observed that over time, Thieszen had taken on the roles of teacher and advisor to other inmates and to the social network he had formed outside of prison. These factors support the imposition of a minimum sentence that is less than life imprisonment. The court, by setting the minimum sentence at 70 years, imposed such a sentence.

Thieszen also claims that his sentence amounted to a de facto life sentence and that such a sentence was disproportionate to the offense. According to Thieszen, his sentence of 70 years' to life imprisonment means he will not be parole eligible until age 53 and, if paroled, he will be on parole for the rest of his life. But the sentence provides Thieszen with a "meaningful and realistic opportunity to obtain release."[22] We have rejected similar claims that a lengthy term-of-years sentence was a de facto sentence of life imprisonment,[23] and we see no reason to revisit that conclusion here.

VI. CONCLUSION

We conclude that the district court did not abuse its discretion in overruling Thieszen's objections to letters in the presentence report, in allowing Thieszen's sister to read her victim impact statement at the sentencing hearing, or in imposing the sentence. We therefore affirm Thieszen's murder sentence of 70 years' to life imprisonment.

Affirmed.

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[22] *State v. Smith*, 295 Neb. 957, 979, 892 N.W.2d 52, 66 (2017), *cert. denied* 583 U.S. 915, 138 S. Ct. 315, 199 L. Ed. 2d 208.

[23] See, *State v. Russell, supra* note 7; *State v. Smith, supra* note 22.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

David LeRette, Jr., individually and as owner of Master Blaster, Inc., appellants and cross-appellees, v. Steven H. Howard and Dowd, Howard & Corrigan, L.L.C., appellees and cross-appellants.

912 N.W.2d 706

Filed June 1, 2018. No. S-17-580.

1. **Jurisdiction: Appeal and Error.** Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.
2. **Judgments: Verdicts: Appeal and Error.** Review of a ruling on a motion for judgment notwithstanding the verdict is de novo on the record.
3. **Trial: Appeal and Error.** The standard of review of a trial court's determination of a request for sanctions is whether the trial court abused its discretion.
4. **Actions: Parties.** The purpose of Neb. Rev. Stat. § 25-301 (Reissue 2016) is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause.
5. **Actions: Parties: Public Policy.** Neb. Rev. Stat. § 25-301 (Reissue 2016) discourages harassing litigation and keeps litigation within certain bounds in the interest of sound public policy.
6. **Actions: Parties: Standing.** The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of controversy. The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
7. **Actions: Pleadings: Parties.** The character in which one is a party to a suit, and the capacity in which a party sues, is determined from the allegations of the pleadings and not from the caption alone.

8. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all 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.
9. ____: ____. 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.
10. **Attorneys at Law: Attorney Fees: Conflict of Interest.** An attorney who violates established rules of professional conduct and performs services despite a conflict of interest may not receive compensation for such services.
11. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is clearly against justice or conscience, reason, and evidence, or when the decision unfairly deprives the litigant of a substantial right or a just result.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Affirmed as modified.

Ronald J. Palagi and Donna S. Colley, of Law Offices of Ronald J. Palagi, P.C., L.L.O., and Kathy Pate Knickrehm for appellants.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Steinke, District Judge.

Steinke, District Judge.

NATURE OF CASE

The jury found in favor of the plaintiffs on a claim for legal malpractice and fraudulent misrepresentation and awarded $775,000. After trial, the district court overruled the plaintiffs' motion for sanctions and partially granted the defendants' motion for judgment notwithstanding the verdict (JNOV),

reducing the damages to $235,968.78. The plaintiffs appeal, and the defendants cross-appeal, challenging the district court's subject matter jurisdiction.

BACKGROUND

In November 2013, David LeRette, Jr., individually and as the owner of Master Blaster, Inc., filed a complaint against Steven H. Howard and his law firm, alleging, among other things, that Howard committed legal malpractice and breached his duty as LeRette's attorney when he failed to advise LeRette of his conflicts of interest and when he acted adversely to LeRette's interests. A jury trial was held on the matter in early 2017. From the evidence presented, we adduce the following set of facts.

Master Blaster's Judgment Against Anderson

In 2006, LeRette sold certain assets of his business, Master Blaster, to Johnnie Anderson. Pursuant to the purchase agreement, Anderson executed a promissory note to Master Blaster for $350,000 with 12 percent annual interest. After three payments, Anderson defaulted on the note.

Master Blaster filed suit for the balance owed. During those proceedings, Master Blaster was represented by Sandra L. Maass.

Anderson then filed for bankruptcy. Master Blaster's suit against Anderson was stayed. In the bankruptcy proceeding, Master Blaster challenged the discharge of Anderson's debt to Master Blaster. The bankruptcy court ultimately granted Master Blaster's request after finding that omissions and misstatements in Anderson's schedules and statements of financial affairs were inaccurate, unreliable, and constituted intentional or reckless indifference to the truth. Thereafter, the stay was lifted from Master Blaster's suit against Anderson. In 2009, Master Blaster secured a judgment against Anderson for $470,020.39 plus interest.

Legal Malpractice Action Against Anderson's Bankruptcy Attorneys

LeRette's bankruptcy attorney thought Anderson's bankruptcy attorneys may have been negligent in their representation of Anderson and suggested to LeRette that Anderson could pursue a legal malpractice claim against them in order to generate funds that could be used to satisfy his debt to Master Blaster. Based on this information, LeRette contacted Maass, who told LeRette that she thought her former classmate, Howard, might be able to help.

With LeRette's approval, Maass called Howard to discuss the matter. Howard indicated that he was interested in the case. Thereafter, Maass gave Howard's contact information to LeRette, who then called Howard.

After talking to Howard, LeRette contacted Anderson and asked him if he was interested in pursuing a legal malpractice claim against his bankruptcy attorneys. Anderson indicated that he was, and LeRette and Anderson met at a fast food restaurant to discuss it. According to LeRette, he told Anderson that he would hire the attorney.

LeRette then called Howard and scheduled a meeting in Howard's law office for May 1, 2009. Howard told LeRette to bring Anderson, which he did. At the meeting, Howard advised LeRette and Anderson that any proceeds from the suit would be used to satisfy the judgment against Anderson. Howard advised LeRette not to execute on the judgment against Anderson, because it would make the case more difficult for Howard. LeRette did not execute on the judgment. According to LeRette, Howard told him that he could not be named in the malpractice action, because malpractice suits cannot be assigned. But Howard represented that the suit would be successful and that LeRette would "get [his] money and get paid."

Howard filed the legal malpractice claim against the bankruptcy attorneys in October 2009.

Mediation and Settlement Agreement

In March 2012, a mediation of the legal malpractice suit against Anderson's bankruptcy attorneys occurred. Howard, LeRette, and Anderson were all present. According to LeRette, he met with Howard before the mediation to discuss what settlement amounts might be acceptable. The mediation ultimately reached an impasse.

Thereafter, the mediator issued a proposal in which he recommended that the parties settle for $350,000, with Anderson to receive $0, LeRette to receive $300,000, and Howard to receive $50,000 for his fees. The proposal was not accepted.

On July 23, 2012, without discussing the matter with LeRette, Howard settled the legal malpractice action for $350,000. Howard deposited the settlement proceeds into his firm's trust account and dispersed $235,964.78 to Anderson, retaining the remaining $114,035.22 in payment of his fees and expenses. Anderson did not pay LeRette, and LeRette never received any of the settlement proceeds.

According to LeRette, he stopped receiving information from Anderson and Howard after the mediation. When LeRette followed up with the malpractice case, he was told that the trial was to occur on October 29, 2012. Sometime later, LeRette learned about the settlement and the payment and filed the suit against Howard and his law firm.

Evidence of Damages

At the trial, LeRette sought to prove that Howard's legal malpractice and fraudulent misrepresentations caused him damages.

As evidence of those damages, LeRette called a university finance professor to testify. The witness calculated what Master Blaster's judgment against Anderson would have been worth beginning in April 2009 through February 2017. A document of his calculations was entered into evidence. According to the document, the value of Master Blaster's judgment at the

time of the trial was either $1,209,614 or $1,276,038, depending on whether a penalty was included.

Relevant to the value of Anderson's claim against his bankruptcy attorneys, an offer of judgment filed by Howard was admitted into evidence. In the offer, Anderson offered to accept an entry of judgment against the bankruptcy attorneys in the amount of $1 million.

Jury Verdict

At the conclusion of the evidence, the jury was instructed on two theories: legal malpractice and fraudulent misrepresentation. After the case was submitted, the jury returned a general verdict for LeRette and Master Blaster with damages of $775,000.

Damages Reduced

After trial, Howard and his law firm filed a motion for JNOV, to alter or amend judgment, and for a new trial. In the motion, Howard and his firm alleged, among other things, that the judgment was not supported by sufficient evidence and that the jury awarded excessive damages. A hearing on the motion was held, and on May 5, 2017, the district court issued an order reducing the damages from $775,000 to $235,968.78, which was the amount Anderson received in the settlement.

In reducing the damages to the amount that Anderson received in the settlement, the district court reasoned:

> There was no evidence adduced at trial that . . . Howard could have obtained a more favorable settlement for Anderson or that he performed deficiently in reaching the settlement. It is clear from the evidence at trial that Anderson was the only one with a legal claim against the bankruptcy attorneys, and he agreed to settle the case for $350,000 in which he received $235,968.78.
>
> The only damages [LeRette and Master Blaster] could have sustained, as a proximate cause of . . . Howard[']s negligence or misrepresentations, was not seeing that LeRette [and Master Blaster] received all or part of the

> settlement proceeds received by Anderson. Under the facts presented to the jury, the amount Anderson received would equal the most [LeRette and Master Blaster] could have received as damages. The Court finds, as a matter of law, that this amount was the only damages that [LeRette and Master Blaster] are entitled [to].

Motion for Sanctions

After the trial, LeRette filed a motion for sanctions, requesting that the trial court strike Howard and his law firm's answer, award attorney fees and costs to LeRette and Master Blaster, and disgorge the attorney fees received by Howard and his law firm in the underlying legal malpractice suit. The district court overruled the motion.

On appeal, LeRette and Master Blaster argue that the district court erred in overruling the motion, because the evidence shows that Howard failed to comply with discovery requests and committed fraud upon the court. LeRette and Master Blaster argue that a pattern of misconduct by Howard and his law firm warranted sanctions and that the trial court's failure to impose sanctions constituted an abuse of discretion.

ASSIGNMENTS OF ERROR

LeRette and Master Blaster assign that the trial court erred in reducing the jury's award of damages and in overruling the motion for sanctions.

Howard and his law firm cross-appeal, assigning that the trial court erred in failing to dismiss LeRette and Master Blaster's complaint for want of subject matter jurisdiction.

STANDARD OF REVIEW

[1] Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.[1]

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[1] *Deutsche Bank Nat. Trust Co. v. Siegel*, 279 Neb. 174, 777 N.W.2d 259 (2010).

[2] Review of a ruling on a motion for JNOV is de novo on the record.[2]

[3] The standard of review of a trial court's determination of a request for sanctions is whether the trial court abused its discretion.[3]

ANALYSIS

Subject Matter Jurisdiction

Before addressing LeRette and Master Blaster's assignments, we first consider Howard and his law firm's assignment regarding subject matter jurisdiction. They argue that because the judgment debt was owned by the corporation Master Blaster and not by LeRette, LeRette was not the real party in interest. Howard and his firm contend that because LeRette was not the real party in interest, he lacked standing to sue, and that therefore, the trial court lacked subject matter jurisdiction.

[4-6] Indeed, Neb. Rev. Stat. § 25-301 (Reissue 2016) requires that except as otherwise provided by statute, all cases are to be brought "in the name of the real party in interest." The purpose of § 25-301 is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause.[4] Section 25-301 also discourages harassing litigation and keeps litigation within certain bounds in the interest of sound public policy.[5] The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest

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[2] See *Bellino v. McGrath North*, 274 Neb. 130, 133, 738 N.W.2d 434, 439 (2007) ("[t]o sustain a motion for [JNOV], the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion"), and *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 605, 650 N.W.2d 760 (2002) (questions of law are reviewed de novo on record).

[3] *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008).

[4] *Manon v. Orr*, 289 Neb. 484, 856 N.W.2d 106 (2014).

[5] *Id.*

in the cause of action, or a legal or equitable right, title, or interest in the subject matter of controversy.[6] The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.[7]

The crux of Howard and his law firm's jurisdictional argument rests on the premise that Master Blaster was not named a party to this action. A review of the operative pleadings, however, reveals otherwise.

[7] We have held that the character in which one is a party to a suit, and the capacity in which a party sues, is determined from the allegations of the pleadings and not from the caption alone.[8]

Here, the caption of the operative complaint, as well as its body, support that both LeRette and Master Blaster were parties to the action. The caption of the operative complaint identifies the "[p]laintiffs" as "DAVID LERETTE, JR., Individually, and as owner of MASTER BLASTER, INC." We notice that the caption uses the plural form of the term "plaintiff" and that it also lists both LeRette and Master Blaster in capital letters, which is traditionally done with parties. In the body of the operative complaint, under the "STATEMENT OF THE FACTS" heading, Master Blaster was again specifically identified as a plaintiff.

We also conclude that the jury instructions, the verdict form, the amended judgment, and the postjudgment motion for sanctions all support that both LeRette and Master Blaster were parties to the action. Each of these filed documents uses the plural form of the term "plaintiff" and refers to both LeRette and Master Blaster.

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[6] *Id.*

[7] *Id.*

[8] *Zapata v. McHugh*, 296 Neb. 216, 893 N.W.2d 720 (2017); *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

Because the allegations of the pleadings sufficiently identify Master Blaster as a party plaintiff, Howard and his law firm's argument that this court lacks jurisdiction because this action was not brought by the real party in interest is without merit.

Reduction of Jury Award

We next consider LeRette and Master Blaster's assignment that the district court erred in partially granting Howard and his law firm's motion for JNOV and reducing the jury's award of damages.

[8,9] On a motion for JNOV, the moving party is deemed to have admitted as true all 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.[9] To sustain a motion for JNOV, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.[10]

LeRette and Master Blaster assert that the trial court erred in reducing the damages to $235,968.78, the amount Anderson received in the settlement. He argues that reasonable minds could have concluded that LeRette and Master Blaster were entitled to $775,000. We disagree.

LeRette and Master Blaster's argument is based on the premise that the damages resulting from Howard's legal malpractice are equal to the value of Master Blaster's judgment against Anderson. Such premise would be true if Anderson's legal malpractice claim had gone to trial and been successful. Then, Anderson's damages would include the damages resulting from the bankruptcy attorney's failure to have Master Blaster's judgment discharged.

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[9] *Bellino, supra* note 2.

[10] *Id.*

However, LeRette and Master Blaster did not present evidence to support a finding that Anderson's malpractice action would have been successful had it proceeded to trial. Nor did they present evidence that Howard was negligent or acted deficiently in securing the $350,000 settlement or that he could or should have secured a greater settlement.

LeRette and Master Blaster did, however, present evidence to support a finding that Howard was negligent in advising LeRette not to execute on the judgment, in representing that LeRette would receive the proceeds, and in cutting LeRette out of the settlement proceeds. With regard to executing on the judgment, the evidence showed that at all relevant times, Anderson had no assets except for various tools and "a partly put together vehicle." Because any damages resulting from the executing advice was minimal, the only damages proximately caused by Howard's negligence or misrepresentations was in not seeing that LeRette and Master Blaster received the settlement proceeds.

[10] Although the district court reduced the award to the amount that Anderson received in the settlement, we modify that amount to include the amount Howard received in the settlement. We so modify the award, because an attorney who violates established rules of professional conduct and performs services despite a conflict of interest may not receive compensation for such services. In *State ex rel. FirsTier Bank v. Mullen*,[11] we explained:

> We do not accept the contention that an attorney can receive fees for representation which from the outset gives the appearance of impropriety and is violative of established rules of professional conduct. An attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of

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[11] *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 390, 534 N.W.2d 575, 580 (1995).

professional responsibility and inconsistent with the character of the profession.

It is an established rule of professional conduct that a lawyer may not represent a client if the representation involves a concurrent conflict of interest, unless, among other things, the client is advised of the conflict and consents to it.[12]

Here, we must assume that Howard failed to advise LeRette and Anderson of his conflict of interest. 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.[13] One of the issues presented to the jury was that Howard failed to advise LeRette and Anderson of his conflict of interest.

Because Howard violated the rule regarding representations involving conflicts of interest, we conclude that, as a matter of law, Howard is not entitled to compensation for his services in the settlement. Thus, we modify the jury award to include the $114,035.22 that he received for those services.

Motion for Sanctions

[11] Finally, LeRette and Master Blaster claim that the trial court abused its discretion in overruling their postverdict motion for sanctions against Howard and his law firm. An abuse of discretion occurs when a trial court's decision is clearly against justice or conscience, reason, and evidence, or when the decision unfairly deprives the litigant of a substantial right or a just result.[14]

Although the trial court did not explain its reasoning for denying LeRette and Master Blaster's motion for sanctions, we think it likely did so because it found that Howard was

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[12] See Neb. Ct. R. of Prof. Cond. § 3-501.7.

[13] *Heckman v. Burlington Northern Santa Fe Ry. Co.*, 286 Neb. 453, 837 N.W.2d 552 (2013).

[14] See *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007).

not acting in bad faith when he sought to protect, based on attorney-client privilege, his files and the confidential information of his client, Anderson. Because we see no abuse of discretion, we find that this assignment is without merit.

CONCLUSION

For the reasons set forth above, we affirm the district court's partial granting of Howard and his law firm's JNOV, but modify the jury award from $235,964.78 to $350,000.

Affirmed as modified.

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

Rachel Eadie and Jeffrey Blount, individually and as parents and natural guardians of their minor children, Jaden and Zarah, appellants, v. Leise Properties, LLC, and Certified Properties Management, Inc., appellees.

912 N.W.2d 715

Filed June 1, 2018. No. S-17-646.

1. **Motions to Dismiss: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
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. **Pleadings: Appeal and Error.** An appellate court reviews a district court's denial of a motion for leave to amend a complaint for an abuse of discretion. However, an appellate court reviews de novo an underlying legal conclusion that the proposed amendments would be futile.
5. **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.
6. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and

raise a reasonable expectation that discovery will reveal evidence of the element or claim.

7. **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.
8. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.
9. **Pleadings.** A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.
10. **Motions to Dismiss: Limitations of Actions.** A dismissal without prejudice means that another petition may be filed against the same parties upon the same facts as long as it is filed within the applicable statute of limitations.
11. **Motions to Dismiss: Claim Preclusion.** A dismissal with prejudice operates as a rejection of the plaintiff's claims on the merits and claim preclusion bars further litigation.
12. **Motions to Dismiss: Pleadings.** As a general rule, when a court grants a motion to dismiss for failure to state a claim, a party should be given leave to amend absent undue delay, bad faith, unfair prejudice, or futility.
13. **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: Thomas A. Otepka, Judge. Reversed and remanded with direction.

James Martin Davis, of Davis Law Office, for appellants.

Stephen G. Olson II, Robert S. Keith, and Kristina J. Kamler, of Engles, Ketcham, Olson & Keith, P.C., for appellee Leise Properties, LLC.

Patrick S. Cooper, David J. Stubstad, and Brandon J. Crainer, of Fraser Stryker, P.C., L.L.O., for appellee Certified Property Management, Inc.

Heavican, C.J., Miller-Lerman, Cassel, and Stacy, JJ., and Luther and O'Gorman, District Judges.

Per Curiam.

INTRODUCTION

A natural gas explosion at a rental house injured the next-door neighbors and destroyed the neighbors' house, and they sued based upon a negligence theory. Less than 5 months after the action commenced, without providing a postresponse opportunity to amend and based upon a no-duty-owed conclusion, the district court dismissed the neighbors' amended complaint with prejudice. Because amendment to state a claim was plausible, the district court abused its discretion in dismissing the complaint with prejudice. We reverse, and remand with direction.

BACKGROUND

The rental house next door to the house where Rachel Eadie and Jeffrey Blount and their children (collectively the neighbors) resided blew up on July 25, 2016. The neighbors sued the rental house's landowner, Leise Properties, LLC, and its property manager, Certified Property Management, Inc. The suit was filed on December 15, 2016. On January 27, 2017, before any response was filed, the neighbors filed an amended complaint, which we summarize.

Amended Complaint

The amended complaint was not a model of clarity, particularly regarding the allegations of negligence. But some of the basic allegations were clear. The rental house that blew up was located at 3858 North 68th Street in Omaha, Nebraska. The neighbors' address was 3862 North 65th Street, contiguous to the rental house property. The neighbors' house was destroyed, and they suffered personal injuries in the explosion.

Sometime prior to the date of the explosion, the landowner and its property manager had evicted tenants from the rental house. The evicted tenants removed items from the rental house, including a gas clothes dryer that did not belong to the tenants. The tenants allegedly removed the dryer without properly terminating and blocking the gas connection, and natural

gas was allowed to seep into and fill the rental house. On July 25, 2016, when an agent of the property manager entered the rental house, the gas ignited and the rental house exploded. The force of the explosion destroyed the neighbors' house and caused personal injuries to the neighbors.

Regarding duty, the amended complaint alleged that the landowner delegated to the property manager "duties . . . of reasonable care." The amended complaint stated that the evicted tenants were "permitted to remove property and to disconnect the gas dryer without permission to do so without proper supervision and due diligence and care by failing to monitor, observe, and to prevent the gas leakage." Later, the complaint stated that the landowner and its property manager "acted in reckless disregard for the safety of neighbors . . . by failing to properly monitor the actions of the tenants who were permitted to re-enter the . . . rental home after eviction and to cause gas to escape." It also stated that the "seepage of gas is one duty that the [landowner and property manager] evaded and permitted to occur." The complaint next alleged a duty to "properly maintain and pursue safe habitation of the home that exploded." Finally, it alleged negligence in "permitt[ing] the ingredients of a dangerous and explosive gas to accumulate within the property."

Motions to Dismiss

The property manager filed a motion to dismiss the amended complaint for failure to state a claim.[1] Three days later, on February 13, 2017, the landowner filed a similar motion. The motions were heard on May 5.

District Court's Order

On May 11, 2017, the district court dismissed the amended complaint with prejudice. The court first disposed of the complaint's allusion to res ipsa loqitur, which is not contested on appeal.

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[1] See Neb. Ct. R. Pldg. § 6-1112(b)(6).

The district court then examined the "proper standard of care regarding negligent supervision and monitoring" and summarized the duty as "whether the defendant acted as a reasonably prudent person would in a similar circumstance." The court concluded that the amended complaint failed to allege a "recognized legal duty." The court opined that there was "no recognized legal duty of a landlord to supervise a tenant's move-out in order to ensure that a third party is not harmed by the actions of the tenant." The court also found no duty to control the conduct of a third person as to prevent him or her from causing physical harm to another in the absence of a special relationship.

The court analyzed two cases cited by the neighbors, one involving the use of dynamite by a construction company to remove a tree a few feet away from the plaintiff's property[2] and one against a gas distribution company regarding an employee who filled an underground tank to supply a restaurant without first inspecting the condition of the equipment receiving the gas.[3] Contrasting the defendants' respective activities in those cases with the landowner's and property manager's engagement in the "real estate and property management business," the court found no duty to "supervise a tenant's move-out to ensure the safety of third parties." Without discussing whether amendment to state a plausible claim was possible or likely, the court dismissed the amended complaint with prejudice.

Postorder Attempt to Amend

The neighbors filed a motion to vacate the order of dismissal with prejudice. They also filed a motion for leave to amend, together with the proposed second amended complaint. On May 30, 2017, both motions were overruled.

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[2] See *Wendt v. Yant Construction Co.*, 125 Neb. 277, 249 N.W. 599 (1933).

[3] See *Clay v. Butane Gas Corporation*, 151 Neb. 876, 39 N.W.2d 813 (1949).

Represented by new counsel, the neighbors brought this timely appeal.

ASSIGNMENTS OF ERROR

The neighbors make two assignments of error, which we have restated into three components. They assign error to (1) the district court's ruling that the amended complaint failed to identify a legal duty, (2) the dismissal with prejudice, and (3) the failure to grant the postdismissal motion to file a second amended complaint.

STANDARD OF REVIEW

[1] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[4]

[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.[5] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[6]

[4] An appellate court reviews a district court's denial of a motion for leave to amend a complaint for an abuse of discretion. However, an appellate court reviews de novo an underlying legal conclusion that the proposed amendments would be futile.[7]

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[4] See *Nimmer v. Giga Entertainment Media*, 298 Neb. 630, 905 N.W.2d 523 (2018).

[5] *Bell v. Grow With Me Childcare & Preschool*, 299 Neb. 136, 907 N.W.2d 705 (2018).

[6] *Id.*

[7] *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017).

ANALYSIS

Basic Civil Pleading Principles

[5] 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.[8] 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.[9]

[6] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[10] Here, we accept the allegations of the amended complaint as true and draw all reasonable inferences in favor of the neighbors. 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.[11]

[7,8] 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.[12]

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[8] *Rodriguez v. Catholic Health Initiatives*, 297 Neb. 1, 899 N.W.2d 227 (2017).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Bell v. Grow With Me Childcare & Preschool, supra* note 5.

The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.[13]

Landowner's Duty to Persons Outside the Land

Unaided by the parties, the district court overlooked our jurisprudence regarding liability imposed upon possessors of land for physical harm to others outside the land under certain circumstances. Prior to our adoption of the duty analysis in § 7 of the Restatement (Third) of Torts in 2010,[14] we had recognized such liability of landowners.

For example, in *Brown v. Nebraska P.P. Dist.*,[15] we adopted § 371 of the Restatement (Second) of Torts.[16] In *Brown*, smoke obstruction from burning weeds was alleged to have caused driving hazards on a nearby public highway. We assumed duty and concluded that issues of fact remained as to whether the defendant failed to exercise reasonable care to prevent injury to travelers on the highway and whether the negligence was a proximate cause of the injury.[17]

We have not yet adopted § 54(a) of the Restatement (Third) of Torts,[18] which would impose upon a possessor of land a duty of reasonable care for artificial conditions or conduct on the land that poses a risk of physical harm to persons or property not on the land.

It is not necessary to do so here. We are not presented with a developed record. The pleadings here were not well articulated.

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[13] *Id.*

[14] See, *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010); 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010).

[15] *Brown v. Nebraska P.P. Dist.*, 209 Neb. 61, 306 N.W.2d 167 (1981).

[16] Restatement (Second) of Torts § 371 (1965).

[17] *Id.*

[18] 2 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 54(a) (2012).

The critical question is whether the district court should have dismissed the complaint with prejudice, thereby effectively denying leave to amend. Because the answer to that question is sufficient to resolve the appeal, we need not delineate with precision the duties owed by possessors of land.

Dismissal With Prejudice

[9] The neighbors argue that because they should have been permitted to amend their complaint, the district court erred in dismissing the action with prejudice. We agree. The district court did not explain why it was dismissing the complaint with prejudice. A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.[19] The record would not support a finding of undue delay, bad faith, or unfair prejudice. As we read the judge's order, it appears that the court thought amendment would be futile.

[10,11] In this case, the district court dismissed the neighbors' amended complaint with prejudice. A dismissal without prejudice means that another petition may be filed against the same parties upon the same facts as long as it is filed within the applicable statute of limitations.[20] In comparison, "'a dismissal with prejudice operates as a rejection of the plaintiff's claims on the merits and [claim preclusion bars] further litigation.'"[21] Here, the dismissal with prejudice would preclude the neighbors from filing a second suit with the same claims in a Nebraska court.

[12] If a plaintiff has moved for leave to amend before the court rules on a motion to dismiss, the court must first consider

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[19] *Estermann v. Bose, supra* note 7.

[20] See *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005).

[21] *RFD-TV v. WildOpenWest Finance*, 288 Neb. 318, 329, 849 N.W.2d 107, 116 (2014) (quoting *Jaramillo v. Burkhart*, 59 F.3d 78 (8th Cir. 1995)).

and rule upon the pending motion to amend.[22] We have hinted that the same rule should apply where the plaintiff did not move for leave.[23] As a general rule, when a court grants a motion to dismiss for failure to state a claim, a party should be given leave to amend absent undue delay, bad faith, unfair prejudice, or futility. Granting leave to amend is consistent with the rationale for the liberal pleading standard in civil cases discussed above.[24] And it is consistent with the practice in Nebraska prior to the adoption of the Nebraska Court Rules of Pleading in Civil Cases.[25] But leave should not be granted when it is clear that the defect cannot be cured by amendment.[26] Here, that would only be the case if amendment would be futile.

As we have already explained, the district court (and the parties, apparently) did not consider whether a duty to the neighbors could be found in the pertinent law governing the liability imposed upon possessors of land for physical harm to others outside the land under certain circumstances. Upon our de novo review of that question, we cannot say that amendment would be futile. Thus, we conclude that the district court abused its discretion in dismissing the amended complaint with prejudice.

Other Assignments

[13] We do not reach the neighbors' other assignments of error. An appellate court is not obligated to engage in an

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[22] See *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011).

[23] See *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

[24] See, John P. Lenich, Nebraska Civil Procedure § 15:5 (2018); 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004 & Supp. 2017).

[25] See Lenich, *supra* note 24.

[26] See *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010).

analysis which is not needed to adjudicate the controversy before it.[27]

CONCLUSION

The district court did not consider the pertinent law governing liability imposed upon possessors of land for physical harm to others outside the land under certain circumstances. Thus, when the court apparently determined that amendment of the complaint would be futile, it overlooked a potential source of duty to the neighbors. Upon de novo review, we cannot say that amendment would have been futile. Thus, we conclude the district court abused its discretion in dismissing the neighbors' complaint with prejudice. We reverse the dismissal with prejudice, and remand the cause with direction to grant the neighbors leave to amend their complaint.

Reversed and remanded with direction.

Funke, J., participating on briefs.

Wright, J., not participating.

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[27] *Thompson v. Johnson*, 299 Neb. 819, 910 N.W.2d 800 (2018).

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

State of Nebraska, appellant, v. Steven J. Hatfield, appellee.

912 N.W.2d 731

Filed June 8, 2018. No. S-16-893.

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. **Search and Seizure.** Application of the good faith exception to the exclusionary rule is a question of law.
5. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
6. **Criminal Law: Statutes: Appeal and Error.** Absent specific statutory authorization, the State generally has no right to appeal an adverse ruling in a criminal case.
7. **Constitutional Law: Search and Seizure: Evidence.** The exclusionary rule is a judicially created remedy that generally prohibits the use of evidence obtained in violation of a defendant's Fourth Amendment rights.
8. **Search and Seizure: Police Officers and Sheriffs: Intent.** The purpose of the exclusionary rule is to deter police misconduct.
9. **Courts: Search and Seizure.** Because the exclusionary rule should not be applied to objectively reasonable law enforcement activity, the U.S. Supreme Court created a good faith exception to the rule.
10. **Constitutional Law: Courts: Search and Seizure: Police Officers and Sheriffs: Evidence.** A court may decline to apply the exclusionary

rule when evidence is obtained pursuant to an officer's objectively reasonable reliance on a law that is not clearly unconstitutional at the time.

11. **Courts: Judgments: Appeal and Error.** Where an exception proceeding is brought from the district court sitting as an appellate court, Neb. Rev. Stat. § 29-2316 (Reissue 2016) does not limit the relief the higher appellate court can order, because the defendant was not placed legally in jeopardy in the district court.

Appeal from the District Court for Gage County, Paul W. Korslund, Judge, Retired, on appeal thereto from the County Court for Gage County, Steven B. Timm, Judge. Exception sustained, and cause remanded for further proceedings.

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

Steven J. Mercure, of Nestor & Mercure, and Lindy L. Mahoney, Senior Certified Law Student, for appellee.

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

Per Curiam.

INTRODUCTION

On intermediate appeal from county court, the district court vacated Steven J. Hatfield's conviction for driving under the influence (DUI) and granted him a new trial after determining that his warrantless blood draw was unlawful and inadmissible in light of *Birchfield v. North Dakota*.[1] Because we determine that the good faith exception to the exclusionary rule applies, we sustain the State's exception. And because we are not prevented from affecting the district court's decision when it sits as an appellate court, we reverse the order and remand the cause for further proceedings consistent with this opinion.

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[1] *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).

BACKGROUND

On an early morning in December 2014, two deputies with the Gage County Sheriff's Department stopped Hatfield's vehicle after radar detected that it had been speeding. When a deputy asked Hatfield for his license and registration, Hatfield was slow to respond and would not make eye contact. Both deputies detected an odor of alcohol coming from the vehicle, although they were unable to determine whether the odor came from Hatfield or one of his three passengers. Upon inquiry, Hatfield confirmed that he had been drinking alcohol. And during field sobriety tests, Hatfield showed signs of impairment during one of the tests. One of the deputies arrested Hatfield for DUI and transported him to a hospital for a blood draw.

Prior to the blood draw, the arresting deputy read Hatfield the "Post Arrest Chemical Test Advisement" form. The form advised Hatfield that he was under arrest for DUI, that he was required by law to submit to a chemical test of his blood for alcohol content, and that refusal to submit to the test was a separate criminal charge. Hatfield signed the form. According to the nurse who drew the blood sample from Hatfield, he was "cooperative throughout the blood draw process." The blood test revealed that Hatfield had an alcohol concentration above the legal limit.

The State charged Hatfield with DUI, and a jury convicted him of the offense. After the county court held an enhancement hearing and determined that this conviction was Hatfield's second DUI offense, the court imposed a sentence.

Hatfield appealed his conviction to the district court. He alleged that the county court erred by receiving certain evidence and by failing to dismiss due to insufficient evidence. After those issues had been briefed, the U.S. Supreme Court released its opinion in *Birchfield*[2] and Hatfield requested that

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[2] *Id.*

the district court consider that decision. Based on *Birchfield*, the court found that Hatfield's warrantless blood draw was unlawful and inadmissible. The court therefore reversed Hatfield's conviction and remanded the matter for a new trial. The court did not consider the errors assigned by Hatfield. Nor did it consider whether Hatfield's consent to the blood test was voluntary or whether the good faith exception to the exclusionary rule applied.

The State appealed, and we moved the case to our docket.[3]

ASSIGNMENT OF ERROR

The State assigns that the district court erred by vacating Hatfield's DUI conviction without considering whether his blood draw was voluntary or whether the good faith exception to the exclusionary rule applied.

STANDARD OF REVIEW

[1-3] 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.[4] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[5] 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.[6]

[4,5] Application of the good faith exception to the exclusionary rule is a question of law.[7] On a question of law,

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

[4] *State v. Thalken*, 299 Neb. 857, 911 N.W.2d 562 (2018).

[5] *Id.*

[6] *Id.*

[7] *State v. Hoerle*, 297 Neb. 840, 901 N.W.2d 327 (2017), *cert. denied* ___ U.S. ___, 138 S. Ct. 1986, 201 L. Ed. 2d 248 (2018).

an appellate court reaches a conclusion independent of the court below.[8]

ANALYSIS

[6] Before addressing the merits, we observe that the State brought this appeal. Absent specific statutory authorization, the State generally has no right to appeal an adverse ruling in a criminal case.[9] But a statutory exception to the general rule authorizes a prosecuting attorney to request appellate review of an adverse ruling by a district court.[10] We have interpreted § 29-2315.01 to allow exception proceedings taken from the district court sitting as an intermediate court of appeal.[11] We now turn to the arguments advanced in the State's appeal.

Good Faith Exception

The State assigns that the district court erred in vacating Hatfield's conviction without considering two matters. It contends that the court should have determined whether the blood draw was voluntary or whether the good faith exception to the exclusionary rule applied. Because we can dispose of the merits of the appeal on the basis of the good faith exception, we need not make a determination as to the voluntariness of the blood draw.

[7-9] The exclusionary rule is a judicially created remedy that generally prohibits the use of evidence obtained in violation of a defendant's Fourth Amendment rights.[12] Its purpose is to deter police misconduct.[13] Because the exclusionary rule should not be applied to objectively reasonable law enforcement activity, the U.S. Supreme Court created a good faith

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[8] *Id.*

[9] *State v. Thalken, supra* note 4.

[10] See Neb. Rev. Stat. § 29-2315.01 (Reissue 2016).

[11] See *State v. Thalken, supra* note 4.

[12] See *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015).

[13] See *State v. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014).

exception to the rule.[14] The *Birchfield* decision did not directly address whether the good faith exception should apply where consent to a blood test is given following an incorrect advisement that refusing such a test is a crime.

[10] In *State v. Hoerle*,[15] we concluded that the good faith exception to the exclusionary rule applied to a warrantless blood draw carried out prior to the *Birchfield* decision. We explained that a court may decline to apply the exclusionary rule when evidence is obtained pursuant to an officer's objectively reasonable reliance on a law that is not clearly unconstitutional at the time. And we discerned no deterrent value in suppressing the results of the blood test.

We adhere to our reasoning in *Hoerle*. Here, as in *Hoerle*, the blood draw was obtained in accordance with our implied consent statute, which was not clearly unconstitutional at the time of Hatfield's December 2014 arrest. Consistent with *Hoerle*, we conclude that the good faith exception applies to warrantless pre-*Birchfield* blood draws in cases brought both on direct appeal and in error proceedings under § 29-2315.01. Because the good faith exception applies, the district court erred in reversing Hatfield's conviction.

Effect of Ruling

As we noted at the outset of the analysis, the State brought this appeal pursuant to § 29-2315.01. Because it was brought as an exception proceeding, Neb. Rev. Stat. § 29-2316 (Reissue 2016) applies. Section 29-2316 states in part that "[t]he 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 . . . ."

[11] In a criminal case, § 29-2316 does not prohibit a higher appellate court from reversing a district court's decision

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[14] *State v. Hoerle, supra* note 7.

[15] See *id.*

where the district court was acting as an intermediate appellate court. We recently declared that "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."[16] We explained that "in a criminal case where the district court is sitting as an appellate court in an appeal brought by the defendant, the defendant . . . effectively arrived at the district court on appeal already cloaked in jeopardy, having been placed legally in jeopardy by the county court."[17] Because § 29-2316 does not limit the relief we can order, we reverse the ruling of the district court.

CONCLUSION

We conclude that the good faith exception to the exclusionary rule applied to the pre-*Birchfield* warrantless blood draw in this case. Because the result of the blood test was admissible, the district court, sitting as an appellate court, erred in reversing Hatfield's conviction and vacating his sentence. We therefore sustain the State's exception. And because § 29-2316 does not constrain us from granting relief, we reverse the district court's order and remand the cause to the district court for further proceedings not inconsistent with this opinion. Upon remand, the district court may consider the errors originally assigned by Hatfield.

Exception sustained, and cause remanded for further proceedings.

Wright and Kelch, JJ., not participating in the decision.

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[16] *State v. Thalken, supra* note 4, 299 Neb. at 880, 911 N.W.2d at 579.

[17] *Id.* at 884, 911 N.W.2d at 581.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Kelly A. Vanness, appellant.

912 N.W.2d 736

Filed June 8, 2018. No. S-17-687.

1. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.
2. ____: ____. 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.
3. **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.
4. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.
5. **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.
6. ____: ____: ____. 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.
7. **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.

8. **Constitutional Law: Effectiveness of Counsel: Conflict of Interest.** The fact of multiple representation alone is not a per se violation of the Sixth Amendment.
9. **Effectiveness of Counsel: Conflict of Interest: Proof.** A defendant who raised no objection at trial must show that an actual conflict of interest existed. When an actual conflict exists, there is no need to show that the conflict resulted in actual prejudice to the defendant.
10. **Effectiveness of Counsel: Conflict of Interest: Presumptions: Proof.** If the defendant shows that his or her defense counsel faced a situation in which conflicting loyalties pointed in opposite 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.
11. **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.
12. **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.
13. ____. 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.
14. ____. A court's failure to advise a defendant of the correct statutory minimum and maximum penalties does not automatically warrant reversal.
15. ____. A determinate sentence is imposed when the defendant is sentenced to a single term of years.
16. ____. When imposing an indeterminate sentence, a sentencing court ordinarily articulates either a minimum term and maximum term or a range of time for which a defendant is to be incarcerated.

17. ____. In Nebraska, the fact that the minimum term and maximum term of a sentence are the same does not affect the sentence's status as an indeterminate sentence.

Appeal from the District Court for Holt County: Mark D. Kozisek, Judge. Affirmed as modified.

Martin V. Klein, of Carney Law, P.C., for appellant.

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

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Strong, District Judge.

Miller-Lerman, J.

I. NATURE OF CASE

Kelly A. Vanness accepted a plea agreement and entered pleas to four charges in the district court for Holt County, for which she was convicted and sentenced to a combined 22 to 22 months' imprisonment with periods of postrelease supervision. Vanness claims that trial counsel was ineffective in various respects. She also appeals her sentences, claiming they are excessive and an abuse of discretion. The State notes two possible points of plain error in connection with the sentencing. The State notes that (1) the district court incorrectly advised Vanness that conviction of a Class IV felony carries a maximum of 5 years in prison, whereas the actual sentence maximum was 2 years, and (2) the district court "may" have imposed an indeterminate sentence, whereas the applicable statutes for the convictions on three of the counts require determinate sentences. We affirm Vanness' convictions and modify certain sentences, as we explain below.

II. STATEMENT OF FACTS

In an information filed December 22, 2015, in the district court for Holt County, Vanness was charged with four counts consisting of the following: operating a motor vehicle during a time of suspension, Neb. Rev. Stat. § 60-4,108 (Cum.

Supp. 2016), a Class III misdemeanor (Count 1); possession of a controlled substance (methamphetamine), Neb. Rev. Stat. § 28-416(3) (Supp. 2015), a Class IV felony (Count 2); possession of a controlled substance (hydrocodone), § 28-416(3), a Class IV felony (Count 3); and possession of drug paraphernalia, Neb. Rev. Stat. § 28-441 (Reissue 2016), an infraction (Count 4).

On February 8, 2016, Vanness pled guilty to all counts alleged in the information. At the plea hearing, Vanness stated that she was present in Holt County on September 13, 2015, operating a motor vehicle with a driver's license which had been suspended for the reason that the insurance had expired. She stated that she was in possession of methamphetamine and hydrocodone which was not prescribed to her, and a pipe recognized as drug paraphernalia. The district court found that a factual basis existed for the pleas of guilty.

At the plea hearing, the district court informed Vanness of her constitutional rights and that by pleading, she would be giving up these enumerated rights; Vanness stated that she understood and still wished to plead. The district court also inquired about Vanness' satisfaction with her trial counsel, which we recite in greater detail below. The district court found that Vanness understood her constitutional and statutory rights and that her pleas were made freely, voluntarily, knowingly, and intelligently. The court accepted the pleas of guilty and found Vanness guilty of all charges.

The district court postponed sentencing pending Vanness' participation in the "North Central Problem Solving Court." However, her participation in the problem-solving court was terminated on April 10, 2017.

On June 6, 2017, following preparation of a presentence investigation report, the district court pronounced the sentence of 60 to 60 days' imprisonment for the conviction on Count 1, to run concurrently with all sentences imposed. For the conviction on Count 2, she was sentenced to 12 to 12 months' imprisonment with 9 months of postrelease supervision, with credit for 26 days served, to run consecutively to other sentences.

For the conviction on Count 3, the district court sentenced Vanness to 10 to 10 months' imprisonment, to run consecutively to other sentences, with a period of 9 months of successive and additional postrelease supervision. Vanness was fined $100 for the conviction on Count 4.

This appeal followed.

III. ASSIGNMENTS OF ERROR

Vanness claims that her trial counsel was ineffective in various respects and that the district court erred by imposing excessive sentences.

IV. STANDARDS OF REVIEW

[1,2] 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*.

[3] 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).

V. ANALYSIS

As we explain below, with regard to Vanness' claims of ineffectiveness of trial counsel, we are unable to reach the merits of her claim that trial counsel had a conflict of interest, but we determine that her other claims of ineffectiveness are refuted by the record. We determine that the sentences imposed on Vanness' convictions did not exceed the statutory limits, and we find no abuse of discretion in connection with the district court's rationale in sentencing. However, we

find plain error in the sentences imposed for the convictions on Counts 1, 2, and 3, because the district court pronounced indeterminate sentences where determinate sentences were required by statutes. Accordingly, we affirm Vanness' convictions and modify her sentences for the convictions on Counts 1, 2, and 3.

1. Ineffective Assistance of Counsel

[4,5] Vanness is represented on direct appeal by counsel different from the counsel who represented her 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. Lane*, 299 Neb. 170, 907 N.W.2d 737 (2018). 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.*

[6,7] 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) Trial Counsel's Alleged Conflict of Interest

Vanness asserts that she was denied effective assistance of trial counsel because of an actual conflict of interest arising

out of counsel's representation of another individual. Vanness specifically notes that her trial counsel also represented another person who was arrested with Vanness and that their cases were consolidated for purposes of their plea hearings. Vanness contends that because the other defendant sold the drugs involved in this case and the drugs belonged to the other defendant, an actual conflict existed.

[8-10] The fact of multiple representation alone is not a per se violation of the Sixth Amendment. *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000). A defendant who raised no objection at trial must show that an actual conflict of interest existed. *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018). When an actual conflict exists, there is no need to show that the conflict resulted in actual prejudice to the defendant. *Id*. If the defendant shows that his or her defense counsel faced a situation in which conflicting loyalties pointed in opposite 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. *Id*. 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. *Id*.

Although Vanness' allegation regarding an alleged conflict of interest of her trial counsel due to multiple representation is sufficiently stated, the record is insufficient to review it in this direct appeal.

(b) Trial Counsel's Failure to Investigate Innocence Defense and Advisement of Lenient Sentencing

On appeal, Vanness claims that drugs found at the scene of the arrest belonged to another individual and that her trial counsel failed to investigate a possible defense of innocence. The files and records of the case affirmatively show that this allegation of ineffectiveness of counsel has no merit. At the plea hearing, the trial judge specifically asked whether Vanness explained to her trial counsel all theories of defense

that she might have or could think of, and whether her trial counsel investigated the defenses which she thought she might have to her satisfaction. Vanness responded "[y]es" to both inquiries.

Vanness further claims that her trial counsel advised her to plead guilty because she would receive "a lenient sentence." Brief for appellant at 10. This allegation of ineffectiveness of counsel has no merit. During the colloquy at the plea hearing, Vanness denied that any threats or promises were made to induce her to enter her pleas of guilty. The record affirmatively refutes Vanness' claim that she was promised lenient sentencing. See *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

2. Sentencing Errors

(a) Excessive Sentences

Vanness generally claims that the sentences imposed were excessive and an abuse of discretion. In particular, Vanness contends that she should have been sentenced to either lesser sentences or concurrent sentences. We find no merit to Vanness' claims regarding excessiveness of sentences.

[11-13] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018). When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id*. Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively. *Id*. This is so even when offenses carry a mandatory minimum

sentence, unless the statute requires that consecutive sentences be imposed. *Id*.

We have reviewed the record which shows that the sentence imposed on each of Vanness' convictions was within the statutory limits and that the district court considered and applied the necessary sentencing factors. The district court expressed concern for Vanness' substance abuse history, relapses, and her lack of success in the problem-solving court. The district court noted one of "the overriding considerations" was protecting the public from Vanness, who had recently been in an accident while reportedly driving under the influence of drugs and alcohol. Given her relapse in the problem-solving court, the district court stated that maintaining Vanness in a "controlled environment" such as prison might allow her to become less likely to abuse drugs and alcohol and less likely to "harm someone else or [her]self." We do not find an abuse of discretion in the court's consideration of sentencing factors.

(b) Incorrect Advisement

[14] The State notes that when Vanness pleaded guilty, the district court incorrectly advised her that the potential maximum penalty for the conviction of a Class IV felony was 5 years' imprisonment. However, because the date of the offenses was in September 2015, after 2015 Neb. Laws, L.B. 605, had become effective on August 30, 2015, the maximum sentence of imprisonment for the conviction of a Class IV felony was 2 years. Neb. Rev. Stat. § 28-105 (Supp. 2015). We have observed that a court's failure to advise a defendant of the correct statutory minimum and maximum penalties does not automatically warrant reversal. *State v. Russell*, 291 Neb. 33, 863 N.W.2d 813 (2015). Here, the district court erroneously advised Vanness that the range of penalties for the convictions on Counts 2 and 3, possession of methamphetamine and hydrocodone, was 0 to 5 years' imprisonment. Although incorrect, this advisement did not prejudice Vanness. The sentences actually imposed of 12 to 12 months' imprisonment with 9 months of postrelease supervision, and

10 to 10 months' imprisonment, with a period of 9 months of successive postrelease supervision were both under the statutory maximum and the maximum articulated by the district court. See *id*. Facing a higher, albeit incorrect maximum, it is "inconceivable" that Vanness would agree to plead guilty to a higher maximum but not the lesser sentence which was actually imposed. See *id*. at 42, 863 N.W.2d at 820.

(c) Plain Error in Sentencing

The State notes a possible error regarding whether Vanness' sentences were "determinate" as required by statutes. Specifically, the convictions on Counts 1, 2, and 3 should have been determinate sentences under Neb. Rev. Stat. § 29-2204.02(1)(a) (Supp. 2015) (Class IV felonies) and Neb. Rev. Stat. § 28-106(2) (Supp. 2015) (misdemeanors).

No error has been assigned with regard to the periods of postrelease supervision imposed, the credit for time served, or the consecutive nature of Vanness' sentencing which we have not already addressed. However, when the district court pronounced the sentences of 60 to 60 days' imprisonment for the convictions on Count 1, a Class III misdemeanor; 12 to 12 months' imprisonment on Count 2, a Class IV felony; and 10 to 10 months' imprisonment on Count 3, a Class IV felony, such sentences were indeterminate rather than determinate. The district court plainly erred by failing to pronounce determinate sentences, and such error requires that we modify these sentences on direct appeal.

[15-17] We recently clarified the distinction between determinate and indeterminate sentences. See *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017), *modified on denial of rehearing* 296 Neb. 606, 894 N.W.2d 349. In *Artis*, we said:

> A determinate sentence is imposed when the defendant is sentenced to a single term of years, such as a sentence of 2 years' imprisonment. See *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999). In contrast, when imposing an indeterminate sentence, a sentencing court ordinarily articulates either a minimum term and maximum term or

> a range of time for which a defendant is to be incarcerated. Neb. Rev. Stat. § 28-105 (Reissue 2016); *State v. White, supra.* In Nebraska, the fact that the minimum term and maximum term of a sentence are the same does not affect the sentence's status as an indeterminate sentence. See *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

296 Neb. at 607, 894 N.W.2d at 349-50.

In its brief, the State refers to *Artis, supra*, and maintains that Vanness' sentences are "determinate" for the reasons the sentences are for an identifiable and definite term of years and the inclusion of postrelease supervision on the sentences for Vanness' Class IV felonies shows the district court intended to impose determinate sentences. See § 29-2204.02(1). The State's characterization of the sentences in question is not consistent with our historical or recent jurisprudence.

Although Vanness' sentences have the same minimum and maximum term of years and can be definitely ascertained, these features do not convert them into determinate sentences. They were not pronounced as a "single term of years" and thus are not determinate, and the district court plainly erred. See *Artis*, 296 Neb. at 607, 894 N.W.2d at 350. For completeness, we note that to the extent any of our prior cases have been perceived as characterizing sentences where the minimum and maximum terms were the same number as determinate, these articulations were not a complete statement of the laws and are disapproved. See, e.g., *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999) (discussing calculation of credit concerning parole dates). We reaffirm the rule in *Artis* that a determinate sentence is a single term of years and an indeterminate sentence is a minimum term and maximum term or a range of time for which a defendant is to be incarcerated, even if the minimum and maximum number are the same. See, also, *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

Because the court's intended sentences are apparent from the record, and because we find no other error in sentencing, as indicated below, we modify each of Vanness' sentences of imprisonment for the convictions on Counts 1, 2, and 3 to a single term of years, in accordance with §§ 29-2204.02(1)(a) and 28-106(2). We find no error and therefore affirm the sentence for the conviction on Count 4.

VI. CONCLUSION

The record is insufficient to resolve Vanness' claim that trial counsel was ineffective due to an actual conflict of interest. Vanness' claims that she was denied effective assistance of trial counsel based on potential defenses or promises of leniency are affirmatively refuted by the record. We affirm Vanness' convictions.

With regard to sentencing, we determine that Vanness' sentences did not exceed the statutory range and that there was no error regarding the sentence for the conviction on Count 4. However, because the district court pronounced indeterminate sentences instead of determinate sentences for the convictions on Counts 1, 2, and 3, as required by §§ 29-2204.02(1)(a) and 28-106(2), we modify Vanness' sentences as follows: for the conviction on Count 1, 60 days' imprisonment to run concurrently with all sentences imposed. For the conviction on Count 2, 12 months' imprisonment with 9 months of postrelease supervision, with credit for 26 days served, to run consecutively to other sentences. For the conviction on Count 3, 10 months' imprisonment, to run consecutively to other sentences, with a period of 9 months of successive and additional postrelease supervision. We find no error and therefore affirm the sentence for the conviction on Count 4.

Affirmed as modified.

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

Frederick Heiden and Ann Heiden, husband and wife, appellees, v. Tracy J. Norris, appellant.

912 N.W.2d 758

Filed June 8, 2018. No. S-17-689.

1. **Visitation: Appeal and Error.** Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial court, whose determinations on appeal will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial court's discretion.
2. **Standing.** Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **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 words which are plain, direct, and unambiguous.
5. **Statutes: Legislature: Intent.** 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. **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. ____. The whole and every part of a statute must be considered in fixing the meaning of any of its parts.
8. **Statutes: Intent.** In construing a statute, a court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.
9. **Statutes: Courts.** Generally, statutes in derogation of the common law are to be strictly construed.

10. **Visitation: Statutes: Courts.** Grandparent visitation did not exist at common law, and thus should be strictly limited to the definition provided by law.

Appeal from the District Court for Hamilton County: Rachel A. Daugherty, Judge. Order vacated, and cause remanded with directions to dismiss.

James M. Buchanan, P.C., L.L.O., for appellant.

Scott D. Grafton, of Grafton Law Office, P.C., L.L.O., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Welch, Judge.

Heavican, C.J.

INTRODUCTION

Frederick Heiden and Ann Heiden filed a complaint to establish grandparent visitation. Visitation was granted. Tracy J. Norris, the biological father of the children impacted by the order, has appealed. The primary issue on appeal is whether the Heidens are grandparents for purposes of the grandparent visitation statutes, Neb. Rev. Stat. §§ 43-1801 to 43-1803 (Reissue 2016). We vacate the order of visitation and remand the cause with directions to dismiss.

BACKGROUND

Tracy and Katherine Norris were divorced in 2016 in Hamilton County, Nebraska. The couple had three children together. Katherine died on July 14, 2016. Since that time, the children have resided with Tracy in Fort Collins, Colorado; the Heidens live in Hampton, Nebraska. The record includes a partial transcript from Tracy and Katherine's divorce proceeding in which the Heidens acknowledge that they were not Katherine's legal (adoptive or biological) parents, but had raised Katherine since she was 3 years of age.

On October 21, 2016, the Heidens sought grandparent visitation, alleging that they were

> grandparents of the minor children *as the context requires* as they have acted as the grandparents of the minor children during their entire lives. Prior to the death of the minor children's mother, a significant beneficial relationship existed between the minor children and the [Heidens] as they resided together from approximately November of 2013 to July 14th, 2016 and the [Heidens] had significant contact with each of the children from the time they were born.

(Emphasis supplied.) Tracy was apparently served with this complaint, but did not appear. An order granting default judgment and visitation to the Heidens was entered on January 5, 2017.

On January 11, 2017, Tracy filed a motion to alter or amend, and on February 2, he filed a motion to vacate, alleging that the Hamilton County District Court did not have jurisdiction. At the hearing, Tracy explained that he did not respond to the complaint because he did not think the Heidens would be able to establish that they were the children's grandparents.

Following the district court's conclusion that it had jurisdiction, Tracy filed another motion on May 8, 2017, entitled "Motion to Vacate, Motion to Alter or Amend, or, Notice of Appeal." On June 29, the district court sustained this motion in part, amending the prior visitation order. Tracy appeals.

ASSIGNMENT OF ERROR

Tracy assigns that the district court erred in finding that the Heidens had standing to bring this action.

STANDARD OF REVIEW

[1] Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial court, whose determinations on appeal will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial court's discretion.[1]

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[1] See *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006).

ANALYSIS

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[2] The district court concluded that it had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act.[3] Having reviewed the record, we agree.[4]

We turn to Tracy's sole argument on appeal that the Heidens lacked standing to bring an action for grandparent visitation. Tracy contends that the Heidens are unable to prove that they are the children's grandparents for purposes of Nebraska's grandparent visitation statutes because they were not Katherine's "biological or adoptive parents" as required by those statutes.[5]

[2] Tracy conflates standing with the merits of the Heidens' claim. Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination.[6] But as we have said previously, the focus of the standing inquiry is "on the party, not the claim itself."[7] For that very reason, in considering standing, the legal and factual validity of the claim presented must be assumed.[8] Here, if the Heidens' assertions that they are grandparents

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[2] *Karo v. Nau Country Ins. Co.*, 297 Neb. 798, 901 N.W.2d 689 (2017).

[3] Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2016).

[4] See § 43-1239.

[5] Brief for appellant at 7. See § 43-1801.

[6] *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

[7] *Id*. at 541-42, 788 N.W.2d at 260.

[8] See, e.g., *Cotrell v. Alcon Laboratories*, 874 F.3d 154 (3d Cir. 2017); *Delaware Dept. of Nat. Resources v. F.E.R.C.*, 558 F.3d 575 (D.C. Cir. 2009) (citing *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)); *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006); *Mr. Furniture v. Barclays American/Commercial Inc.*, 919 F.2d 1517 (11th Cir. 1990).

within the meaning of § 43-1801 and entitled to visitation under the statute are assumed to be valid, it becomes plain that the Heidens are the proper parties to bring such a claim and thus have standing.

But the crux of Tracy's argument is that the Heidens were not entitled to an order of visitation. Tracy contends that because the Heidens were not Katherine's legal parents, they are not grandparents under our statutes and thus are not entitled to consideration of their request for visitation. We turn to that contention, which is a matter of statutory interpretation.

Section 43-1802 sets forth a grandparent's right to visitation in part as follows:

> (1) A grandparent may seek visitation with his or her minor grandchild if:
>
> (a) The child's parent or parents are deceased;
>
> (b) The marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered; or
>
> (c) The parents of the minor child have never been married but paternity has been legally established.
>
> (2) In determining whether a grandparent shall be granted visitation, the court shall require evidence concerning the beneficial nature of the relationship of the grandparent to the child. The evidence may be presented by affidavit and shall demonstrate that a significant beneficial relationship exists, or has existed in the past, between the grandparent and the child and that it would be in the best interests of the child to allow such relationship to continue. Reasonable rights of visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.

As relevant to this appeal, § 43-1801 provides that "unless the context otherwise requires, grandparent shall mean the biological or adoptive parent of a minor child's biological or adoptive parent."

This court has found Nebraska's grandparent visitation statutes to be constitutional, relying in part on the limitation of only biological and adoptive grandparents as those entitled to visitation, as well as a limitation of those circumstances in which a grandparent could seek visitation and a high standard of proof required to show entitlement to an order of visitation.[9]

[3-5] The issue is one of statutory interpretation, which presents a question of law.[10] 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 are plain, direct, and unambiguous.[11] 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.[12]

[6-8] 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.[13] The whole and every part of a statute must be considered in fixing the meaning of any of its parts.[14] 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

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[9] *Hamit v. Hamit, supra* note 1.

[10] *Davis v. Gale*, 299 Neb. 377, 908 N.W.2d 618 (2018).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.[15]

[9,10] "Generally, statutes in derogation of the common law are to be strictly construed."[16] Grandparent visitation did not exist at common law,[17] and thus should be strictly limited to the definition provided by law. Here, the plain meaning of the term "grandparent" excludes the Heidens.

The Heidens argue, however, that the term "grandparent" means a biological or adoptive parent of the child's biological or adoptive parent and that in this case, the "context" shows that they are the children's grandparents. We disagree.

A review of our case law suggests that the "context" referred to in § 43-1801 is not the factual circumstances presented by a case, but the context of the statutory language itself.[18] In *Pig Pro Nonstock Co-op v. Moore*,[19] we examined, but ultimately rejected, cases from other jurisdictions that went beyond the context of the statute to the facts in order to determine whether a cooperative was designated "nonprofit" for purposes of a statutory scheme. As another court has since explained: "The term 'context' in the statutory phrase 'unless the context otherwise requires' means the context 'within which [a defined statutory term] is used within the statute's substantive provisions.'"[20]

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[15] *Id.*

[16] 73 Am. Jur. 2d *Statutes* § 181 at 415 (2012).

[17] See *Hamit v. Hamit, supra* note 1.

[18] See, *Farmers Co-op v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017); *State v. Nguyen*, 293 Neb. 493, 881 N.W.2d 566 (2016); *State v. Covey*, 290 Neb. 257, 859 N.W.2d 558 (2015); *First Data Corp. v. State*, 263 Neb. 344, 639 N.W.2d 898 (2002). But see *School Dist. of Omaha v. State Board of Education*, 187 Neb. 76, 187 N.W.2d 592 (1971).

[19] *Pig Pro Nonstock Co-op v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997).

[20] *People v. Mendenhall*, 363 P.3d 758, 766 (Colo. App. 2015), quoting *Pima Financial Service Corp. v. Selby*, 820 P.2d 1124, 1128 (Colo. App. 1991). See *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 113 S. Ct. 716, 121 L.Ed.2d 656 (1993).

Moreover, we note that a narrow definition of the term "grandparent" was a factor in our conclusion that such visitation statutes were constitutional. We specifically noted in *Hamit v. Hamit*[21] that "Nebraska's statutes are . . . narrowly drawn . . . and explicitly protect parental rights while taking the child's best interests into consideration."

Because the plain language of the statutes provides that a grandparent is defined as the biological or adoptive parent of a minor child's biological or adoptive parent, and because the Heidens failed to show that they were Katherine's biological or adoptive parents—indeed the record in this case affirmatively shows that they were not Katherine's biological or adoptive parents—the Heidens are not entitled to an order of visitation under §§ 43-1801 to 43-1803. The district court's order of visitation is vacated, and the cause is remanded to the district court with directions to dismiss.

CONCLUSION

The district court erred in granting the Heidens' request for grandparent visitation. We vacate the order of visitation, and remand the cause with directions to dismiss.

Order vacated, and cause remanded with directions to dismiss.

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[21] *Hamit v. Hamit, supra* note 1, 271 Neb. at 677, 715 N.W.2d at 527.

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

State of Nebraska on behalf of Marcelo K. and Rycki K., minor children, appellant, v. Ricky K. and Belinda D., appellees.

912 N.W.2d 747

Filed June 8, 2018. No. S-17-723.

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. ____: ____. 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: Parties: Final Orders: Appeal and Error.** One may bring an appeal pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2016) only when (1) multiple causes of action or multiple parties are present, (2) the court enters a "final order" within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2016) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.
4. **Jurisdiction: Appeal and Error.** An appellate court and the tribunal appealed from do not have jurisdiction over the same case at the same time.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Appeal dismissed.

Theodore P. Arndt, Authorized Attorney for the State of Nebraska, for appellant.

Willow T. Head, of Law Offices of Willow T. Head, P.C., L.L.O., for appellee Ricky K.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Daugherty, District Judge.

Cassel, J.

INTRODUCTION

The State of Nebraska initiated a proceeding to establish support for two children, based upon notarized acknowledgments of paternity. Ultimately, the pleadings framed multiple claims. After the district court entered an order disestablishing paternity of one child and taking no action on the other claims, the State purported to appeal. Because our statute[1] governing multiple parties and multiple claims dictates that the order was not final or appealable, we dismiss the appeal for lack of jurisdiction.

BACKGROUND

The State brought an action against Ricky K., the acknowledged father of Marcelo K. and Rycki K., to establish child support for the two minor children. Belinda D., the mother of the minor children, was joined in the initial complaint, which styled her as a "Third Party Defendant."

Ricky filed an amended answer and counterclaim and cross-claim (styled as a cross-complaint, despite seeking relief against both the State and Belinda) in which he alleged that he was not the biological father of Marcelo, that Belinda fraudulently coerced him into signing the minor child's birth certificate, and that there was a material mistake of fact and fraud based on her representations. For these reasons, he sought a disestablishment of paternity as to Marcelo. As to Rycki, Ricky admitted he was Rycki's biological father and sought joint legal and physical custody of the minor child. The counterclaim and cross-claim set forth two "causes of action" separately raising Ricky's claims regarding Marcelo and Rycki, respectively.

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[1] Neb. Rev. Stat. § 25-1315 (Reissue 2016).

The district court did not officially bifurcate the matter, but the issues pertaining to the disestablishment of paternity of Marcelo, including appointment of a guardian ad litem, were referred to the district court referee. After genetic testing was done, but before hearing on the disestablishment issue, the referee appointed a guardian ad litem.

After an evidentiary hearing on disestablishment, the referee found that the genetic testing excluded Ricky from being Marcelo's biological father. However, because the referee determined that both Ricky and Belinda signed the acknowledgment of paternity knowing that Ricky was not Marcelo's biological father, it concluded that the evidence was insufficient to satisfy the required showing of fraud, material mistake of fact, or duress. Consequently, the referee determined that Ricky had failed to meet his burden of proof and recommended denying disestablishment.

Ricky filed exceptions to the referee's report and requested that the issue be considered by the district court. After a hearing, the district court sustained the exception to the referee's recommendations and rejected its analysis and conclusion. The court made independent findings and concluded that the statutory requirements to set aside the acknowledgment of paternity as to Marcelo on the basis of fraud had been met.

The court entered this order on June 19, 2017. This order purported to set aside the prior legal determination establishing Ricky's paternity of Marcelo and ordered that Ricky shall have no legal obligation of a parent or be recognized as a parent to Marcelo. The order was silent as to Rycki, the other child.

On July 17, 2017, the State purported to appeal from the June 19 order. In due course, the appeal was docketed and we moved it to our docket.[2]

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

On September 6, 2017, the district court entered a decree of paternity addressing the remaining claims against Ricky concerning the minor child Rycki. The decree stated in part, "[Ricky] is found not to be the biological father of [Marcelo], and [Ricky] filed to disestablish paternity of [Marcelo]. . . . [A]fter a hearing, the Court found that fraud existed and disestablishment was in the best interest of [Marcelo], and granted disestablishment of paternity as it pertains to [Marcelo]." The record does not show any appeal or attempt to appeal from the September 6 decree.

ASSIGNMENTS OF ERROR

The State assigns that the district court abused its discretion when it determined that Ricky successfully challenged a notarized acknowledgment of paternity and met his burden to show fraud, duress, or a material mistake of fact in the signing of the acknowledgment.

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.[3]

ANALYSIS

[2] Ricky asserts that there is "an issue whether or not [this court] has jurisdiction based on whether the Order dated June 19, 2017 is the final order."[4] Ricky does not explain why this is so, but before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5] Therefore, we must first determine whether we have appellate jurisdiction to review the district court's order disestablishing Ricky's paternity of Marcelo.

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[3] *Deleon v. Reinke Mfg. Co.*, 287 Neb. 419, 843 N.W.2d 601 (2014).

[4] Brief for appellee at 1.

[5] See *Boyd v. Cook*, 298 Neb. 819, 906 N.W.2d 31 (2018).

Appellate courts have jurisdiction to review the judgments and final orders of the district court.[6] A "judgment" is "the final determination of the rights of the parties in an action."[7] The pleadings set forth three claims: the State's claim to establish child support as to both children, Ricky's "cause of action" for disestablishment of Marcelo, and his "cause of action" for custody and visitation of Rycki. The June 19, 2017, order addressed only one of the three claims. Because the June 19 order did not finally determine the rights of the parties in the paternity action, it was not a "judgment."

[3] Another statute provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.[8]

And, where this statute is implicated, we have held that one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a "final order" within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2016) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.[9]

[4] In the present case, there were multiple parties and multiple claims. However, the district court did not make an

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[6] See Neb. Rev. Stat. § 25-1911 (Reissue 2016).

[7] Neb. Rev. Stat. § 25-1301(1) (Reissue 2016).

[8] § 25-1315(1).

[9] See *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

express direction for the entry of judgment. Presumably the district court did not intend the June 19, 2017, order to be final, because it retained jurisdiction over the case after the State appealed and entered the paternity decree on September 6. It no doubt was aware of the longstanding principle that an appellate court and the tribunal appealed from do not have jurisdiction over the same case at the same time.[10] Therefore, without the district court's express direction for the entry of judgment, we have no jurisdiction to review the June 19 order.

Nonetheless, the State responded at oral argument that the disestablishment order was a final order, because it was an order affecting a substantial right made during a special proceeding, or perhaps, the State argued, made when such order in effect determined the action and prevented a judgment.[11]

But the State does not explain how this would avoid the effect of § 25-1315. That section states, "In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties . . . ."[12] Even if disestablishment was fully adjudicated by the June 19, 2017, order, it was asserted with other claims in the overall proceeding. Because the June 19 order did not adjudicate those other claims, it did not "terminate the action as to any of the claims or parties," including the disestablishment claim.

For the sake of completeness, we note that in three limited instances, we have found § 25-1315 to not apply in the case of a special proceeding. But, we find the present case

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[10] See, *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996); *State Bank of Beaver Crossing v. Mackley*, 118 Neb. 734, 226 N.W. 318 (1929).

[11] See § 25-1902.

[12] § 25-1315(1).

distinguishable. First, we have declined to apply § 25-1315 to a postconviction order granting an evidentiary hearing on some issues and denying a hearing on others.[13] Although we followed pre-§ 25-1315 precedent, we should have explained that a postconviction proceeding does not raise multiple claims within the meaning of § 25-1315, but may assert multiple grounds for a prisoner's claim of a "denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States."[14] Here, in contrast, multiple claims were presented.

Second, we have declined to apply § 25-1315 to an order determining title in a partition proceeding where the parties have united the issues of title and the right to partition.[15] Because an order in such a case affirmatively disposes of all title claims of all interested parties, it does not implicate § 25-1315 which only applies where there is a final order "as to one or more *but fewer than all* of the claims or parties."[16] But, as we have explained, § 25-1315 is implicated in the present case, because it involved multiple parties and multiple claims and resolved fewer than all of the causes of action or parties.

Finally, we have declined to apply § 25-1315 in the context of an order denying intervention.[17] In that circumstance, we have found that the plain language of § 25-1315 is not implicated, because although it references claims, counterclaims, cross-claims, and third-party claims, it does not mention complaints in intervention. Without plain language to the

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[13] See *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

[14] Neb. Rev. Stat. § 29-3001(1) (Reissue 2016).

[15] See *Guardian Tax Partners v. Skrupa Invest. Co.*, 295 Neb. 639, 889 N.W.2d 825 (2017).

[16] § 25-1315(1) (emphasis supplied).

[17] See *Streck, Inc. v. Ryan Family*, 297 Neb. 773, 901 N.W.2d 284 (2017).

contrary, we shall continue to apply preexisting final order jurisprudence to orders denying intervention. But, as here, where the language of § 25-1315 is implicated, we must apply the requirements of that section in order to find a final, appealable order.

CONCLUSION

Because the State appealed from an order deemed to be nonfinal under § 25-1315, we lack jurisdiction over the appeal. Accordingly, the appeal must be dismissed.

Appeal dismissed.

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

Mark Heineman, appellee, v. The Evangelical Lutheran Good Samaritan Society, doing business as Good Samaritan Society-Scribner, et al., appellants.

912 N.W.2d 751

Filed June 8, 2018. No. S-17-983.

1. **Arbitration and Award.** Arbitrability presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
3. **Trial: Evidence: Appeal and Error.** Generally, it is not the function of an appellate court to review evidence which was not presented to the trial court.
4. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
5. **Actions: Judicial Notice: Records: Appeal and Error.** An appellate court may take judicial notice of a document, including briefs filed in an appeal, in a separate but related action concerning the same subject matter in the same court.
6. **Contracts: Consideration.** Consideration is sufficient to support a contract if there is any detriment to the promisee or any benefit to the promisor.
7. **Arbitration and Award: Federal Acts: Contracts.** If a contract containing an arbitration clause involves interstate commerce, the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (2012), governs the contract.
8. **Contracts: States: Words and Phrases.** Contracts involving interstate commerce include contracts for services between parties of different states.
9. **Federal Acts: Contracts: Arbitration and Award: States.** The Federal Arbitration Act, at 9 U.S.C. § 2 (2012), preempts inconsistent state laws that apply solely to the enforceability of arbitration provisions in contracts evidencing a transaction involving commerce.

Appeal from the District Court for Dodge County: Geoffrey C. Hall, Judge. Reversed and remanded with directions.

Nicholas A. Buda, Steven D. Davidson, and Lindsay K. Lundholm, of Baird Holm, L.L.P., and, on brief, Thomas E. Johnson for appellants.

Douglas R. Novotny, of Novotny Law, L.L.C., for appellee.

Heavican, C.J., Cassel, Stacy, Funke, and Papik, JJ., and Schreiner, District Judge.

Cassel, J.

INTRODUCTION

A nursing home resident filed suit for personal injuries against the facility and several of its employees. The defendants moved to dismiss and compel arbitration pursuant to an arbitration agreement signed by the resident at the time of admission. The district court declared that the arbitration agreement was void and unenforceable on state law grounds and for being contrary to public policy. Because the court erred in both respects, we reverse, and remand with directions.

BACKGROUND

Mark Heineman filed a personal injury action against The Evangelical Lutheran Good Samaritan Society, doing business as Good Samaritan Society-Scribner, and several of its employees (collectively Evangelical Lutheran), for injuries he sustained as a resident at the Good Samaritan Society-Scribner nursing home. Heineman is a Nebraska resident and The Evangelical Lutheran Good Samaritan Society is a nonprofit North Dakota corporation with its principal place of business in South Dakota.

Evangelical Lutheran filed motions to dismiss or stay the proceedings and to compel arbitration pursuant to an arbitration clause within the admission agreement Heineman had signed before he was admitted as a resident in the nursing

home. The signature on the second page of the arbitration section was dated February 11, 2015.

The agreement included a "Resolution of Legal Disputes" section in which Heineman agreed to arbitrate "[a]ny legal controversy, dispute, disagreement or claim arising between the Parties" by checking a box next to, "YES I DO wish to arbitrate disputes and I received a copy of this Resolution of Legal Disputes." In addition to permitting the signor to either opt into or out of the arbitration clause, the contract stated that the agreement to arbitrate disputes was not a condition of admission or of continued stay. The arbitration agreement further provided: "This arbitration provision binds all parties whose claims may arise out of or relate to treatment or service provided by the center including any spouse or heirs of the Resident." And by signing the agreement, Heineman agreed that the "Resolution of Legal Disputes" provision shall be governed by and interpreted under the Federal Arbitration Act (FAA).[1]

The district court held two hearings on the motions to dismiss and compel arbitration. The hearings were conducted on affidavits, one at each hearing, offered by Evangelical Lutheran. They were substantially identical. Heineman did not offer any evidence.

After reviewing the language of the agreement, the court determined that the arbitration clause lacked "mutuality of obligation" by the parties. In doing so, the court relied on *De Los Santos v. Great Western Sugar Co.*[2] It further found the arbitration clause unenforceable for failure to strictly conform to the requirements of Nebraska's Uniform Arbitration Act (UAA).[3] Finally, it relied on 42 C.F.R. § 483.70(n)(1) (2017) to find that the federal government "has taken action to eliminate preemptory arbitration clauses in nursing care facility

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[1] 9 U.S.C. § 1 et seq. (2012).

[2] *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984).

[3] Neb. Rev. Stat. § 25-2601 et seq. (Reissue 2016).

contracts wherein the facility receives Medicaid funding." Consequently, it also found the arbitration clause to be void and unenforceable as contrary to public policy and overruled the motions.

Evangelical Lutheran appealed, and we moved the case to our docket.[4]

ASSIGNMENTS OF ERROR

Evangelical Lutheran assigns that the district court erred in (1) failing to find that the arbitration clause was governed by the FAA, (2) finding that the arbitration clause was void and unenforceable under the UAA, (3) finding that the arbitration clause lacked mutuality of obligation between the parties, (4) finding that the arbitration clause was void and unenforceable on public policy grounds, and (5) failing to dismiss or stay the action and compel arbitration.

STANDARD OF REVIEW

[1,2] Arbitrability presents a question of law.[5] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[6]

ANALYSIS

"Mutuality of Obligation"

The district court found that the arbitration agreement lacked "mutuality of obligation," thereby making it unenforceable. We understand "mutuality of obligation" to be the equivalent of mutuality of consideration.[7]

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

[5] *Citizens of Humanity v. Applied Underwriters*, 299 Neb. 545, 909 N.W.2d 614 (2018).

[6] *Frohberg Elec. Co. v. Grossenburg Implement*, 297 Neb. 356, 900 N.W.2d 32 (2017).

[7] See, Black's Law Dictionary 1179 (10th ed. 2014) (defining "mutuality of obligation"); Joseph M. Perillo, Calamari and Perillo on Contracts § 4-12 (6th ed. 2009).

The district court relied on *De Los Santos v. Great Western Sugar Co.*,[8] but the situation there was significantly different. There, the processing company promised to pay for transportation of sugar beets but only to the extent loaded on the contractor's trucks. In the absence of a specified quantity, the processing company had no obligation to use the contractor's services. Here, as we discuss below, the language of the agreement imposed reciprocal obligations.

Evangelical Lutheran argues that there was sufficient consideration and that both Evangelical Lutheran and Heineman were mutually bound by the arbitration agreement. It argues that the language of the agreement applies to "'any legal controversy, dispute, disagreement, or claim of any kind,' not just to claims brought by . . . Heineman."[9] Therefore, it contends that Evangelical Lutheran would also be required to submit its claims to arbitration pursuant to the agreement.

In response to this argument, Heineman argues that Evangelical Lutheran is not actually bound by the arbitration agreement. To support this response, he cites to county and district court cases outside of our record. He asserts that in those cases, Evangelical Lutheran filed suit against its residents without first attempting arbitration. And he asks us to take judicial notice of the complaints filed in those cases as *proof* of this lack of mutuality of obligation.

[3,4] But to expand the record in this fashion would be improper, because, generally, it is not the function of an appellate court to review evidence which was not presented to the trial court.[10] A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.[11]

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[8] *De Los Santos v. Great Western Sugar Co., supra* note 2.

[9] Brief for appellants at 22.

[10] See, e.g., *U.S. v. Oatman*, 702 Fed. Appx. 478 (8th Cir. 2017).

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

[5] It is true that we have held that an appellate court may take judicial notice of a document, including briefs filed in an appeal, in a separate but related action concerning the same subject matter in the same court.[12] But Heineman's request goes much further. Because we see no reason to expand this precedent, we overrule Heineman's motion to take judicial notice.

[6] And without the extraneous material, his argument collapses. Consideration is sufficient to support a contract if there is any detriment to the promisee or any benefit to the promisor.[13] In this case, the language of the arbitration agreement applies equally to claims brought by Heineman and by Evangelical Lutheran. Because both parties are subject to the same detriment and benefit as mutual promisees and promisors, consideration was sufficient. The district court erred in finding that the agreement was unenforceable for insufficient consideration or "no mutuality of obligation."

Applicability of FAA

Having determined that an enforceable arbitration agreement existed, we now turn to consider whether the arbitration clause was subject to the requirements of the FAA or UAA.

[7,8] If a contract containing an arbitration clause involves interstate commerce, the FAA governs the contract.[14] And we have held that contracts involving interstate commerce include contracts for services between parties of different states.[15] Here, there is no question that the admission agreement involved interstate commerce. Heineman conceded as much at oral argument, and the agreement itself stated that it was "a

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[12] See, *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008); *Jessen v. Jessen*, 259 Neb. 644, 611 N.W.2d 834 (2000).

[13] *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008).

[14] See *Wilczewski v. Charter West Nat. Bank*, 295 Neb. 254, 889 N.W.2d 63 (2016).

[15] See *Frohberg Elec. Co. v. Grossenburg Implement, supra* note 6.

transaction involving interstate commerce." Consequently, the FAA governs this contract.

[9] Because the FAA, at 9 U.S.C. § 2, preempts inconsistent state laws that apply solely to the enforceability of arbitration provisions in contracts evidencing a transaction involving commerce,[16] the arbitration agreement did not need to strictly comply with the language of the UAA. For this reason, the district court erred in finding the arbitration agreement void and unenforceable on UAA grounds.

Public Policy

Lastly, we consider the district court's holding that the arbitration agreement was void and unenforceable as contrary to public policy. The only authority on which the court relied was a federal regulation[17] which provides that "[a] facility must not enter into a pre-dispute agreement for binding arbitration with any resident or resident's representative nor require that a resident sign an arbitration agreement as a condition of admission to the [long-term care] facility."[18]

However, this provision of the regulation did not become effective until November 28, 2016,[19] long after the date of the agreement in the case before us, which was signed on February 11, 2015. And the U.S. Supreme Court has made clear that retroactivity is not favored in the law and has held "administrative rules will not be construed to have retroactive effect unless their language requires this result."[20] Moreover, as Evangelical Lutheran points out, implementation

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[16] See *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

[17] 42 C.F.R. § 483.70.

[18] 42 C.F.R. § 483.70(n)(1).

[19] See Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688 (Oct. 4, 2016).

[20] *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988).

of the regulation has been enjoined by a federal court.[21] Thus, Heineman's public policy argument rests on retroactive application of a federal regulation, which has no plain language mandating retroactivity and which has been enjoined by a federal court from being placed into effect. At oral argument, Heineman conceded that neither the U.S. Congress nor the Nebraska Legislature had enacted legislation encompassing the public policy articulated in the enjoined regulation. We decline his invitation to impose such a policy based upon the "common law." The district court erred in using the regulation as a basis to conclude that the agreement was void and unenforceable.

CONCLUSION

Because the arbitration agreement was valid and enforceable and governed by the FAA, the district court should have sustained the motions to dismiss and compel arbitration. But, in sustaining the motions, the district court could exercise its discretion to stay rather than dismiss the case.[22] Accordingly, we reverse the district court's order and remand the cause with directions that the court enter an order compelling arbitration pursuant to the agreement and either dismissing or staying the action.

Reversed and remanded with directions.

Miller-Lerman, J., not participating.

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[21] *American Health Care Association v. Burwell*, 217 F. Supp. 3d 921 (N.D. Miss. 2016).

[22] See *Wilczewski v. Charter West Nat. Bank, supra* note 14.



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. Kent J. Trembly, respondent.

912 N.W.2d 764

Filed June 15, 2018. No. S-17-461.

1. **Disciplinary Proceedings: Appeal and Error.** Because attorney discipline cases are original proceedings before the Nebraska Supreme Court, the court reviews a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
2. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline under the circumstances.
3. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
4. ____. Each attorney discipline case must be evaluated in light of its particular facts and circumstances.
5. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.
6. ____. The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
7. **Disciplinary Proceedings: Rules of the Supreme Court.** A pattern of noncompliance with Nebraska disciplinary rules and cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

8. **Disciplinary Proceedings: Convictions.** A felony conviction is a strongly aggravating factor in determining the sanction ultimately imposed on an attorney.
9. **Disciplinary Proceedings.** An attorney's cooperation in disciplinary proceedings, taking responsibility for his or her actions, and lack of previous discipline are each mitigating factors.
10. ____. A continuing commitment to the legal profession and the community is also a mitigating factor in an attorney discipline case.
11. ____. When no exceptions to the referee's findings of fact in an attorney discipline case are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.
12. **Disciplinary Proceedings: Case Disapproved.** *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003), is disapproved to the extent it was determined therein that a 2-year suspension was a sufficient sanction based on the egregious conduct substantiating the grounds for disciplinary action.

Original action. Judgment of suspension.

Julie L. Agena, Assistant Counsel for Discipline, for relator.

Clarence E. Mock, of Johnson & Mock, P.C., L.L.O., for respondent.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Hall, District Judge.

Per Curiam.

This is an attorney discipline case in which the only question before this court is the appropriate sanction. Kent J. Trembly admits to receiving a felony conviction for filing a false individual income tax return in the U.S. District Court for the District of Nebraska. The referee recommended Trembly be suspended from the practice of law for 18 months. However, after our de novo review of the record, we conclude a 3-year suspension from the practice of law is the proper sanction.

BACKGROUND

Trembly was admitted to the practice of law in the State of Nebraska on September 28, 1994. At all relevant times, he was engaged in the practice of law in Wahoo, Nebraska.

Grounds for Attorney Discipline

On December 16, 2015, the U.S. District Court for the District of Nebraska accepted Trembly's plea of guilty and found him guilty of the charge of filing a false tax return for tax year 2006, under I.R.C. § 7206(1) (2012). Specifically, Trembly filed a U.S. individual tax return that failed to report any gross receipts from his business activity—involving legal, veterinary, supplement sales, and investment brokerage businesses—omitting gross receipts of $1,110,982.77. On December 8, 2016, Trembly was sentenced to probation for 2 years, with 6 months of home restriction, and restitution in the amount of $110,374.58.

Procedural History

On May 3, 2017, Counsel for Discipline of the Nebraska Supreme Court filed formal charges against Trembly, alleging that he violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. § 3-508.4(a) through (c). Trembly admitted to these allegations in his answer, and we sustained Counsel for Discipline's motion for judgment on the pleadings limited to the facts. We then appointed a referee for the taking of evidence limited to the appropriate discipline.

Referee's Report

After an evidentiary hearing, the referee reported his findings of fact and recommendations for the appropriate sanction. The referee reasoned that omitting over $1 million of income from a tax return was serious, needed to be deterred, and reflected poorly on the reputation of the bar as a whole. However, the referee noted that Trembly's actions did not harm any clients and that "Trembly has accepted responsibility for the actions that form the basis of this proceeding, has satisfied all terms of his probation and has cooperated with Counsel for [D]iscipline to resolve this matter expeditiously."

The referee also identified certain mitigating factors that reflect on Trembly's present and future fitness to practice law: Trembly's cooperation with Counsel for Discipline and

acceptance of responsibility; Trembly's lack of prior disciplinary issues, with Counsel for Discipline or the professional boards in the three states where he holds a veterinarian license; and his honorable discharge from the Nebraska Air National Guard as a lieutenant colonel in 2014.

In the report, the referee acknowledged the seriousness of a felony conviction and that this court has generally found disbarment to be the appropriate sanction for attorneys who have received a felony conviction. Nevertheless, the referee stated that such discipline was not required and that "the nature of the conduct . . . ought to be evaluated more thoroughly than the final classification of any criminal proceeding."

The referee found Trembly's conduct more egregious than in cases where attorneys filed no income tax returns, receiving 1-year suspensions, but less egregious than in *State ex rel. Counsel for Dis. v. Mills*[1] (*Mills I*), where we issued a 2-year suspension. Because the attorney in *Mills I*, Stuart B. Mills, was convicted of a felony for the conduct we had disciplined him for after our proceedings and he received no additional suspension because of the conviction, the referee determined Trembly's felony conviction was essentially irrelevant to determining his discipline. In weighing the factors for imposing discipline and the mitigating factors, the referee determined the appropriate sanction for Trembly fell between cases involving 1-year and 2-year suspensions. Accordingly, the referee recommended Trembly be suspended from the practice of law for 18 months.

ASSIGNMENT OF ERROR

The only question before this court is the appropriate discipline.

STANDARD OF REVIEW

[1] Because attorney discipline cases are original proceedings before this court, we review a referee's recommendations

[1] *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003).

de novo on the record, reaching a conclusion independent of the referee's findings.[2]

ANALYSIS

[2-4] The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline under the circumstances.[3] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.[4] Each attorney discipline case must be evaluated in light of its particular facts and circumstances.[5]

Violation of a disciplinary rule concerning the practice of law is a ground for discipline.[6] Further, criminal offenses committed by an attorney and involving violence, dishonesty, breach of trust, or serious interference with the administration of justice require imposition of attorney discipline.[7]

Trembly admitted being convicted of a felony for filing a false individual income tax return and violating the Nebraska Rules of Professional Conduct and his oath of office as an attorney, § 7-104, in his answer to the formal charges. Thus, we granted Counsel for Discipline's motion for judgment on the pleadings as to the facts substantiating the grounds for

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[2] *State ex rel. Counsel for Dis. v. Halstead*, 298 Neb. 149, 902 N.W.2d 701 (2017).

[3] *State ex rel. Counsel for Dis. v. Jorgenson*, 298 Neb. 855, 906 N.W.2d 43 (2018).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] See § 3-508.4, comment 2. See, also, *State ex rel. Counsel for Dis. v. Walz*, 291 Neb. 566, 869 N.W.2d 71 (2015).

disciplinary action. We must now determine the appropriate sanction.

Under Neb. Ct. R. § 3-304, this court may impose one or more of the following disciplinary sanctions: "(1) Disbarment by the Court; or (2) Suspension by the Court; or (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or (4) Censure and reprimand by the Court; or (5) Temporary suspension by the Court[.]"

[5,6] For purposes of determining the proper discipline of an attorney, we consider the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.[8] The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[9]

Nature of Offense

We have stated that "[t]here should be no question that the knowing failure to file tax returns and to pay taxes is a serious violation of the ethical obligations of an attorney."[10] Trembly's actions are even more serious in light of his affirmative misrepresentation to the Internal Revenue Service (IRS) by underreporting his income and signing that the amount he did report was accurate. We have stated that the failure to file a tax return is a crime of moral turpitude, which is now reflected in a professional conduct rule prohibition against "commit[ing] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; [and] engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."[11]

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[8] *Jorgenson, supra* note 3.

[9] *Id.*

[10] *State ex rel. NSBA v. Caskey*, 251 Neb. 882, 889, 560 N.W.2d 414, 418 (1997).

[11] § 3-508.4.

Another important consideration regarding the nature of Trembly's offense is the sheer magnitude of Trembly's conduct. The fact that Trembly underreported over $1.1 million in income makes the misrepresentation substantially more egregious.

Deterrence and Reputation of Bar

Attorneys have an "'obligation to uphold the laws of the United States' and [a] felony conviction thus 'violate[s] basic notions of honesty and endanger[s] public confidence in the legal profession'" at the most egregious level.[12] Accordingly, crimes severe enough to warrant a felony conviction are those most detrimental to the bar and require a sanction deterring other members of the bar from committing such actions. While felonies resulting from actions harming a client or committed in the performance of duties as a legal professional are distinguishable from felonies committed as a member of the public, both violate the basic notion that attorneys are guardians of the law.

Protection of Public

Trembly's actions were in his capacity as an individual, not an attorney, and did not harm any clients.

Nevertheless, the goal of attorney discipline proceedings is not as much punishment as a determination of whether it is in the public interest to allow an attorney to keep practicing law.[13] Providing for the protection of the public requires the imposition of an adequate sanction to maintain public confidence in the bar.[14]

Attitude of Respondent

The referee stated, "Trembly has accepted responsibility for the actions that form the basis of this proceeding, has satisfied

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[12] *State ex rel. Counsel for Dis. v. Council*, 289 Neb. 33, 47, 853 N.W.2d 844, 854 (2014).

[13] *Walz, supra* note 7.

[14] *Id.*

all terms of his probation and has cooperated with Counsel for [D]iscipline to resolve this matter expeditiously."

Fitness to Continue Practice of Law

[7] There was no evidence presented of Trembly's being unfit to practice law based on any mental condition or any other issue in personal life. As mentioned above, a criminal act of any kind negatively reflects on an attorney's fitness to practice law. A pattern of noncompliance with our disciplinary rules and cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.[15]

Trembly's honorable discharge from the National Guard, his lack of other misconduct in the legal and veterinary professions, and his commitment to remedying his improper action each weigh in favor of his fitness. In fact, this single indiscretion, which occurred over 10 years ago, on his otherwise unblemished record of 23 years of legal practice provides a strong indication that he is fit to continue practicing and is unlikely to reoffend.[16]

Aggravating Factors

As discussed above, the referee acknowledged that a felony conviction for the conduct at issue in disciplinary proceedings is significant, yet the referee gave little weight to Trembly's felony conviction in the recommended sanction. Neither Counsel for Discipline nor Trembly takes exception with the 18-month suspension recommended by the referee. However, Counsel for Discipline argues Trembly should be strongly sanctioned for his felony conviction.

Trembly contends that the referee was correct in determining we have not adopted a bright-line rule requiring disbarment for a felony conviction and the underlying conduct, not the felony conviction, should be our focal point for

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[15] *Jorgenson, supra* note 3.

[16] See *Walz, supra* note 7.

determining discipline. He argues focusing on a conviction for the underlying conduct places undue influence on "the serendipitous exercise of unfettered discretion by a prosecuting authority."[17]

As the referee and parties acknowledge, we have not adopted a bright-line rule requiring the disbarment of attorneys who receive a felony conviction. In *State ex rel. Counsel for Dis. v. Walz*,[18] we explained that "[a]lthough we have not stated a 'bright line rule,' our case law involving discipline for felony convictions indicates that such a conviction reflects adversely upon a lawyer's fitness to practice law and that disbarment is considered to be the appropriate sanction." We note many of the cases cited in *Walz* included additional significant aggravating factors to the felony conviction.[19] Nevertheless, we stand behind our statement that the serious nature of a felony conviction alone is sufficient to warrant disbarment as an appropriate sanction but reiterate that such a sanction is not required.

Additionally, we do not believe this court should impose a bright-line rule that a felony conviction creates a presumption in favor of disbarment, as we have for acts of misappropriating funds and commingling.[20] Unlike those violations, the acts that may result in a felony conviction are simply too numerous to apply a rigid rule governing our determination of how to handle such conduct. Therefore, we agree with the parties that the nature of the conduct underlying the conviction, as well as the other factors for determining discipline, is the proper focal point for our proceedings. Nevertheless, we also refuse to adopt a rule that gives no effect to the existence of a felony conviction for the actions of an attorney.

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[17] Brief for respondent at 9.

[18] *Walz, supra* note 7, 291 Neb. at 575, 869 N.W.2d at 77.

[19] See, *Council, supra* note 12; *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009).

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

We are not persuaded by Trembly's argument that the discretionary decision of a prosecuting authority justifies disregarding the ultimate result of criminal charges. Instead, holding that the discretionary decision of an attorney charged with the duty of enforcing the law justifies disregarding the ultimate determination of a judge or jury on the charges brought would only harm the legal profession. Such discretionary decisions are based on the severity of the underlying offense and the need to deter others from committing similar acts, among other considerations; these are the same factors we consider in our own determination for sanctions. Further, the end result of a felony conviction carries with it substantial implications to the reputation of the bar and the protection of the public deserving of an appropriate disciplinary response.

We also reject the notion that our reinstatement of Mills without further sanctions established a precedent that a felony conviction is meaningless to the appropriate discipline for an attorney's conduct.[21] In *Mills I*, we determined the discipline appropriate for Mills' misconduct before any conviction had been imposed. Then, during our reinstatement proceedings in *State ex rel. Counsel for Dis. v. Mills*[22] *(Mills II*), we considered only whether Mills affirmatively showed both that he had fully complied with the order of suspension and that he would not engage in practices offensive to the legal profession in the future, which he had. Whether Mills should have received further sanction for his felony conviction was not before this court. Instead, we explained Mills had been disciplined for his underlying conduct, with a 2-year suspension, and later for his felony conviction in separate proceedings, with a private reprimand, which Counsel for Discipline did not appeal to this court.[23]

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[21] See *State ex rel. Counsel for Dis. v. Mills*, 272 Neb. 56, 736 N.W.2d 712 (2006).

[22] *Id.*

[23] *Id.*

[8] As we indicated in *Walz*, the fact that Mills had not been convicted of a felony at the time of our disciplinary proceedings was relevant to our consideration of the appropriate discipline.[24] Therefore, we consider a felony conviction to be a strongly aggravating factor in determining the sanction ultimately imposed on an attorney.

Mitigating Factors

[9,10] Trembly fully cooperated with Counsel for Discipline, admitted to his misconduct, took responsibility for his actions, had practiced for many years, and had no previous disciplinary history. Further, the violation he committed was a completely isolated act not part of any pattern of misconduct. These are all mitigating factors.[25] Further, a continuing commitment to the legal profession and the community is also a mitigating factor in an attorney discipline case.[26]

[11] In his brief, Trembly argues that letters attesting to his good character and honesty were submitted to the referee as evidence. However, these letters were not mentioned in the referee's report, and Trembly has not taken exception to the findings of fact in the referee's report. When no exceptions to the referee's findings of fact in an attorney discipline case are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.[27] We find the referee's report final and conclusive, so we do not consider any letters submitted on Trembly's behalf.

Prior Cases

On two prior occasions, we have issued sanctions to attorneys who received a felony conviction for the same offense

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[24] *Walz, supra* note 7.

[25] *Halstead, supra* note 2; *Council, supra* note 12.

[26] *Council, supra* note 12.

[27] *State ex rel. Counsel for Dis. v. Island*, 296 Neb. 624, 894 N.W.2d 804 (2017).

as Trembly.[28] However, in both cases, the attorney voluntarily surrendered his license and we determined disbarment was an appropriate sanction without analysis.[29] Accordingly, we do not find either case binding here, where Trembly has not chosen to voluntarily relinquish his license.

Further, our reinstatement proceedings on one of these cases, *State ex rel. NSBA v. Scott*,[30] evidences its dissimilarity from the present case. During that proceeding, we reviewed the conduct of the attorney which formed the basis for the disciplinary proceedings: He admitted to receiving a felony conviction for filing a false income tax return and to filing false income tax returns continuously for 15 years.[31] In determining whether the attorney should be reinstated, we considered the fact he still owed the State of Nebraska $18,000 and the IRS $300,000 to $400,000 in unpaid taxes, fees, and penalties and over $61,000 in restitution for his underlying misconduct.[32] Additionally, we noted that 1 week before his disbarment, the attorney had received a 1-year suspension for deliberately lying to a court, among other misconduct.[33]

The cumulative acts of misconduct and an overall pattern of violating our ethical rules, the failure to comply with the restitution order of the sentence, and the voluntary license surrender each show a stark contrast between the circumstances in *State ex rel. NSBA v. Scott*[34] and this case. We note our proposition of law that disbarment ought not to be imposed

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[28] *State ex rel. NSBA v. Scott*, 252 Neb. 749, 566 N.W.2d 741 (1997); *State ex rel. NSBA v. Watkins*, 252 Neb. 588, 563 N.W.2d 790 (1997).

[29] *Id.*

[30] *State ex rel. NSBA v. Scott*, 275 Neb. 194, 745 N.W.2d 585 (2008).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

for an isolated act unless the act is of such a nature that it is indicative of permanent unfitness to practice law.[35]

We have also sanctioned attorneys in numerous cases for failing to file income tax returns, each representing a pattern of failure to do such.[36] In these cases, we have consistently sanctioned the attorneys with a 1-year suspension of their licenses.[37] This case, however, is distinguishable from these cases based on the affirmative misrepresentation, the felony conviction, and the magnitude of the offense.

The referee found *Mills I* to be the most analogous case to the facts here but also stated that the facts of *Mills I* were more egregious. In *Mills I*, Mills' misconduct included filing a federal estate tax return form with the IRS containing affirmative misrepresentations. Additionally, Mills showed a pattern of misconduct by improperly notarizing and altering client renunciations and deeds, lying to an IRS agent, encouraging his clients to lie to an IRS agent, and causing a loss to the estate he was handling.[38]

We considered these violations collectively as an isolated incident in the attorney's career because they occurred in the course of one case.[39] Other mitigating factors included Mills' full compliance with Counsel for Discipline, showing of remorse, otherwise unblemished career of 30 years, and community involvement. We sanctioned Mills with a 2-year suspension.[40]

Also, as noted above, Mills was convicted of a felony for his filing with the IRS after our proceedings in *Mills I*.

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

[36] See, e.g., *State ex rel. NSBA v. Duchek*, 224 Neb. 777, 401 N.W.2d 484 (1987); *State ex rel. Nebraska State Bar Assn. v. Fitzgerald*, 165 Neb. 212, 85 N.W.2d 323 (1957).

[37] *Id.*

[38] *Mills I, supra* note 1.

[39] *Id.*

[40] *Id.*

We noted in *Walz* that the absence of this aggravating factor when we sanctioned Mills may have affected the ultimate sanction.[41]

[12] In light of the felony conviction Mills received and the egregious conduct substantiating the grounds for disciplinary action, we disapprove of the 2-year suspension imposed in *Mills I* to the extent that it was considered sufficient.

We agree that *Mills I* includes similar misconduct and mitigating factors to the case at hand. While the breadth of Mills' misconduct was greater than Trembly's and represented a pattern of misconduct, Trembly's misconduct was of a greater magnitude. Both attorneys had long careers with only one period of misconduct, were fully cooperative with Counsel for Discipline, and presented other mitigating factors. Based on our determination that the 2-year suspension in *Mills I* was insufficient and on the strongly aggravating factor of a felony conviction, we think a 2-year suspension would also be insufficient here.

Sanction

Trembly's felony conviction for filing a false income tax return underreporting more than $1.1 million in income was an offense of moral turpitude that requires a sanction sufficient to maintain the public's confidence in the bar and deter such action in other attorneys. Further, the magnitude of the violation and the resulting felony conviction aggravate the misconduct. Conversely, Trembly's attitude and demonstrated fitness to continue practicing law, the fact that no clients were harmed by his actions, and the numerous mitigating factors each warrant leniency.

These factors make this case most analogous to *Mills I*, in which we sanctioned the attorney with a 2-year suspension. Because the sanction imposed in *Mills I* was insufficient for the violation and because of the aggravating factor of

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[41] *Walz, supra* note 7.

Trembly's felony conviction, we hold that a 3-year suspension of Trembly's license is necessary to maintain the public's confidence in the bar and deter such action in other attorneys.

CONCLUSION

Upon our de novo review of the record, we conclude the appropriate sanction for Trembly's misconduct is a 3-year suspension. Accordingly, we find the referee's recommendation of an 18-month suspension to be in error.

Trembly is hereby suspended from the practice of law for a period of 3 years, effective immediately. Trembly is directed to comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, he shall be subject to punishment for contempt of this court. Trembly 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 suspension.

Heavican, C.J., not participating in the decision.

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

Thomas Cullinane, as Special Administrator for the Estate of Helen Cullinane, deceased, appellee, v. Beverly Enterprises - Nebraska, Inc., doing business as Golden LivingCenter - Valhaven, appellant, and Thomas Larson, Jr., DPM, et al., appellees.

912 N.W.2d 774

Filed June 15, 2018. No. S-17-486.

1. **Arbitration and Award.** Arbitrability presents a question of law.
2. ____. Whether a stay of proceedings should be granted and arbitration required is a question of law.
3. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
5. **Arbitration and Award: Appeal and Error.** The standard of review as to the issue of arbitrability summarily tried to the court is the same as in a bench trial of a law action.
6. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong.
7. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
8. **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, and this is so even where neither party has raised the issue.
9. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered

by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.

10. **Federal Acts: Arbitration and Award: Final Orders: Appeal and Error.** In order to determine whether state law governs the finality for purposes of appeal of an order denying a motion to compel arbitration under the Federal Arbitration Act, courts must first apply state procedural rules to determine whether the order is final for purposes of appeal and then determine whether the result of that inquiry would undermine the goals and policies of the act.
11. ____: ____: ____: ____. A direct appeal from an order denying a motion to compel arbitration furthers the objectives of the Federal Arbitration Act by permitting final resolution of the issue of arbitrability without having to first conclude a judicial proceeding on the merits, at which point the arbitral remedy would be rendered essentially meaningless.
12. **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.
13. **Arbitration and Award: Final Orders.** The denial of a motion to compel arbitration is a final, appealable order because it affects a substantial right and is made in a special proceeding.
14. **Arbitration and Award.** Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he or she has not agreed so to submit.
15. **Federal Acts: Arbitration and Award: Contracts.** If arbitration arises from a contract involving interstate commerce, it is governed by the Federal Arbitration Act.
16. **Constitutional Law: Waiver: Intent.** A party has a constitutional right to adjudication of a justiciable dispute, and the law will not find a waiver of that right absent direct and explicit evidence of actual intent of a party's agreement to do so.
17. **Arbitration and Award.** Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.
18. **Arbitration and Award: Contracts.** Disputes about arbitrability for a court to decide include threshold 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.

19. **Arbitration and Award: Intent.** Parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy, if they do so with clear and unmistakable intent.
20. **Arbitration and Award.** A valid delegation clause requires the court to refer a claim to arbitration to the arbitrator to decide gateway arbitrability issues.
21. **Arbitration and Award: Contracts.** Enforcement of an arbitration agreement involves two analytical steps: The first is contract formation—whether the parties entered into any arbitration agreement at all. The second involves contract interpretation to determine whether this claim is covered by the arbitration agreement.
22. **Federal Acts: 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.
23. **Federal Acts: Arbitration and Award: Contracts.** Arbitration in Nebraska is governed by the Uniform Arbitration Act as enacted in Nebraska, but if arbitration arises from a contract involving interstate commerce, it is governed by the Federal Arbitration Act.
24. **Federal Acts: Arbitration and Award.** Where a transaction falls within the scope of the Federal Arbitration Act, the substantive issue of whether the motion to compel arbitration should be granted is a question of federal law.
25. ____: ____. Under 9 U.S.C. § 4 (2012) of the Federal Arbitration Act, the court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof, if no jury trial be demanded by the party alleged to be in default.
26. **Arbitration and Award.** Under Neb. Rev. Stat. § 25-2603(a) (Reissue 2016), on application of a party showing a valid arbitration agreement and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order for the moving party; otherwise, the application shall be denied.

27. **Federal Acts: Arbitration and Award.** Neb. Rev. Stat. § 25-2603 (Reissue 2016) does not defeat the Federal Arbitration Act's objective, expressed in 9 U.S.C. § 4 (2012), that if the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereon.
28. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
29. **Federal Acts: Arbitration and Award: Contracts.** The Federal Arbitration Act makes arbitration agreements valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
30. **Contracts: Fraud.** In the absence of fraud, one who signs an instrument without reading it, when one can read and has had the opportunity to do so, cannot avoid the effect of one's signature merely because one was not informed of the contents of the instrument.
31. ____: ____. The doctrine that the carelessness or negligence of a party in signing a writing estops him or her from afterward disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto when the defense is that such writing, by reason of fraud, does not embrace the contract actually made.
32. ____: ____. Fraud in the execution goes to the very existence of the contract, such as where a contract is misread to a party or where one paper is surreptitiously substituted for another, or where the party is tricked into signing an instrument he or she did not mean to execute.
33. ____: ____. Fraud in the inducement goes to the means used to induce a party to enter into a contract; in such cases, the party knows the character of the instrument and intends to execute it, but the contract may be voidable if the party's consent was obtained by false representations.
34. **Fraud: Proof.** A fraudulent misrepresentation claim requires a plaintiff to establish the following elements: (1) A representation was made; (2) the representation was false; (3) when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that the plaintiff should rely on it; (5) the plaintiff did so rely on it; and (6) the plaintiff suffered damage as a result.
35. **Fraud.** Fraudulent misrepresentations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false.
36. ____. Whether a party's reliance upon a misrepresentation was reasonable is a question of fact.
37. ____. A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity.

38. **Fraud: Proof: Circumstantial Evidence.** In fraud case, direct evidence is not essential, but proof of fraud drawn from circumstantial evidence must not be guesswork or conjecture; such proof must be rational and logical deductions from facts and circumstances from which they are inferred.
39. **Trial.** Under Neb. Rev. Stat. § 25-1127 (Reissue 2016), in the absence of a request by a party for specific findings, a trial court is not required to make detailed findings of fact and need only make its findings generally for the prevailing party.
40. **Trial: Judgments: Evidence: Appeal and Error.** Where trial is to the court and no request for specific findings is made, if there is a conflict in the evidence, an appellate court, in reviewing the judgment rendered, will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.
41. **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.
42. **Judgments: Evidence: Appeal and Error.** Even though an appellate court is, in the absence of oral testimony, equally capable as the trial court of examining the evidence and drawing conclusions therefrom and is under a duty to do so, and even though a case was submitted to the trial court without oral evidence, the duty of the appellate court to evaluate the facts does not extend to the right or duty to make an independent evaluation thereof without regard to the findings below. In such a case, an appellate court is loath to overturn the findings of an experienced trial judge unless in the opinion of the court they are clearly wrong.
43. **Affidavits.** Statements in affidavits as to opinion, belief, or conclusions of law are of no effect.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed.

Jeanelle R. Lust and Charles E. Wilbrand, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant.

Shayla M. Reed, of Reed Law Offices, P.C., L.L.O., for appellee Thomas Cullinane.

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

Funke, J.

Beverly Enterprises - Nebraska, Inc., doing business as Golden LivingCenter - Valhaven (GLCV), appeals the denial of its motion to dismiss or stay proceedings and compel arbitration. GLCV moved to enforce an agreement to arbitrate against Thomas Cullinane, as special administrator for the estate of his mother, Helen Cullinane; Thomas had filed a wrongful death action against GLCV. Thomas objected to GLCV's motion, and the court ruled in his favor, finding the execution of the "Alternative Dispute Resolution Agreement" (the ADR Agreement) was not binding upon Helen or her estate. GLCV appealed, and for the reasons set forth below, we affirm.

I. BACKGROUND

Helen was a resident of GLCV, a skilled nursing facility located in Valley, Nebraska. She was 88 years old at the time of her admission in 2010 and suffered from dementia. She passed away on February 2, 2015. Thomas became the special administrator of Helen's estate and filed a wrongful death action against GLCV on behalf of the estate.

GLCV filed a motion to dismiss or, in the alternative, stay proceedings and compel arbitration pursuant to § 4 of the Federal Arbitration Act (FAA),[1] in accordance with the terms of a written arbitration agreement between GLCV and Helen. GLCV asserted that Eugene Cullinane, Helen's husband, age 84, while acting as Helen's attorney in fact, agreed to resolve disputes through arbitration when he signed the ADR Agreement on September 28, 2010, the date Eugene and Helen were admitted to the facility.

The front page of the ADR Agreement contains a title written in bold and capitalized letters and large font which states: "Alternative Dispute Resolution Agreement." The following language, in bold and capitalized letters, appears

[1] 9 U.S.C. §§ 1 to 16 (2012).

below the title: "This agreement is not a condition of admission to or continued residence in the facility." The ADR Agreement states:

> The Parties agree that any disputes covered by this Agreement ("Covered Disputes") that may arise between them shall be resolved exclusively by an ADR process that shall include mediation and, where mediation is not successful, binding arbitration. The parties to this Agreement acknowledge and agree that upon execution by Resident, this Agreement becomes part of the Admission Agreement, and that the Admission Agreement evidences a transaction in interstate commerce governed by the [FAA].

The ADR Agreement further includes the following language, in bold and capitalized letters:

> The parties understand, acknowledge, and agree that they are selecting a method of resolving disputes without resorting to lawsuits or the courts, and that by entering into this agreement, they are giving up their constitutional right to have their disputes decided in a court of law by a judge or jury . . . .

The ADR Agreement provides: "Covered Disputes, including the determination of the scope or applicability of this Agreement, shall be determined by arbitration . . . ." A section in the agreement titled "Resident's Understanding" states: "The Resident understands that . . . his or her signing of this Agreement is not a condition of admission to or residence in the Facility . . . ." The signature page of the document states in bold and capitalized letters and in large font: "This agreement governs important legal rights. Please read it carefully and in its entirety before signing."

At the hearing on GLCV's motion to compel arbitration, GLCV offered the affidavit of Trisha Weberg, the business manager of GLCV. The affidavit included a copy of the durable power of attorney signed by Helen on July 23, 2008, which appointed Eugene as her attorney in fact. Weberg, who

was not present when the ADR Agreement was executed, stated her personal knowledge concerning the facility's routine procedure with respect to its resident admissions. Weberg stated that when she assisted in the admission process, she would do the following: present the ADR Agreement to the resident and allow the resident and the resident's family members to read the paperwork; explain that by signing the ADR Agreement, the resident would waive his or her right to a trial and agree to submit any dispute to arbitration, but state that signing the ADR Agreement was not required to become a resident at the facility; obtain the resident's signature; and sign the document on behalf of GLCV. Weberg stated it is her belief that the normal procedure was followed with regard to Helen's admission. GLCV did not present an affidavit from its employee who executed the ADR Agreement on its behalf.

Thomas offered affidavits from himself and Eugene. According to Eugene's affidavit, he and Helen sought admission to GLCV when Helen was transferred from the hospital on September 28, 2010. Helen was taken to a room, and a GLCV staff member led Eugene and Thomas into a small office. Eugene stated, "[W]e sat down and the female staff member presented me with a stack of papers which she said was 'the paperwork I needed to sign to admit my wife' and another stack to admit myself." He stated, "The staff member handled the papers, turned the pages and told me she needed my signature 'here' and directed me where to sign." Eugene conceded that he signed the ADR Agreement, but stated that he did so because it was his understanding that if he did not sign the paperwork, Helen would not have been admitted to receive health care. He stated he was not informed that any document in the stack of papers was optional, that the paperwork included an arbitration agreement, or that he was waiving his or his wife's right to a jury trial. Eugene stated he would have not signed the ADR Agreement had he known what it meant and that it was not required.

Thomas stated in his affidavit that when he and Eugene met with the staff member in the office, she specifically stated that "'these are standard forms we need you to sign.'" Thomas stated she turned the stack of papers to face Eugene, flipped up the bottom half of the pages, and pointed to the place where she wanted him to sign. He stated that he was present during the entire meeting and that at no time did the staff member state any of the documents were optional or would have the effect of waiving legal rights.

Based on the evidence, the district court entered an order which found that "Eugene['s] execution of the arbitration agreement cannot be binding upon Helen . . . , nor her estate, and that [GLCV's] motion should be dismissed, and [GLCV] given two weeks to further plead to [Thomas'] Complaint."

II. ASSIGNMENTS OF ERROR

GLCV assigns, summarized, that the district court erred in (1) dismissing GLCV's motion to dismiss or stay proceedings and compel arbitration, (2) failing to compel Thomas to arbitration, (3) determining that Eugene's execution of the ADR Agreement was not binding upon Helen or her estate, (4) implicitly ruling that Eugene's signature was obtained by fraud, and (5) failing to support its decision with any legal analysis.

III. STANDARD OF REVIEW

[1-4] Arbitrability presents a question of law.[2] Whether a stay of proceedings should be granted and arbitration required is also a question of law.[3] Likewise, a jurisdictional issue that does not involve a factual dispute presents a question of law.[4] When reviewing questions of law, an appellate court

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[2] *Citizens of Humanity v. Applied Underwriters*, 299 Neb. 545, 909 N.W.2d 614 (2018).

[3] *Good Samaritan Coffee Co. v. LaRue Distributing*, 275 Neb. 674, 748 N.W.2d 367 (2008).

[4] *State v. Irish*, 298 Neb. 61, 902 N.W.2d 669 (2017).

resolves the questions independently of the lower court's conclusions.[5]

[5] We have not yet had the opportunity to determine a standard of review when the issue of arbitrability is summarily tried to the court. However, we see no reason why the standard of review would be different from the standard of review in a bench trial of a law action.

[6,7] In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong.[6] In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[7]

IV. ANALYSIS

1. Jurisdiction

[8,9] 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.[8] This is so even where, as here, neither party has raised the issue.[9] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to

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[5] *Frohberg Elec. Co. v. Grossenburg Implement*, 297 Neb. 356, 900 N.W.2d 32 (2017).

[6] See *Wynne v. Menard, Inc.*, 299 Neb. 710, 910 N.W.2d 96 (2018). See, also, *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[7] *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008).

[8] *Boyd v. Cook*, 298 Neb. 819, 906 N.W.2d 31 (2018).

[9] *Karo v. NAU Country Ins. Co.*, 297 Neb. 798, 901 N.W.2d 689 (2017).

entertain appeals from nonfinal orders.[10] In this case, we must decide whether the order denying GLCV's motion to compel arbitration was a final, appealable order.

Nebraska has adopted the Uniform Arbitration Act (UAA), which is codified in Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2016). Section 25-2603(a) of the UAA authorizes a party to a judicial proceeding to apply for an order compelling arbitration of the dispute. The UAA further provides that an appeal may be taken from an order denying such an application, pursuant to § 25-2620(a)(1).[11]

But GLCV did not invoke the UAA in its motion to compel arbitration. Instead, GLCV filed its motion to compel arbitration pursuant to the FAA. Thus, the provision of the UAA permitting an appeal from an order denying an application to compel arbitration is inapplicable to this case.

Section 4 of the FAA authorizes a U.S. district court to entertain a petition to compel arbitration if the court would have jurisdiction, save for the arbitration agreement, over a suit arising out of the controversy between the parties,[12] while § 16 of the FAA governs appeals and provides in part that "[a]n appeal may be taken from . . . (1) an order . . . (B) denying a petition under section 4 of this title to order arbitration to proceed."[13] The FAA, however, does not indicate whether its provisions relating to appeals are applicable in state court actions, such as the instant matter, where a party seeks to enforce an arbitration clause under the FAA.

[10,11] In *Webb v. American Employers Group*,[14] we concluded that in order to determine whether state law governs the finality for purposes of appeal of an order denying a motion

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

[11] *Pearce v. Mutual of Omaha Ins. Co.*, 293 Neb. 277, 876 N.W.2d 899 (2016).

[12] 9 U.S.C. § 4.

[13] 9 U.S.C. § 16.

[14] *Webb, supra* note 6.

to compel arbitration under the FAA, we must first apply our state procedural rules to determine whether the order is final for purposes of appeal and then determine whether the result of that inquiry would undermine the goals and policies of the FAA. We determined that State procedural rules, which do not defeat the FAA's objectives, govern the determination of whether an order denying a motion to compel arbitration is final for purposes of appeal.[15] We found that a direct appeal from an order denying a motion to compel arbitration furthered the objectives of the FAA by permitting final resolution of the issue of arbitrability without having to first conclude a judicial proceeding on the merits, at which point the arbitral remedy would be rendered essentially meaningless.[16]

[12,13] 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 that, in effect, 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 a judgment is rendered.[17] Ultimately, in *Webb*, we held that the denial of a motion to compel arbitration under the FAA is a final, appealable order under the second of these categories, because it affects a substantial right and is made during a special proceeding.[18]

In the instant matter, the order denying GLCV's motion to compel arbitration was made pursuant to a special proceeding. The order affected GLCV's substantial rights, namely its legal, contractual right to the benefits of arbitration, which

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[15] See *id*. See, also, *Speece v. Allied Professionals Ins. Co.*, 289 Neb. 75, 853 N.W.2d 169 (2014); *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

[16] *Webb, supra* note 6.

[17] *In re Interest of Dana H.*, 299 Neb. 197, 907 N.W.2d 730 (2018).

[18] *Webb, supra* note 6.

right was available to GLCV prior to the court's order. The district court's order is therefore a final, appealable order.

2. ADR Agreement

[14] The U.S. Supreme Court has held that arbitration "'is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'"[19] Thus, we must determine whether the district court clearly erred when it determined that the ADR Agreement was not binding upon Helen or her estate. In order to make that determination, we must consider whether the ADR Agreement comes within the scope of the FAA, whether the trial court had the authority to decide the enforceability of the ADR Agreement, and whether the trial court used the correct procedure to decide the arbitrability of the agreement.

(a) ADR Agreement Within Scope of FAA

[15] It is well settled that if arbitration arises from a contract involving interstate commerce, it is governed by the FAA.[20] "Commerce" as defined by the FAA includes "commerce among the several States."[21] The U.S. Supreme Court has held that the phrase "'"involving commerce"'" requires a broad interpretation in order to give effect to the FAA's basic purpose, which is to put arbitration provisions on the same footing as a contract's other terms.[22]

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[19] *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). See, also, *Zweiback Family L.P. v. Lincoln Benefit Life Co.*, 299 Neb. 180, 907 N.W.2d 700 (2018), and *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb, supra* note 6.

[20] *Karo, supra* note 9; *Aramark Uniform & Career Apparel v. Hunan, Inc.*, 276 Neb. 700, 757 N.W.2d 205 (2008).

[21] 9 U.S.C § 1.

[22] *Webb, supra* note 6, 268 Neb. at 478, 684 N.W.2d at 39 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995)).

In the instant matter, GLCV brought the motion to compel under § 4 of the FAA. In addition, Thomas' complaint alleges that Helen was a resident of Nebraska and that Beverly Enterprises - Nebraska, Inc., doing business as GLCV, was a California corporation; the ADR Agreement specifically states that the admission agreement evidences a transaction involving interstate commerce; and neither party contends that the FAA is not the applicable statutory authority. As a result, we conclude that this case involves a transaction within the scope of the FAA.

(b) Court Decides Enforceability of ADR Agreement

[16-18] A party has a constitutional right to adjudication of a justiciable dispute, and the law will not find a waiver of that right absent direct and explicit evidence of actual intent of a party's agreement to do so.[23] "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[24] This rule creates a rebuttable presumption that the issue of arbitrability—whether the parties have agreed to subject a dispute to arbitration—is an issue for judicial determination.[25] Disputes about arbitrability for a court to decide include threshold 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

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[23] *Smith Barney, Inc. v. Painters Local Union No. 109*, 254 Neb. 758, 579 N.W.2d 518 (1998); *Tracy Broadcasting Corp. v. Telemetrix, Inc.*, 17 Neb. App. 112, 756 N.W.2d 742 (2008).

[24] *AT&T Technologies, supra* note 19, 475 U.S. at 649.

[25] *Id*. See, *BG Group plc v. Republic of Argentina*, 572 U.S. 25, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995).

type of controversy.[26] Disputes over "formation of the parties' arbitration agreement" and "its enforceability or applicability to the dispute" at issue are "matters . . . 'the court' must resolve."[27]

[19,20] Conversely, parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy, if they do so with "clear and unmistakable" intent.[28] 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."[29] A valid delegation clause requires the court to refer a claim to arbitration to the arbitrator to decide gateway arbitrability issues.[30]

[21,22] Enforcement of an arbitration agreement involves two analytical steps: The first is contract formation—whether the parties entered into any arbitration agreement at all. The second involves contract interpretation to determine whether this claim is covered by the arbitration agreement.[31] Thus, if the party seeking arbitration points to a purported delegation clause, the court's analysis is limited. It performs the first step—an analysis of whether there is an agreement to arbitrate any set of claims—as it always does.[32] But the only question, after finding that there is in fact a valid agreement, is whether the purported delegation clause is in fact a delegation clause—that is, if it evinces an intent to have the arbitrator decide

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[26] *BG Group plc, supra* note 25.

[27] *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299-300, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010).

[28] *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).

[29] See, *id.*; *Citizens of Humanity, supra* note 2.

[30] See *id.*

[31] *Kubala v. Supreme Production Services, Inc.*, 830 F.3d 199 (5th Cir. 2016).

[32] *Id.*

whether a given claim must be arbitrated.[33] 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.[34]

In the instant matter, we note the plain language of the ADR Agreement does not clearly and unmistakably empower an arbitrator to determine enforceability issues such as the challenge Thomas raises here. In addition, GLCV did not argue to the trial court, nor does it argue to this court, that the parties agreed to allow an arbitrator to decide issues of arbitrability. Further, Thomas specifically challenged the validity of the agreement to arbitrate based upon fraud. Accordingly, if the claim is fraud in the inducement or fraud in the execution of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the court may proceed to adjudicate it.[35]

Thus, Thomas' enforceability challenge to the ADR Agreement is a matter for judicial determination.

(c) Motion to Compel Arbitration Proceedings

The parties put forth different understandings about the procedure the trial court followed when it ruled on GLCV's motion to compel arbitration. Thomas claims the court denied arbitration using a motion for summary judgment standard of viewing the evidence in the light most favorable to the

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[33] *Id.*

[34] *Citizens of Humanity, supra* note 2.

[35] *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). See, also, *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001); *Ferro Corp. v. Garrison Industries, Inc.*, 142 F.3d 926 (6th Cir. 1998); *R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534 (5th Cir. 1992); *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866 (7th Cir. 1985).

nonmoving party. Thomas further claims he is entitled to a jury trial on the issue of the formation of the ADR Agreement. To support his contentions, Thomas relies on 9 U.S.C. § 4.[36]

GLCV contends that neither of Thomas' claims is correct. First, it contends that the district court's order did not reference the motion for summary judgment standard. Second, it contends that since the court summarily denied the application to compel arbitration, the issue is fully decided and no jury trial would be warranted.

[23,24] Arbitration in Nebraska is governed by the UAA as enacted in Nebraska, but if arbitration arises from a contract involving interstate commerce, it is governed by the FAA.[37] Where a transaction falls within the scope of the FAA, the substantive issue of whether the motion to compel arbitration should be granted is a question of federal law.[38] However, the U.S. Supreme Court has never held that § 4 of the FAA, which is a procedural section, applies to state courts.[39] There is no federal policy favoring arbitration under a certain set of procedural rules, and the federal policy is simply to ensure the enforceability of private agreements to arbitrate.[40]

[25] Section 4 of the FAA authorizes an aggrieved party to seek an order directing arbitration to proceed in the manner provided for in the parties' agreement.[41] The court shall hear

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[36] See, *BOSC, Inc. v. Bd. of Cnty. Com'rs Bernalillo Cnty*, 853 F.3d 1165 (10th Cir. 2017); *Nebraska Machinery Co. v. Cargotec Solutions, LLC*, 762 F.3d 737 (8th Cir. 2014); *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975 (10th Cir. 2014); John M. Gradwohl, *Arbitration: Interface of the Federal Arbitration Act and Nebraska State Law*, 43 Creighton L. Rev. 97 (2009).

[37] *Aramark Uniform & Career Apparel, supra* note 20.

[38] *Webb, supra* note 6.

[39] *Vaden v. Discover Bank*, 556 U.S. 49, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009); *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *Kremer, supra* note 15.

[40] *Kremer, supra* note 15.

[41] 9 U.S.C. § 4.

the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.[42] If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof, if no jury trial be demanded by the party alleged to be in default.[43]

[26] Under § 25-2603(a) of the UAA, on application of a party showing a valid arbitration agreement and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order for the moving party; otherwise, the application shall be denied.

[27] Section 25-2603 does not defeat the FAA's objective, expressed in § 4, that if the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereon. Further, nothing in our record indicates that Thomas requested a jury trial on the enforceability of the ADR Agreement, and as a result, the trial court summarily tried the issue of arbitrability.

[28] On appeal, Thomas did not object to the procedure followed by the district court, and he did not cross-appeal or assign error to the fact that the district court did not order a jury trial on the issue. Because an appellate court will not consider an issue on appeal that was not passed upon by the trial court,[44] we do not address Thomas' contention that he is entitled to a jury trial on the issue of enforceability.

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[42] *Id.*

[43] *Id.*

[44] *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007).

(d) Enforceability of ADR Agreement

[29] The FAA makes arbitration agreements "'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[45] Under § 2 of the FAA, arbitration agreements can be declared unenforceable "'upon such grounds as exist at law or in equity for the revocation of any contract,'"[46] including contract defenses like fraud or unconscionability.[47] State law governs the formation of contracts, as well as the validity, revocability, and enforceability of contracts generally.[48] The U.S. Supreme Court has declared that state contract law applies to contracts with arbitration agreements governed by the FAA.[49]

In this matter, neither party disputed that Eugene signed the ADR Agreement and that he had authority to bind Helen and her estate under the durable power of attorney. Instead, Thomas argues that the ADR Agreement was not enforceable, because it was obtained by fraud.

In overruling GLCV's motion to compel arbitration, the court did not explicitly state that Eugene signed the ADR Agreement as a consequence of a fraudulent misrepresentation made by GLCV's agent. However, a logical reading of the court's order is that it implicitly determined that the ADR Agreement is void or should be voided due to fraud.

GLCV claims that if the court denied the motion on a fraud theory advanced by Thomas, a proper fraud analysis would

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[45] *Kindred Nursing Centers L. P. v. Clark*, 581 U.S. 246, 137 S. Ct. 1421, 1426, 197 L. Ed. 2d 806 (2017) (quoting 9 U.S.C. § 2).

[46] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

[47] *Id*. See, also, *Prima Paint, supra* note 35.

[48] *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). See *Koricic v. Beverly Enters. - Neb.*, 278 Neb. 713, 773 N.W.2d 145 (2009).

[49] *Aramark Uniform & Career Apparel, supra* note 20.

have analyzed the six elements of fraud.[50] Accordingly, GLCV argues that no representation was made, any representation made was not false, any false representation made was not known to be false, and there was no fraudulent intent, nor was there any reasonable reliance. GLCV asserts there was no fraud in the execution, nor was there any fraud in the inducement.

[30] Generally, in the absence of fraud, one who signs an instrument without reading it, when one can read and has had the opportunity to do so, cannot avoid the effect of one's signature merely because one was not informed of the contents of the instrument.[51]

> "[C]ourts will not permit a party to avoid a contract into which that party has entered on the grounds that he or she did not attend to its terms, that he or she did not read the document which was signed and supposed it was different from its terms, or that it was a mere form."[52]

To permit a party to admit that he or she signed an instrument but did not read it or know its provisions would absolutely destroy the value of contracts.[53]

[31] However, the rule that one who fails to read a contract cannot avoid the effect of signing it applies only in the

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[50] See *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014).

[51] *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015); *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005); *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997); *Todd Brothers v. Federal Crop Ins. Corp.*, 178 Neb. 211, 132 N.W.2d 778 (1965); *Case Co. v. Hrubesky*, 125 Neb. 588, 251 N.W. 169 (1933).

[52] *In re Claims Against Pierce Elevator, supra* note 51, 291 Neb. at 826, 868 N.W.2d at 802 (quoting *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004) (superseded by statute as stated in *Telrite Corp. v. Nebraska Pub. Serv. Comm.*, 288 Neb. 866, 852 N.W.2d 910 (2014)).

[53] *Todd Brothers, supra* note 51.

absence of fraud[54] or an inability to read.[55] The doctrine that the carelessness or negligence of a party in signing a writing estops him or her from afterward disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto when the defense is that such writing, by reason of fraud, does not embrace the contract actually made.[56]

[32,33] A variety of different types of fraud may be at issue in a given case. We have emphasized, for example, that "fraud in the execution" and "fraud in the inducement" are distinct theories of fraud.

> Fraud in the execution goes to the very existence of the contract, such as where a [contract] is misread to the [party], or where one paper is surreptitiously substituted for another, or where a party is tricked into signing an instrument he or she did not mean to execute. In such cases, . . . there was no meeting of the minds, . . . in other words, it is not a question of a contract voidable for fraud, but of no contract at all. Fraud in the inducement, by contrast, goes to the means used to induce a party to enter into a contract. In such cases, the party knows the character of the instrument and intends to execute it, but the contract may be voidable if the party's consent was obtained by false representations—for instance, as to the nature and value of the consideration, or other material matters.[57]

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[54] *Walters v. Sporer*, 298 Neb. 536, 905 N.W.2d 70 (2017); *Eicher, supra* note 7; *Todd Brothers, supra* note 51.

[55] *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011); NJI2d Civ. 15.21.

[56] *Eicher, supra* note 7; *Lippire v. Eckel*, 178 Neb. 643, 134 N.W.2d 802 (1965); *West v. Wegner*, 172 Neb. 692, 111 N.W.2d 449 (1961); *Ward v. Spelts*, 39 Neb. 809, 58 N.W. 426 (1894).

[57] *Gonzalez, supra* note 55, 282 Neb. at 66, 803 N.W.2d at 442. Accord *Heritage Bank v. Bruha*, 283 Neb. 263, 812 N.W.2d 260 (2012).

[34] In this matter, Thomas contends that Eugene was induced into executing the ADR Agreement by GLCV's fraudulent misrepresentation. A fraudulent misrepresentation claim requires a plaintiff to establish the following elements: (1) A representation was made; (2) the representation was false; (3) when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that the plaintiff should rely on it; (5) the plaintiff did so rely on it; and (6) the plaintiff suffered damage as a result.[58]

[35-37] Fraudulent misrepresentations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false.[59] A plaintiff must show that the defendant intended the plaintiff to rely on a false representation.[60] Whether a party's reliance upon a misrepresentation was reasonable is a question of fact.[61] A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity.[62] A plaintiff fails to exercise ordinary prudence only when the plaintiff's reliance is wholly unreasonable, given the facts open to the plaintiff's observation and his or her own skill and experience.[63]

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[58] *deNourie & Yost Homes, supra* note 50; *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013); *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000). See *Hayes v. Equine Equities*, 239 Neb. 964, 480 N.W.2d 178 (1992).

[59] *Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010).

[60] *Id.*

[61] *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012); *Cao, supra* note 58.

[62] *InterCall, Inc., supra* note 61; *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996); *Hayes, supra* note 58.

[63] *deNourie & Yost Homes, supra* note 50.

[38] In a fraud case, direct evidence is not essential, but proof of fraud drawn from circumstantial evidence must not be guesswork or conjecture; such proof must be rational and logical deductions from the facts and circumstances from which they are inferred.[64]

We now turn to whether the district court's decision to deny GLCV's motion was clearly wrong.

[39,40] Under Neb. Rev. Stat. § 25-1127 (Reissue 2016), in the absence of a request by a party for specific findings, a trial court is not required to make detailed findings of fact and need only make its findings generally for the prevailing party.[65] In a case tried to the court without a jury, a motion for specific findings of fact pursuant to § 25-1127 must be made before the final submission of the case to the court.[66] Where trial is to the court and no request for specific findings is made, if there is a conflict in the evidence, this court, in reviewing the judgment rendered, will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.[67] In such a case, it is not within the province of this court to resolve conflicts or to weigh evidence.[68]

In the instant matter, the record does not reflect that either party made a request for detailed findings. The trial court, however, did address the issue raised by GLCV's motion and made findings generally in Thomas' favor.

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[64] *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997); *Schuelke, supra* note 62.

[65] See *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993).

[66] *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991).

[67] *Burgess v. Curly Olney's, Inc.*, 198 Neb. 153, 251 N.W.2d 888 (1977); *C. Goodrich, Inc. v. Thies*, 14 Neb. App. 170, 705 N.W.2d 451 (2005).

[68] *Bailey v. Karnopp*, 170 Neb. 836, 104 N.W.2d 417 (1960).

We note that the evidence before the district court consisted of affidavits from Weberg, Eugene, and Thomas, as well the ADR Agreement and Helen's durable power of attorney.

[41] We recently set forth that "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."[69] The Nebraska Legislature has authorized the use of affidavits to support a wide range of common civil motions.[70] Congress has provided that unless otherwise expressly provided, any application to the court brought under the FAA shall be made and heard in the manner provided by law for the making and hearing of motions.[71] The policy underlying § 6 of the FAA "is to expedite by ordinary motion practice judicial treatment of matters pertaining to arbitration."[72] For example, over 40 years ago in *Prima Paint v. Flood & Conklin*,[73] in reviewing a claim of fraud in the inducement of an arbitration contract, the U.S. Supreme Court considered affidavit evidence to decide the issue of whether the contract was a transaction in interstate commerce.

[42] Although we are less deferential to a trial court's findings given that the case was presented wholly on documents and affidavit statements rather than through live witnesses, that does not alter our standard of review in this case.[74] Rather, GLCV's burden of proving that the district court's findings

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[69] *TransCanada Keystone Pipeline v. Nicholas Family*, 299 Neb. 276, 283, 908 N.W.2d 60, 66 (2018).

[70] See Neb. Rev. Stat. §§ 25-1144, 25-1330 to 25-1336, 25-2160, and 25-2301.01 (Reissue 2016 & Supp. 2017).

[71] 9 U.S.C. § 6.

[72] *Tepper Realty Company v. Mosaic Tile Company*, 259 F. Supp. 688, 693 (S.D.N.Y. 1966).

[73] *Prima Paint, supra* note 35.

[74] See *Matter of Bohart*, 743 F.2d 313 (5th Cir. 1984).

were clearly wrong is "'"'"to some extent ameliorated.'"'"'"[75] Even though an appellate court is, in the absence of oral testimony, equally capable as the trial court of examining the evidence and drawing conclusions therefrom and is under a duty to do so, and even though a case was submitted to the trial court without oral evidence, the duty of the appellate court to evaluate the facts does not extend to the right or duty to make an independent evaluation thereof without regard to the findings below. In such a case, an appellate court is loath to overturn the findings of an experienced trial judge unless in the opinion of the court they are clearly wrong.[76]

[43] Thomas adduced evidence that an agent of GLCV made a representation to Eugene that he was required to sign the ADR Agreement in order for Helen to become a resident of the facility. Though Weberg's affidavit stated her belief that this representation was not made, she was not present when the ADR Agreement was signed, and the trial court appears to have given little or no weight to her submission. Further, statements in affidavits as to opinion, belief, or conclusions of law are of no effect.[77]

If the representation was made, the evidence indicates that the representation was false. The language of the ADR Agreement states that execution of the ADR Agreement was not a condition for admission.

There is also evidence that the representation was known to be false when it was made, or was made recklessly. The disclaimer at the top of the first page of the ADR Agreement, written in bold and capitalized letters, suggests that anyone who had an opportunity to read and sign the agreement, including a GLCV staff member, would have known that it was optional.

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[75] *Id.* at 325 n.12.

[76] *Commercial Standard Ins. Co. v. Universal Underwriters*, 282 F.2d 24 (10th Cir. 1960).

[77] See *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999).

There is also evidence that the false representation was made with the intention that Thomas should rely upon it. Both Eugene and Thomas claimed they were not given an opportunity to review the contract. Eugene stated the staff member handled the paperwork, flipped through the pages, and told him to sign "'here.'" Thomas stated the staff member showed Eugene only the bottom half of the pages. This conclusion is supported by the ADR Agreement itself, because everything other than Eugene's signature appears to have been filled out in advance.

The evidence also indicates that Eugene reasonably relied upon the false representation. Both Eugene and Thomas stated that the staff member claimed these were "'standard forms,'" that she did not provide them with a copy of the ADR Agreement, that she did not explain its legal effect, and that she did not state that it was not required in order to admit Eugene and Helen. Additionally, Eugene stated that he would not have signed the ADR Agreement if he had known it was not mandatory.

Lastly, the evidence shows that Helen suffered damage as a result of the false representation. If GLCV's motion to compel arbitration would be sustained, Thomas, on behalf of Helen's estate, would lose the right to bring suit for her alleged wrongful death.

Recognizing that direct evidence is not required in fraud cases, and viewing the evidence in the light most favorable to Thomas, we find Thomas satisfied each element required for a claim of fraudulent representation and the determination that the ADR Agreement is not binding upon Helen. We conclude from our review that the evidence supports the outcome reached by the district court.

V. CONCLUSION

In the absence of a contractual provision evidencing clear and unmistakable intent to the contrary, the issue of whether

an arbitration agreement is enforceable is for a court to decide and not an arbitrator. The district court did not err in determining that the ADR Agreement was not binding upon Helen or her estate. We therefore affirm the district court's decision.

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 Application of Northeast Neb. Pub. Power Dist. Northeast Nebraska Public Power District et al., appellants, v. Nebraska Public Power District, appellee.

912 N.W.2d 884

Filed June 15, 2018. No. S-17-529.

1. **Nebraska Power Review Board: Arbitration and Award: Appeal and Error.** On an appeal from the decision of an arbitration board convened under Neb. Rev. Stat. § 70-1301 et seq. (Reissue 2009), trial in the appellate court is de novo on the record.
2. **Nebraska Power Review Board: Arbitration and Award: Evidence: Appeal and Error.** Despite de novo review, when credible evidence is in conflict on material issues of fact, the appellate court will consider and may give weight to the fact that the arbitration board under Neb. Rev. Stat. § 70-1301 et seq. (Reissue 2009) observed the witnesses and accepted one version of the facts over another.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. ____: ____. An appellate court has an independent duty to decide jurisdictional issues on appeal, even if the parties have not raised the issue.
5. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
6. **Jurisdiction.** A lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
7. **Jurisdiction: Appeal and Error.** When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks the power to adjudicate the merits of the claim.
8. **Arbitration and Award: Jurisdiction: Statutes.** An arbitration board under Neb. Rev. Stat. § 70-1301 et seq. (Reissue 2009), as a creature

of statute, has only such authority as has been conferred upon it by statute.

9. **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.
10. **Public Utilities.** Persons receiving similar service from a public power district under similar circumstances cannot be charged for such service in an arbitrary, designed, dissimilar manner.
11. **Contracts: Parties.** The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
12. ____: ____. The nature and extent of an implied covenant of good faith and fair dealing are measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party.
13. ____: ____. A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.

Appeal from the Power Review Board. Affirmed.

Steven D. Davidson and David C. Levy, of Baird Holm, L.L.P., for appellants.

Kile Johnson and Corey Wasserburger, of Johnson, Flodman, Guenzel & Widger, and John C. McClure, of Nebraska Public Power District, for appellee.

Heavican, C.J., Cassel, Stacy, and Funke, JJ., and Steinke, District Judge.

Cassel, J.

I. INTRODUCTION

This is our first opinion addressing an appeal from an arbitration board's decision under Neb. Rev. Stat. §§ 70-1301 to 70-1329 (Reissue 2009). After Nebraska Public Power District (NPPD) provided a discount to wholesale customers

who renewed their contractual relationship, some nonrenewing customers initiated statutory arbitration. They alleged that the discount was discriminatory and an abuse of NPPD's statutory rate-setting authority,[1] but the arbitration board disagreed. Upon our de novo review, we conclude that the discount was reasonable and not arbitrary and that it did not breach the contract or the covenant of good faith. Accordingly, we affirm the arbitration board's decision.

II. BACKGROUND

1. Overview of Wholesale Rate Dispute Process

Nebraska's public policy is to "provide adequate electrical service at as low overall cost as possible, consistent with sound business practices."[2] To further that policy, "electric service should be provided by nonprofit entities including public power districts, public power and irrigation districts, nonprofit electric cooperatives, and municipalities."[3] Public power districts are required by law to fix rates which are fair, reasonable, and nondiscriminatory.[4]

In 1979, the Legislature enacted §§ 70-1301 to 70-1329[5] to provide a method to quickly and fairly resolve wholesale electric rate disputes.[6] If a wholesale purchaser elects to dispute a portion of the wholesale electric charge established by a supplier[7] and the dispute remains unresolved 45 days after the supplier receives written notice of the dispute, the dispute shall be submitted to arbitration.[8] The arbitration board is

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[1] See Neb. Rev. Stat. § 70-655(1) (Cum. Supp. 2016).

[2] § 70-1301.

[3] *Id.*

[4] See §§ 70-655(1) and 70-1302.

[5] See 1979 Neb. Laws, L.B. 207.

[6] See § 70-1302.

[7] See § 70-1304.

[8] See § 70-1306.

composed of three members: one selected by the purchaser, one selected by the supplier, and a third selected by the other two arbitrators.[9] At a hearing, the arbitration board hears testimony and receives evidence relating to the dispute.[10] Within 30 days after completion of the hearing, the arbitration board shall render a written decision.[11] And within 5 days of the date of the decision, the arbitration board shall file the decision along with all the pleadings and exhibits with the secretary of the Nebraska Power Review Board.[12]

A party who is unsatisfied with the arbitration board's decision may appeal to reverse, vacate, or modify the decision.[13] To do so, the party must file a notice of appeal with the Nebraska Power Review Board within 30 days after the arbitration board's decision is filed with the Nebraska Power Review Board.[14] "Trial in the appellate court shall be de novo on the record."[15] As noted, this is our first such decision concerning such an appeal from the arbitration board. We now turn to the facts of the case.

2. Contracts

NPPD, a public power district, derives the majority of its revenue from wholesale power supply contracts with political subdivisions in Nebraska. These wholesale power supply contracts often are the largest single financial obligation of the purchasing political subdivision.

The appellants (hereinafter purchasers) are political subdivisions engaged in the distribution of electricity to retail electric customers. They are wholesale customers of NPPD.

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[9] See § 70-1307.

[10] See § 70-1318.

[11] See § 70-1320.

[12] See § 70-1321.

[13] See § 70-1325.

[14] See § 70-1326.

[15] § 70-1327.

Purchasers are parties to NPPD's 2002 wholesale power contract (2002 WPC).

The 2002 WPC included a 20-year term beginning on January 1, 2002. After December 31, 2021, the 2002 WPC would automatically renew from year to year unless terminated with 5 years' notice by either party.

The 2002 WPC obligated wholesale customers to purchase their full energy requirements from NPPD for the first 6 years of the contract. After that point, a wholesale customer could limit or reduce its purchases of demand and energy from NPPD in varying amounts depending on the length of advance notice provided to NPPD. To limit purchases meant that a customer could continue to buy power in the same amount as on the date of its notice to NPPD, but that it would not buy any future growth in its electricity from NPPD going forward. To reduce purchases meant that the customer could purchase less than its full requirements from NPPD. The 2002 WPC imposed no fee or rate increase in exchange for the privilege to limit or reduce purchases. Each purchaser had given, or intended to give, notice to NPPD of its intention to limit or reduce its purchases, which reductions would commence at various times on and after January 1, 2017.

The 2002 WPC listed different types of costs that NPPD was authorized to include in its revenue requirement for rate-setting purposes. One such cost was "amounts reasonably required to be set aside in reserves for items of costs the payment of which is not immediately required, such as . . . post-retirement employee benefit reserves." Thus, the 2002 WPC allowed NPPD to include in its revenue requirements a reasonable amount to be set aside for other postemployment benefits (OPEB). OPEB are benefits promised to employees once they retire. They are unfunded liabilities associated with past service.

In 2009, NPPD formed a contract strategy team to look at options for extension of the 2002-era contracts. NPPD desired more certainty in its revenue stream than that provided by

the 2002 WPC. And NPPD believed that the provisions of the 2002 WPC permitting customers to limit or reduce their purchases would allow some customers to economically disadvantage others.

In 2013, NPPD initiated negotiations to replace the 2002 WPC with a new standard wholesale contract. The negotiations resulted in a 20-year contract beginning on January 1, 2016, and ending on December 31, 2035 (2016 WPC). A customer under the 2016 WPC could not limit or reduce its purchases unless NPPD failed to meet certain performance standards. NPPD decided to charge extending and nonextending customers the same general firm power service rate. But as an incentive to get customers to execute a new contract, NPPD created a discount for renewing customers. Thus, the 2016 WPC provides a rate discount through December 31, 2021, at an amount to be approved by the NPPD board of directors. Purchasers did not execute the 2016 WPC.

3. Funding OPEB Obligation

Prior to 2007, NPPD funded its OPEB obligation on a "pay-as-you-go" basis. In 2007, the Governmental Accounting Standards Board implemented Governmental Accounting Standards Board Statement No. 45. This statement required NPPD to use actuaries to calculate and identify its unfunded OPEB liability and include those amounts in notes to its financial statements. It allowed NPPD to amortize the unfunded OPEB liability over a period up to 30 years. The statement also introduced the concept of the annual required contribution, which is the theoretical amount, if contributed consistently each year, that would fully prefund future retiree benefits associated with benefits earned for past service.

NPPD then explored its options for accounting and reporting of OPEB. One was continuation of "pay-as-you-go." This had the lowest impact on rates. However, because of a perception that NPPD was not addressing the liability, it had the potential for a negative response from rating agencies and the investment community. Another option was to put the annual

required contribution into 1 year's rates. That would mean adding approximately $36 million as a revenue requirement in the rate-setting process and collecting the full sum from customers in rates within a 1-year period. A third option was to borrow money toward the OPEB liability. NPPD could borrow money, and the debt service from the borrowing would be added into the revenue requirements used to set rates.

At that point, NPPD adopted a plan to obtain additional funding in rates. Under the plan, NPPD would continue on the pay-as-you-go basis for 2007. Through rates, NPPD would collect $4 million over the pay-as-you-go amount between 2008 and 2013, and then $10 million above the pay-as-you-go amount thereafter. The money would fund an OPEB trust, which was projected to be fully funded by 2033.

By 2011, actuarial studies showed that NPPD would need to contribute more in order to have the liability funded by 2033. NPPD decided to accelerate the collection of the OPEB liability to the 6-year term remaining in the 2002 WPC. Otherwise, based on purchasers' notifications of reductions, purchasers would be able to avoid 40 percent of their pro rata share of the OPEB obligation. NPPD estimated the liability to be $155 million. To collect that amount over 6 years, NPPD increased the annual budgeted contribution to the OPEB trust by $25 million. NPPD referred to it as a "catch-up."

The Governmental Accounting Standards Board also created Governmental Accounting Standards Board Statement No. 75, which became effective for fiscal years ending after June 2017. This statement no longer permitted disclosure of OPEB in notes to the financial statements; it required entities such as NPPD to recognize the entire OPEB as a "hard" liability on its balance sheet. Because the statement recommended early implementation, NPPD chose to do so for the 2016 year end.

4. 2016 and 2017 Rates

The inclusion of the $25 million in OPEB catch-up expense resulted in a 3.7-percent increase for 2016 rates. Wholesale

customers who elected to sign the 2016 WPC received a 3.57-percent discount on the rate in 2016. The 2017 rate similarly included $25 million for accelerated funding of the OPEB trust and a discount for customers who signed the 2016 WPC.

5. Complaint

Purchasers filed a complaint against NPPD before the arbitration board. They alleged that NPPD violated § 70-655(1), claiming that the 2016 rate was discriminatory. Purchasers alleged that the 2016 rate was formulated and implemented in breach of the 2002 WPC. They further claimed that NPPD breached the implied covenant of good faith and fair dealing by charging them a different rate. They sought declaratory relief and damages. Purchasers later filed an amended complaint to challenge the 2017 rate on similar grounds.

At a hearing, the arbitration board received extensive evidence. We will discuss the evidence in more detail in the analysis section of the opinion.

6. Arbitration Board's Decision

The arbitration board determined that the 2016 and 2017 rates were reasonable. It stated that the OPEB catch-up amounts were reasonable, because they related to the value of the service rendered to purchasers during their years of taking service from NPPD. It further stated that NPPD did not arbitrarily select the amounts to include in the catch-up, but, rather, those amounts were "the product of a systematic study of the actuarial liability of OPEB attributable to production-level services."

The arbitration board also determined that the 2016 and 2017 rates were nondiscriminatory. It reasoned that the discount merely deferred the collection of the 2016 and 2017 catch-up amounts for customers under the 2016 WPC. The board explained:

> Customers under the 2002 WPC and the 2016 WPC are taking the same service from NPPD and charged

> the same rate. The customers operate under two separate and differing contracts, fairly negotiated. The 2016 customers gave up some rights they had under the 2002 WPC and accepted new terms including the deferred collection of the OPEB Catch-Up amounts included in the 2016 and 2017 rates. Customers under the 2016 WPC have over 18 years left in their comm[i]tment to NPPD, whereas [purchasers] have just over 4 years. This differentiated approach is fair and reasonable as relating to the collection of a liability that solely relates to past services.

Finally, the board determined that NPPD did not breach the 2002 WPC or the covenant of good faith and fair dealing. The board therefore denied all of purchasers' requests and determined that the 2016 and 2017 rates met the standards established by § 70-655(1).

Purchasers appealed, and we granted their petition to bypass review by the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

Purchasers assign that the arbitration board erred in (1) failing to find NPPD's 2016 and 2017 wholesale rate structure violated § 70-655(1), (2) failing to find NPPD's 2016 and 2017 wholesale rate structure breached the 2002 WPC, and (3) failing to find NPPD violated the duty of good faith and fair dealing under the 2002 WPC.

IV. STANDARD OF REVIEW

[1,2] On an appeal from the decision of an arbitration board convened under § 70-1301 et seq., trial in the appellate court is de novo on the record.[16] Despite de novo review, when credible evidence is in conflict on material issues of fact, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of

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[16] § 70-1327.

the facts over another.[17] We apply this same rule in an appeal from an arbitration board under this statutory scheme.

V. ANALYSIS

1. Jurisdiction

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[18] Neither party challenges the arbitration board's jurisdiction to decide the matters presented to it. But an appellate court has an independent duty to decide jurisdictional issues on appeal, even if the parties have not raised the issue.[19]

[5-7] Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.[20] A lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[21] When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks the power to adjudicate the merits of the claim.[22] We begin by considering whether the arbitration board had subject matter jurisdiction over the issues presented to it.

The parties presented three issues to the arbitration board, and those same three issues are before us on appeal. The issues

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[17] See *Mock v. Neumeister*, 296 Neb. 376, 892 N.W.2d 569 (2017). See, also, *In re Interest of Steven S.*, 299 Neb. 447, 908 N.W.2d 391 (2018); *Erin W. v. Charissa W.*, 297 Neb. 143, 897 N.W.2d 858 (2017); *Strohmyer v. Papillion Family Medicine*, 296 Neb. 884, 896 N.W.2d 612 (2017); *Lingenfelter v. Lower Elkhorn NRD*, 294 Neb. 46, 881 N.W.2d 892 (2016).

[18] *Boyd v. Cook*, 298 Neb. 819, 906 N.W.2d 31 (2018).

[19] *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).

[20] *Boyd v. Cook, supra* note 18.

[21] *Id.*

[22] *Cappel v. State*, 298 Neb. 445, 905 N.W.2d 38 (2017).

concern the validity of NPPD's rate structure, whether NPPD breached its contract with purchasers, and whether NPPD breached the covenant of good faith and fair dealing. Because this case was brought under § 70-1301 et seq., we must determine whether the arbitration board had subject matter jurisdiction over all of the issues.

[8] The arbitration board, as a creature of statute, has only such authority as has been conferred upon it by statute.[23] Statutes have clearly empowered an arbitration board to determine a wholesale electric rate dispute.[24] But it is less clear whether the arbitration board also has jurisdiction over the contractual issues presented in this case.

[9] Reading the statutes in §§ 70-1301 to 70-1329 as a whole leads us to conclude that the arbitration board's jurisdiction is not limited to deciding a dispute over the establishment of a wholesale rate. 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.[25] One section empowers the board to resolve not just wholesale rate disputes but also "rate disputes relating to transmission and delivery of electrical energy."[26] A dispute may address "all or any portion of the wholesale electric charge."[27] The dispute could concern a "mathematical, metering, or quantity error in the billing."[28] And that the arbitration board may consider more than merely the wholesale rate to be charged is implicit in the Legislature's directive that the parties meet with the

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[23] See, generally, *Interiano-Lopez v. Tyson Fresh Meats*, 294 Neb. 586, 883 N.W.2d 676 (2016).

[24] See, e.g., §§ 70-1302, 70-1304, 70-1306, and 70-1307.

[25] *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018).

[26] § 70-1302.

[27] § 70-1304. See, also, § 70-1305 ("disputed portion").

[28] § 70-1304.

arbitration board "for the purpose of clarifying and narrowing the specific issues from those set forth in the detailed statement of disputed issues."[29]

An arbitrated dispute may be intertwined with contractual issues. The Legislature clearly contemplated the existence of power contracts.[30] Often, such contracts speak to amounts that may be charged for electricity. In order to resolve a dispute, an arbitration board may need to determine whether there was contractual compliance. The arbitration board has authority to "consider only those matters necessary for the resolution of the disputed issues" but it may "not alter or modify any existing contract."[31] We conclude that where, as here, contractual issues are intertwined with a rate dispute, such contractual issues are within the arbitration board's jurisdiction.

We note that no party is attacking the constitutionality of the statutes contained in §§ 70-1301 to 70-1329. We express no opinion on the relationship of these statutes to the jurisdiction conferred upon a district court under the Nebraska Constitution.[32]

2. Whether Rate Structure Violates § 70-655(1)

(a) Additional Evidence at Hearing

NPPD presented considerable evidence concerning its efforts to address its unfunded OPEB liability. NPPD's wholesale billing manager testified that if NPPD had collected the full unfunded OPEB obligation of $150 million in 1 year, it would have resulted in a rate increase of over 22 percent—a much larger rate increase than the 3.7 percent that was implemented. The manager testified as to the amounts of purchasers' pro rata shares of OPEB that they could avoid by

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[29] § 70-1312.

[30] See §§ 70-1303, 70-1304, and 70-1314.

[31] See § 70-1314.

[32] See Neb. Const. art. V, § 9.

reducing their purchases under the 2002 WPC. In the aggregate, purchasers potentially could avoid $3,750,000 of their pro rata share of the $150 million OPEB catch-up collection. The manager emphasized fairness and reasonableness and stated that because the costs were associated with past service, NPPD needed to find a way to recover the costs from all of its customers who had benefited from them. He believed that NPPD's methodology was reasonable because it tried to recover the unfunded obligation over a 6-year period, which was the remaining time period in the 2002 WPC.

NPPD's chief financial officer testified that in 2016, NPPD borrowed approximately $23 million on behalf of the 2016 WPC customers by issuing taxable debt to generate bond proceeds. The interest on the borrowing was capitalized through 2021. NPPD borrowed a similar amount under similar terms for the 2017 catch-up. The chief financial officer explained that purchasers and customers under the 2016 WPC "are both being charged the exact same rate, except for the 2016 contract customers I have borrowed their pro rata share and made that deposit into the OPEB trust and I've recorded a regulatory asset that says they will have to pay that beginning in 2022." Because the rates are identical, the difference in what is charged and collected is a function of the discount. With the discount, OPEB gets paid from two sources: contributions from ratepayers and investment earnings in the trust.

According to the chief financial officer, the purpose of the discount would be "deferring the collection of that 2016 and now 2017 catch-up amount until 2022 through 2033, the same time period." She explained that the wholesale customers would pay the same amount, but it would be collected over a different time period. In order for the delayed payments to equate to a payment today, NPPD would have to apply a discount rate between 3.37 and 3.9 percent. The chief financial officer testified that the discount was "a mechanism to fairly collect the OPEB catch-up from two different customer groups."

Purchasers' expert, David Dismukes, a consulting economist, viewed purchasers and the customers under the 2016 WPC as similarly situated in terms of the nature of the power service they receive from NPPD. Dismukes testified that customers can be charged different rates, but that the rates "have to be justifiable and there has to be a cost basis for that."

Dismukes opined that the rate structure created discrimination between the two sets of customers. He explained that similarly situated customers were being assessed rates that differed for taking similarly situated services. According to Dismukes, there were no cost differences between the two groups of customers. The signing of the 2016 WPC was the only difference, and Dismukes did not believe that the execution of a new contract justified a different rate. He testified that there was no legitimate cost basis supporting the discount mechanism. Based on Dismukes' knowledge of the industry, he believed that a discount for one subset of customers and not the other constituted rate discrimination.

From a cost-based rate-setting perspective, Dismukes disagreed with testimony to the effect that both groups would ultimately pay the same amount. He pointed out that "a dollar today is not the same as a dollar tomorrow" and that there was a benefit to not making the payment today. He testified that the timing difference created an economic advantage of sufficient consequence to support a finding of discrimination. Thus, Dismukes opined that NPPD did not set its rates in a manner that was fair, reasonable, and nondiscriminatory.

NPPD's expert, Joseph Mancinelli, the general manager and president of a consulting firm specializing in management economics predominantly serving the public power market, disagreed. He opined that NPPD's 2016 and 2017 rates were fair, reasonable, and nondiscriminatory. In arriving at that conclusion, he looked at the unfunded accrued OPEB liability, which was incurred over a historical period and was directly attributed to the labor of retirees. He testified that it was proper to recover those costs from customers who enjoyed

those benefits, i.e., the 2002 WPC and 2016 WPC customers. Mancinelli believed that the rates were adequate and would support the revenue requirement.

Mancinelli explained that there was one rate and that the difference was the source of the funding of the OPEB liability. Because the 2016 WPC customers had a long contract, the cost was financed. But financing was not an option for the 2002 WPC customers, so the funding came out of rate revenues. He stated that the source of the funds created a difference and that difference "is the genesis of what we call the discount."

Mancinelli believed that the cost of borrowing the money was not materially different from the discount. He testified that the discount was cost based and that it was basically the difference between funding the trust with cash from revenues or funding the trust with borrowed funds. Mancinelli was unaware of any other utility imposing a rate increase for the exclusive purpose of collecting money for an OPEB trust. Although NPPD's situation and solution was unique, he opined that it met the test of being fair, reasonable, and nondiscriminatory.

(b) Discussion

Purchasers contend that the rate structure for 2016 and 2017 violates § 70-655. That statute requires NPPD's board of directors to fix adequate rates that are "fair, reasonable, nondiscriminatory, and so adjusted as in a fair and equitable manner to confer upon and distribute among the users and consumers . . . the benefits of a successful and profitable operation and conduct of the business of the district."[33] As the party claiming discrimination, purchasers have the burden of proof to establish its existence.[34]

[10] Purchasers rely on *McGinley v. Wheat Belt P.P. Dist.*[35] In that case, a wholesale distributor informed Wheat Belt

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[33] § 70-655(1).

[34] See 12 Eugene McQuillin, The Law of Municipal Corporations § 35:57 (3d ed. 2017).

[35] *McGinley v. Wheat Belt P.P. Dist.*, 214 Neb. 178, 332 N.W.2d 915 (1983).

Public Power District (Wheat Belt) that the distributor would be imposing a surcharge on Wheat Belt, which would be assessed on the basis of Wheat Belt's summer peak demand. To deal with the surcharge, Wheat Belt created two classes of customers based on the date the customer requested service. Customers before a certain date would be protected from increased costs associated with the surcharge, on the theory that it was the new customers who were causing the increased summer peak demand. As a result, Wheat Belt charged markedly different rates for customers receiving similar service. We concluded that Wheat Belt's action in establishing two classes of customers and assessing most of the surcharge to one class was arbitrary and discriminatory. We stated, "Persons receiving similar service under similar circumstances cannot be charged for such service in an arbitrary, designed, dissimilar manner."[36]

McGinley is distinguishable from the situation at hand. There, Wheat Belt wanted to assess the bulk of a surcharge against one class of customers. To do so, it wanted to charge different rates to similarly situated customers. Here, NPPD is charging but one rate—purchasers are charged the same rate as NPPD's customers under the 2016 WPC. The difference between the amounts charged to purchasers and the 2016 WPC customers is attributable to a discount for the 2016 WPC customers. Of course, under some circumstances, charging one rate but conferring a discount upon some customers could be discriminatory. But here, as discussed below, there was a reasonable basis for NPPD's ratemaking determination.

The discount is tied to the OPEB liability. That liability relates solely to past services of NPPD employees, and purchasers received the benefit of those services. Because a specific portion of OPEB cannot be connected to any particular customer, NPPD allocated the liability on a pro rata basis. It is reasonable for purchasers to pay their pro rata share of

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[36] *Id.* at 187, 332 N.W.2d at 920.

the liability. And the catch-up amounts, which were based on actuarial studies, are not arbitrarily established.

There is a reasonable basis for the discount. If a variance in rates is based upon a reasonable and fair difference in conditions that equitably and logically justifies a different rate, any discrimination is not unjust.[37] Purchasers opted not to extend their contractual relationship with NPPD; thus, NPPD had a shorter period of time in which to collect purchasers' pro rata share of the liability. On the other hand, customers under the 2016 WPC extended their relationship with NPPD for an additional 20 years, thereby giving NPPD a longer period of time over which to collect those customers' pro rata share.

NPPD crafted a plan to collect the OPEB catch-up expense at different times. Under the plan, purchasers pay their portion of the OPEB catch-up expense over the 6 years remaining on their contract, while customers under the 2016 WPC get a discount during those years and will pay the catch-up expense between 2022 and 2033. It is the difference in the remaining terms of the contractual relationship with NPPD between purchasers and customers under the 2016 WPC that allows for the different collection of the OPEB liability. The effort to fund the OPEB trust through catch-up amounts in 2016 and 2017 was an effort to mitigate the risk of shifting the cost of the common liability onto the customers under the 2016 WPC. Under the circumstances of this case, the discount for one group of customers is not discriminatory.

The methodology assured that both classes of customers would pay an equal share of OPEB costs—the difference would be solely in the timing of the payments. Contrary to purchasers' argument, the financing scheme imposed a future cost sufficient to remedy the advantage that the 2016 WPC customers otherwise would have had from paying their share later. In other words, an approximation of the time value of

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[37] See 14 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 6681 (Carol A. Jones ed., perm. ed., rev. vol. 2012).

money was built into the mechanism employed to ensure that both classes of customers were treated fairly. In evaluating the experts' testimony, the arbitration board had the advantage of observing them and making judgments considering their credibility. We have considered and given weight to that fact.

3. Whether Rate Structure Breached 2002 WPC

Purchasers next argue that the discount constitutes a breach of the 2002 WPC. It does not. Under the 2002 WPC, purchasers agreed to pay "amounts reasonably required to be set aside in reserves for items" such as OPEB. The catch-up amounts were reasonably within the definition of revenue requirements. This assignment of error lacks merit.

4. Whether Rate Structure Breached Covenant of Good Faith

[11,12] Finally, purchasers argue that the discount breached the covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.[38] The nature and extent of an implied covenant of good faith and fair dealing are measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party.[39]

[13] Purchasers claim that giving a discount to the 2016 WPC customers penalized purchasers for exercising their contractual right to purchase energy elsewhere. We disagree. The availability of the discount was not connected to whether a

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[38] *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

[39] *Id.*

customer reduced or limited its energy purchases from NPPD; rather, it was available to all customers under the 2016 WPC. A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.[40] Purchasers did not have a right to avoid paying amounts toward unfunded accrued liability for OPEB. They have failed to show that NPPD significantly impaired any benefit of the 2002 WPC.

VI. CONCLUSION

We conclude that NPPD's rate structure for 2016 and 2017 was fair, reasonable, and nondiscriminatory. We further conclude that the rate structure did not constitute a breach of either the 2002 WPC or the implied covenant of good faith and fair dealing. Accordingly, we affirm the decision of the arbitration board.

Affirmed.

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

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[40] *Id.*

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

Upper Republican Natural Resources District and Steve Yost, appellees, and FEM, Inc., and M & L Cattle Company, appellees and cross-appellants, v. Dundy County Board of Equalization, appellant and cross-appellee.

912 N.W.2d 796

Filed June 15, 2018. No. S-17-814.

1. **Taxation: Judgments: Appeal and Error.** An appellate court reviews Nebraska Tax Equalization and Review Commission decisions for error appearing on the record of the commission.
2. ____: ____: ____. When reviewing a Nebraska Tax Equalization and Review Commission judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law.** An administrative agency's decision is arbitrary when it is made in disregard of the facts or circumstances without some basis which would lead a reasonable person to the same conclusion; administrative agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.
4. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Nebraska Tax Equalization and Review Commission decisions are reviewed de novo.
5. **Constitutional Law: Due Process.** The determination of whether the procedures afforded to an individual comport with constitutional requirements for procedural due process presents a question of law.
6. **Taxation.** Neb. Rev. Stat. § 77-5016(8) (Cum. Supp. 2018) provides that for questions other than taxable value, the Nebraska Tax Equalization and Review Commission's power is limited to questions that are both (1) raised in the proceeding before the commission and (2) a basis for the order, decision, determination, or action appealed from.
7. **Appeal and Error.** An appellate court ordinarily considers only those errors assigned and discussed in the briefs, but may notice plain error.

8. **Appeal and Error: Words and Phrases.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
9. **Taxation: Property: Public Purpose.** Property can be used by a public entity in more than one way and for more than one public purpose, and all public purpose uses should be considered together in evaluating whether any private use of the property is merely incidental in the analysis under Neb. Rev. Stat. § 77-202(1)(a) (Cum. Supp. 2012) of the extent to which the property is used or being developed for use for a public purpose.

Appeal from the Tax Equalization and Review Commission. Affirmed in part, vacated in part, and in part reversed and remanded with directions.

Jeanelle R. Lust, Richard C. Reier, and Carly L. Bahramzad, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant.

Todd R. McWha, of Waite, McWha & Heng, and Lindsay E. Pedersen for appellees FEM, Inc., and M & L Cattle Company.

Joel E. Burke, of Burke & Pribbeno, L.L.P., for appellee Upper Republican Natural Resources District.

Heavican, C.J., Miller-Lerman, Cassel, and Stacy, JJ., and Luther and O'Gorman, District Judges.

O'Gorman, District Judge.

I. NATURE OF CASE

This is an appeal by the Dundy County Board of Equalization (Board) from the decision of the Tax Equalization and Review Commission (TERC). The central issue in this appeal is the tax exempt status of land purchased by the Upper Republican Natural Resources District (NRD) as part of a ground water integrated management plan. The NRD retired irrigated acres and converted them to grassland to achieve soil conservation

and range management objectives. The NRD leased much of that grassland for grazing. The parties dispute the extent to which the lease was at fair market value for a public purpose, as described by Neb. Rev. Stat. § 77-202(1)(a) (Cum. Supp. 2012). The parties also dispute the scope, under Neb. Rev. Stat. § 77-5016(8) (Cum. Supp. 2016), of the questions properly before the TERC; whether due process allowed for any tax assessment to the lessees if they lacked notice of the proceedings before the Board; and whether it is legally permissible, under Neb. Rev. Stat. § 77-202.11 (Reissue 2009), to assess property tax to a public entity that has leased land for a nonpublic purpose.

II. BACKGROUND

1. Purchase and Lease Agreements

In order to comply with the Republican River Compact and to meet other water management objectives, in 2011, the NRD paid approximately $10 million to purchase from FEM, Inc., approximately 4,080 acres of agricultural land, 3,262 of which were certified irrigated acres. Under the terms of the purchase agreement, FEM retained the right to lease back the property, but once the NRD had decertified the irrigated acres, FEM's use of the land was limited to grazing and use of certain fixtures. During the years pertinent to this appeal, the land had been converted from irrigated land to native grassland. FEM exercised its right to lease back the entirety of the FEM property and, as allowed by the terms of the lease, subleased the land to M & L Cattle Company (M&L), the company through which FEM conducts its cattle operations (M&L and FEM together are referred to herein as "lessees").

The lease agreement between the NRD and FEM provides that the NRD "shall pay all real estate taxes and personal property attributable to fixtures located on the property."

In 2013, the NRD purchased an additional 3,200 certified irrigated acres from Maurice Wilder, for $8,050,000. The land

was contiguous to the FEM parcels and was also acquired in order to carry out the objectives of the management plan.

Both properties were located in Dundy County, Nebraska.

2. Assessor Notice of Taxable Status

In 2013, the Dundy County assessor sent the NRD notices of taxable status for 12 FEM parcels and 6 Wilder parcels. The notices stated that the reason the assessor determined the parcels to be taxable was because they were not being used for a public purpose.[1] The notices did not state that the assessor had determined that any of the parcels were being leased at less than fair market value.

The notices advised the NRD that if the property was leased to another entity and the NRD "d[id] not intend to pay the taxes as allowed under subsection (4) of section 77-202.11, [the NRD] must immediately forward this notice to the lessee." The NRD did not forward the notices to the lessees, and the lessees did not have actual notice of the assessment.

The assessor similarly determined the parcels nonexempt in 2014 and 2015. The NRD similarly failed to forward notices of the 2014 and 2015 assessments to the lessees, who lacked actual knowledge thereof.

3. Protests to Board

The NRD protested the 2013 through 2015 assessments to the Board. The NRD had apparently paid assessments by the assessor for 2012, when the land was still being utilized by the lessees as irrigated farmland. The NRD did not object to the 2013 through 2015 assessments against it on the ground that it was legally impermissible to assess property tax against a public entity leasing public land. The NRD argued simply that the property was exempt from taxation, because it was being used for a public purpose. The lessees did not have notice of

[1] See § 77-202(1)(a).

the NRD's protests and were not parties to the proceedings before the Board.

Following a hearing, the Board determined that all 18 parcels were nonexempt, taxable property for the years 2013 through 2015. The Board stated as the basis for its decision that the surface and buildings were not being used for a public purpose. The Board was not presented with and did not pass upon the issue of whether the lease was at fair market value.

4. Appeal to TERC

The NRD timely appealed to the TERC. The NRD stated in its appeal form that it was appealing the Board's determination that the property was not used for a public purpose. Again, the NRD did not raise any issue of whether the lessees, rather than the NRD, should be assessed tax liability in the event the TERC rejected its contention that the parcels were for a public use. The lessees received notice of the appeal, but they were not originally made parties.

(a) Necessary Parties

The TERC issued an order to show cause whether it had jurisdiction to determine the tax-exempt status of any leased parcel without all lessees as parties. The NRD argued at the show cause hearing that the lessees were not necessary parties, because the question presented to the TERC was limited to the NRD's tax liability. But the TERC ultimately concluded that any determination of whether the property was used for a public purpose would have implications for lessee tax obligations. Therefore, the TERC decided that it lacked some necessary parties to the appeal.

Though the informal hearing on the merits had already been held, the TERC vacated the hearing. The NRD, upon an order to disclose, stated that M&L was the missing necessary party to the proceedings. The TERC scheduled a new hearing and, pursuant to its authority under Neb. Rev. Stat. § 77-5015.01 (Cum. Supp. 2016), served notice to M&L. Upon a joint stipulation of the Board, the NRD, FEM, and M&L, the TERC

determined the issues based on the exhibits and transcript of the prior hearing.

(b) Evidence and Arguments Presented

At the informal hearing, the NRD and the Board were given the opportunity to present evidence and argument.[2] The underlying facts related to the use of the property were not in dispute. Instead, the parties disputed how those facts applied to the concept of public purpose as set forth in the statutes. Neither party presented argument as to whether the lease was at fair market value.

The Board conceded that there was some public purpose served by the NRD's ownership of the parcels, but argued that in determining whether the predominant use was for a public purpose, the TERC should focus on the use of the surface of the land and not the use or nonuse of the water underneath. The assessor explained that in determining the parcels were agricultural and not predominantly for a public use, she was "looking at the surface and the surface only." She also found it pertinent in her assessment that the NRD was not specifically required by law to purchase land as the means of complying with its legal duties.

The NRD responded that its use of the land should include the use or nonuse of the water rights, because ownership of the overlying land was essential to that purpose. Moreover, the NRD's ownership of the land brought into play important statutory duties of soil conservation and range and wildlife management, as set forth in Neb. Rev. Stat. § 2-3229 (Reissue 2012), which were furthered by the grazing.

(i) Management Plan

Dr. Jasper Fanning, general manager of the NRD, testified at the hearing. Fanning explained that the impetus behind the NRD's purchase of the parcels was to carry out the goals of

[2] See Neb. Rev. Stat. § 77-5015 (Cum. Supp. 2016).

the NRD's integrated management plan, which involved both the retirement of irrigated acres to reduce use and the establishment of a well field for controlled augmentation of streamflow during dry periods. Fanning explained that this combination of retirement and augmentation was a more reliable tool for ground water management than simply retiring irrigated acres and letting the water flow naturally into the streams during wetter periods.

The integrated management plan was directed primarily at compliance with the Republican River Compact. Fanning explained that the location put the NRD at the forefront of compliance. The augmentation aspect of the plan also sought to benefit local water users by increasing the amount of water that could be allotted to each irrigated acre.

Fanning explained that the integrated management plan required a sizable property, since the amount of water a property owner can reasonably use is related to the area of overlying land. The property would also have to have a lot of irrigation to retire, in order to balance the supply and use. The property had to be a certain distance from the river to be able to use the land's aquifer as storage for the augmentation part of the plan. Finally, the land would have to have high-capacity wells.

(ii) Purchases and Implementation of Plan

The NRD discovered the FEM property listed for sale on the open market, and it was "ideal for what the district needed." Fanning explained that the fact that the parcels were available in the open market "allowed us to purchase those at market cost and not have to go out and condemn property from multiple landowners to try to put the project together."

Before the purchase by the NRD, the FEM parcels were being used for irrigated agriculture. By January 2013, the FEM parcels were decertified. By the relevant taxation period, the NRD had decertified all the FEM parcels and had completed construction of miles of pipeline underneath the FEM parcels.

Fanning explained that the ground water aquifer under the FEM parcels acted as a storage vessel. The NRD could then discharge that water at a creek on the adjoining landowner's property as needed in order to "retime natural flows to the river from all the other upland irrigation pumping that occurs throughout the district." The NRD utilized wells already on the land and formerly for irrigation to monitor the water depth and record the impact of pumping for the augmentation project.

Fanning testified that while the NRD could conceivably have purchased solely the right to use the water on the FEM parcels, this would not have served its augmentation purposes. The NRD also considered the purchase of water rights to be a risk, since the NRD would not have the land ownership that would justify the reasonable use needed for the integrated management plan. Moreover, the purchase price of the land from FEM with the leaseback was less than the purchase price of water rights alone would have been.

With regard to the leaseback provision of the purchase agreement, Fanning explained that FEM insisted upon the leaseback as a condition of the sale, and it reduced the purchase price of the FEM parcels.

In 2013, the NRD determined that due to declining water levels, it needed to acquire additional certified irrigated acres in order to balance water use. This led to the purchase of the Wilder parcels. There were no augmentation wells on the Wilder parcels, but the retirement of the irrigated acres adjacent to the FEM well field would allow for the infiltration of Wilder water onto the FEM parcels. This, in turn, would allow the NRD larger use for pumping water on the FEM property.

(iii) Soil Conservation and Range and Wildlife Management

Fanning explained that as the owner of the land, the NRD was required to carry out its soil conservation and other duties set forth in § 2-3229. The soil conservation also protected the

water quality in that area. While the NRD purchased the property primarily as an augmentation project, Fanning pointed out that the NRD was a multipurpose natural resources district and that it was "not going to turn [the properties] into wasteland and watch it blow away."

The NRD worked with Nebraska's Game and Parks Commission, which considered the acquired parcels part of the biologically unique Sand Sage Prairie area. With a large grant from the Nebraska Environmental Trust, the NRD reseeded the parcels with a mix of native grasses, forbs, and sand sage to fit that biologically unique landscape. According to Fanning, it was one of the largest conversions of irrigated land to native grasslands ever undertaken in Nebraska.

The NRD understood that the parcels were going to "require significant mowing unless we want to fill every fence within 20 or 30 miles full of tumbleweeds." The alternative to mowing was grazing. Fanning described that mowing would cost the NRD $1 to $12 an acre. In contrast, the NRD could receive $5 or $6 an acre for the same weed control through a lease allowing someone to seasonally graze cattle on the land. Grazing, Fanning explained, had the additional advantage of incorporating the seed through "hoof action."

Three FEM parcels had improvements other than wells and underground pipelines. Fanning testified that these improvements were used primarily by the lessees for the lessees' agricultural or commercial purposes. One parcel contained seven grain bins and a 1-acre farmsite. One parcel contained three mobile homes, scales and a scale house, 12 grain bins, a garage, a livestock shed, two vertical tanks, a 1-acre farmsite, and a 4-acre homesite. And one parcel contained an old airplane hangar and a 2.07-acre farmsite.

With respect to the Wilder parcels, the NRD did not retire the certified irrigated acres and reseed with grassland during the first year of acquisition. At the time of acquisition, it was too late in the season to do so. Rather, the NRD determined that the best course of action for its ultimate goal of

planting native grasses was to plant sorghum and a ground cover first. The NRD did not harvest the crop, but planted it to add organic matter to the soil and to prevent soil erosion. The NRD irrigated the sorghum, but Fanning emphasized that this use was a reduction from the parcels' historical, fully irrigated use.

The NRD planted native grasses the following year, in 2014, and retired the Wilder irrigated acres. One of the Wilder parcels contained a house, a machine shed, 10 grain bins, a scale house, a scale, a dryer, two vertical tanks, two anhydrous tanks, and a 1-acre homesite. All of these improvements were unusable. While the Wilder parcels had a lessee who was grazing cattle on the land at the time of purchase, those parcels were no longer leased after May 1, 2013. By the tax levy date of October 15, 2013, none of the Wilder parcels were leased.

(iv) Rents

Under the lease portion of the purchase agreement with FEM, the NRD could evaluate each year how many cattle were allowed to graze, in order to serve the NRD's purposes without overgrazing the property. When asked if the lease had a base rate for grazing, based upon animal units per acre, Fanning responded:

> Yeah, we knew that the lease was going to be variable — or the real world is going to be variable in the number of cows that they'd be able to graze, so the lease essentially sets out a grazing rate based on kind of what their fair market value was at the time for grazing a cow/calf pair, and then it's adjusted based on the number of animals that we determined they can actually run.

The FEM lease also established a rent of 5 cents per bushel of all grain the lessees brought onto the property.

During the relevant tax years, after the NRD retired the irrigated acres and the lessees were limited to grazing and use of fixtures, the total annual income derived from the leaseback agreement with FEM was approximately $57,000.

Fanning explained that by retiring the irrigated acres and turning them into grassland, the NRD reduced the market value of the land from "a $4,000 piece of irrigated property . . . into something that's worth 5- or 600 bucks." And Fanning pointed out that the NRD's yearly rental income under the lease was less than its monthly electricity bill for the augmentation project.

(c) Posthearing Briefs

The NRD and the Board submitted posthearing briefs. The lessees did not. In its posthearing brief, the NRD argued that the parcels were predominantly used for the public purposes of ground water management, compact compliance, soil erosion control, and other public purposes under the NRD's statutory authority.

The Board asserted in its posthearing brief that "[t]he narrow question before the Commission is whether 6,640 acres of real property owned [by the NRD] are exempt from taxation in 2013 because the property is 'used or being developed for use . . . for a public purpose,'" although the Board also pointed out that the NRD had never adduced "independent" evidence on the fair market value of the lease. The Board concedes in this appeal that the "narrow question before TERC was whether 6,640 acres of real property owned by [the NRD] were exempt from taxation because the property is 'used or being developed for use . . . for a public purpose.'"[3]

(d) TERC's Decision

Pursuant to 350 Neb. Admin. Code, ch. 15, § 003.07 (2009), the TERC examined separate and distinct use portions of the properties and divided them broadly into three groups: the FEM parcels with improvements, the FEM parcels without improvements (except wellheads and underground pipes), and the Wilder parcels.

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[3] Brief for appellant at 5.

(i) FEM Parcels Without Improvements

The TERC determined that the nine FEM parcels without surface improvements were simultaneously used for multiple purposes, but that, considering the factors set forth in 350 Neb. Admin. Code, ch. 15, § 003.07A (2009), the predominant use was for public purposes. The TERC found that the cattle grazing assisted in the NRD's long-term and ongoing development of a project plan for the purposes of compliance with the Republican River Compact, management of water use, range management, and the control of soil erosion. The TERC also found that in order to achieve its plan, the NRD had expended significant resources in purchasing the parcels, converting wellheads, and planting natural grassland. The NRD received a comparatively small $40,000 per year in grazing rental income from the lease. At the same time, the TERC noted that the cattle grazing under the lease supported the NRD's primary use by reducing costs that the NRD would otherwise have incurred to mow the grasses. Finally, the TERC found that the NRD's public purpose use of the parcels was year round, while the cattle grazing was seasonal.

Having concluded that the nine FEM parcels without improvements were leased for a public purpose, the TERC turned to the issue of whether they were leased at fair market value. The TERC found sufficient evidence of fair market value in Fanning's testimony that the lease of the grazed acres was based upon the fair market value of a grazing lease per cow-calf pair. The TERC noted that there was no evidence to the contrary.

(ii) Wilder Parcels

The TERC found that all six Wilder parcels were used for the public purposes of soil conservation, development of wildlife habitat, and range management. The TERC grouped both the parcels with and the parcels without improvements together. The TERC explained that none of the improvements on the Wilder parcels—except, apparently, the irrigation

equipment—had any value. The improvements were unusable and merely incidental to the NRD's use of the parcels.

The TERC determined that the Wilder parcels should not be considered leased property, even for 2013, because the lease terminated before the levy date on October 15, 2013. And under 350 Neb. Admin. Code, ch. 15, § 003.11A (2009), when the tax status of real property owned by a public entity changes after January 1, but before the levy date, the county assessor is required to modify its determination of the tax status as of the levy date. The TERC found that the planting of the sorghum and use of the irrigation equipment to grow the sorghum were for soil conservation and suppression of weeds until grasslands could be planted.

(iii) FEM Parcels With Improvements

With respect to the three FEM parcels with improvements, the TERC concluded that the entirety of the parcel with the airplane hangar and 2.07-acre farmsite was nonexempt and that only those portions of the other two parcels with the improvements were nonexempt.

In finding the one parcel nonexempt and portions of the two parcels nonexempt, the TERC reasoned first that the NRD had failed to adduce evidence that the portion of the lease associated with the use of improvements, other than wellheads or other fixtures used to provide water for the cattle, was at fair market value. The TERC reasoned second that the property was not used predominantly for a public purpose.

Cattle were grazed on the remaining portions of those two parcels. For the portions without improvements, the TERC applied the same reasoning it applied to the FEM parcels without improvements.

(iv) Responsible Party for Nonexempt Parcels

Having concluded that one parcel was nonexempt and portions of two parcels were nonexempt, the TERC believed it

necessary to then determine which party or parties held the obligations to pay the tax for the nonexempt property.

Citing § 77-202.11(4), the TERC stated that a governmental subdivision is permitted to operate as a tax collector, collecting the tax on behalf of the county through monthly rental payments, which it in turn pays to the county. But the TERC believed the governmental subdivision was not permitted by law to "assume the tax liability." Citing to § 77-202.11(3), the TERC concluded, "There is no set of circumstances under the statute where the actual tax liability shifts to the state or its governmental subdivisions."

In the lease agreement, the NRD agreed to pay all property taxes. And the TERC specifically found that the NRD intended to exercise its authority granted by § 77-202.11(4), to voluntarily pay any applicable tax and collect it as part of the rent. Nevertheless, citing to § 77-202.11(1), the TERC decided that "[r]egardless of the contract, or even in the event that the [NRD] exercises its discretion to voluntarily pay the tax and collect it from FEM . . . , the ultimate responsibility for the property taxes lies with the lessee, FEM . . . ."

The TERC explained that while the NRD was allowed to voluntarily pay the tax, but collect it from the lessee through rents, the NRD was not permitted to assume its lessee's property tax liability. Otherwise, the NRD would effectively collect taxes from all taxpayers in the district to pay for its lessee's tax liability.

The TERC accordingly concluded that property taxes for the nonexempt portions of the FEM parcels with improvements should not be assessed to the NRD. The TERC turned to the question of whether it could assess the tax to FEM.

(v) Due Process for Lessees

The TERC concluded that FEM's due process rights were violated by lack of notice of the proceedings before the Board. Though the TERC determined that no statutory notice provisions were violated, it concluded that FEM was deprived of

participation in a contested hearing before the Board. Such lack of participation was meaningful, the TERC concluded, because the Board has a lower standard of review of an assessor's determination than the standard of review in the appeal before the TERC of the Board's decision. In the proceeding before the Board, FEM would have had the burden to demonstrate by a preponderance of the evidence that the assessor was incorrect.[4] In contrast, under § 77-5016(9), when the TERC acts as an appellate body, there is a presumption that the board of equalization acted upon sufficient competent evidence, which presumption must be rebutted on appeal before the TERC by clear and convincing evidence.[5]

The TERC pointed out that it was bound to exercise the appellate standard of review set forth in § 77-5016(9), and the TERC could identify no authority to remand the matter back to the Board to correct the due process violation. The TERC concluded that due to the due process violation, it lacked authority to assign tax liability to FEM. The TERC also found that the tax liabilities of FEM in relation to the nonexempt parcels or portions of parcels were "void."

III. ASSIGNMENTS OF ERROR

The Board timely filed a petition for review[6] by the Nebraska Court of Appeals, and we moved the case to our docket. The Board seeks an order reversing the TERC's decision that (1) the unimproved FEM parcels and the Wilder parcels were exempt, (2) portions of the improved FEM parcel were exempt, (3) tax liability cannot be assessed to the NRD, and (4) tax liabilities of FEM are void. The Board asks this court to remand the cause to the TERC to assess tax liability to the NRD or FEM.

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[4] See *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015).

[5] See *id.*

[6] See Neb. Rev. Stat. § 77-5019 (Cum. Supp. 2016).

In its appellate brief, the Board assigns that the TERC unlawfully determined that (1) certain unimproved FEM parcels were leased for a public purpose at fair market value and were therefore exempt, (2) those portions of improved FEM parcels were exempt, (3) the Wilder parcels were used for a public purpose and exempt, (4) the property taxes of nonexempt portions of the FEM parcels could be assessed to neither the NRD nor FEM, (5) FEM's due process rights were violated, (6) the TERC lacked authority to assign the tax liability for the nonexempt portions of the FEM parcels to FEM, and (7) the tax liabilities of FEM were void.

The lessees assign in their brief on cross-appeal that the TERC erred in determining that (1) it had subject matter jurisdiction to decide if any taxes could be assessed to the NRD or assigned to the lessees, (2) the lease agreement was in conflict with § 77-202.11, and (3) the lessees' failure to receive direct notice of the assessor's determination that the property was not exempt did not violate due process.

IV. STANDARD OF REVIEW

[1] We review TERC decisions for error appearing on the record of the commission.[7]

[2] When reviewing a TERC judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[8]

[3] An administrative agency's decision is arbitrary when it is made in disregard of the facts or circumstances without some basis which would lead a reasonable person to the same conclusion; administrative agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.[9]

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[7] *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 906 N.W.2d 285 (2018); § 77-5019(5).

[8] *Id.*

[9] See *id.*

[4] Questions of law arising during appellate review of the TERC's decisions are reviewed de novo.[10]

[5] The determination of whether the procedures afforded to an individual comport with constitutional requirements for procedural due process presents a question of law.[11]

V. ANALYSIS

In its appeal from the TERC's decision, the Board argues that all the parcels had a predominantly agricultural use instead of a predominantly public use. The Board also argues that the TERC erred in concluding the lease was at fair market value. Both the Board and the lessees assert that the TERC erred in concluding that the NRD cannot be assessed any tax in these appeals and in even addressing that issue, which the Board and the lessees assert was not properly before the TERC. The Board and the lessees disagree whether the TERC erred in concluding that assessing the tax to the TERC would violate FEM's due process rights. Neither the NRD nor the lessees contest the TERC's decision that one FEM parcel and portions of two other FEM parcels with improvements were nonexempt.

1. Scope of Questions Before TERC

As a threshold matter, we must determine what issues were properly before the TERC, because that governs what issues are properly presented in this appeal. The TERC was acting as an intermediate appellate body. In an ordinary civil case, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court, because a trial court cannot commit error in resolving an issue never presented and submitted to it for disposition.[12] Statutes govern the scope of review by the TERC, and, as an administrative

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[10] *Id.*

[11] *Id.*

[12] See *Brown v. Jacobsen Land & Cattle Co.*, 297 Neb. 541, 900 N.W.2d 765 (2017).

body, it only has that power that has been granted to it by the Legislature.[13]

Section 77-5016(8) provides that "[t]he [TERC] may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based." Additionally, under § 77-5016(8), "[t]he [TERC] may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal." Neb. Rev. Stat. § 77-5017(1) (Cum. Supp. 2016) states that in resolving an appeal or petition, the TERC may "make such orders as are appropriate for resolving the dispute but in no case shall the relief be excessive compared to the problems addressed." Neb. Rev. Stat. § 77-5018(1) (Cum. Supp. 2016) provides that the TERC "may issue decisions and orders which are supported by the evidence and appropriate for resolving the matters in dispute."

Accordingly, in an appeal from the TERC's decision denying tax exempt status under § 77-202(1)(c) to an assisted living facility, we held in *Bethesda Found. v. Buffalo Cty. Bd. of Equal*.[14] that only the question of whether the facility was used for charitable purposes was before us on appeal. The other element of exempt status under § 77-202(1)(c), i.e., that the facility be owned by a charitable organization, was not before us. That question was not before us because it was not a contested issue before the Board:

> Since the issue was not presented to the [board of equalization], it could not be presented to TERC, and TERC had no power to reach the issue sua sponte. The appeal is restricted to questions raised before the [b]oard. TERC has no authority to consider questions not raised before a county board of equalization.[15]

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[13] *Id.*

[14] *Bethesda Found. v. Buffalo Cty. Bd. of Equal.*, 263 Neb. 454, 640 N.W.2d 398 (2002).

[15] *Id*. at 458, 640 N.W.2d at 402.

Likewise, in several cases decided when district courts acted as the intermediate appellate body reviewing decisions of a county board of equalization, we held that the district court lacked the power to consider questions that were not raised before the county board of equalization.[16] Neb. Rev. Stat. § 77-1511 (Reissue 1996) controlled appeals from decisions by a county board of equalization and provided that the district court shall hear and determine "all questions raised before the county board of equalization."

In *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*,[17] we said that the parties disputing the merits of whether the subject property was exempt under provisions relating to state-owned property had overlooked the "important and dispositive procedural point in [the] case." The important and dispositive point, we explained, was that the issue of such exemption was not raised before the board of equalization.[18] We explained that in the application filed with the county assessor, the issue presented was whether the subject property fell under charitable and educational exemptions. The discussion at the hearing before the board of equalization likewise focused on whether the property was owned by a charitable organization and was used for charitable purposes. Finally, the board's decision disallowed the educational and charitable exemption and did not address any other exemption.[19]

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[16] See, *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991); *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987); *Reichenbach Land & Loan Co. v. Butler County*, 105 Neb. 209, 179 N.W. 1015 (1920); *Reimers v. Merrick County*, 82 Neb. 639, 118 N.W. 113 (1908); *Arcadian Fertilizer v. Sarpy Cty. Bd. of Equal.*, 7 Neb. App. 499, 583 N.W.2d 353 (1998).

[17] *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal., supra* note 16, 237 Neb. at 19, 465 N.W.2d at 122.

[18] See *id.*

[19] See *id.*

We described the statutory limitation of the scope of the appeal from a county board of equalization as jurisdictional.[20] We said that where there was no jurisdiction at the intermediate appellate tribunal to consider an issue, we likewise lacked the power to adjudicate its merits.[21] We also pointed out that in *Reichenbach Land & Loan Co. v. Butler County*,[22] we had described that it is the public policy of the state that the county board of equalization should have an opportunity to pass on the question for ultimate decision before the public revenues become involved in protracted or vexatious litigation.

[6] Section 77-5016(8) provides that for questions other than taxable value, the TERC's power is limited to questions that are both (1) raised in the proceeding before the TERC and (2) a basis for the order, decision, determination, or action appealed from. Thus, in this case, the TERC lacked the power to address questions that were not raised in the proceeding before the TERC or that were not questions upon which the Board's decision was based. When the TERC addresses questions outside the scope of its limited statutory authority, its decision in that respect must be vacated.

This case began when the assessor gave the NRD notice that she had determined the parcels were taxable because they were not being used for a public purpose. Though it may be the burden on the party seeking the exemption to prove tax exempt status, the assessor initially frames the issues that the party seeking the exemption must respond to. More importantly, the parties raised before the Board solely the question of whether the parcels were being used for a public purpose. And the Board determined they were not being used for a public purpose, without addressing any other issue. The assessment by the Board was against the NRD.

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[20] See *id.*

[21] See *id.*

[22] *Reichenbach Land & Loan Co. v. Butler County, supra* note 16. See *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal., supra* note 16.

Finally, on appeal to the TERC, the only issue raised by the parties was whether the parcels were being used for a public purpose. Indeed, the Board expressly stated that the only issue presented was whether the land was being used for a public purpose. The NRD did not contest its liability for the taxes in the event the TERC determined the parcels were not being used for a public purpose. And the Board did not argue as an alternative ground to affirm the nonexempt determination that the lease was not for fair market value.

In deciding whether to affirm or reverse the Board's decision, the TERC erred in considering questions beyond whether the parcels were being used for a public purpose. Not only was it unfair for the TERC to decide issues that the parties had no notice were being litigated; doing so was outside of the TERC's appellate jurisdiction as set forth by § 77-5016(8). The TERC also violated the mandate of § 77-5017(1) that it shall in no case provide relief excessive compared to the problems addressed.

[7,8] Though the parties dispute only the TERC's power to decide the issue of whether the NRD could be assessed any tax for nonexempt property, we find plain error in the TERC's consideration of the fair market value of the lease. An appellate court ordinarily considers only those errors assigned and discussed in the briefs, but may notice plain error.[23] Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[24]

Neither the issue of assessment to the NRD nor the issue of fair market value was the basis for the Board's order. And, as discussed, § 77-5016(8) limits the TERC's review to questions upon which the Board's decision was based. Furthermore, neither the issue of assessment to the NRD nor the issue of fair market value was an issue raised in the proceeding before

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[23] See *Cain v. Custer Cty. Bd. of Equal., supra* note 4.

[24] *Id.*

the TERC. And § 77-5016(8) also limits the jurisdiction of the TERC to the questions raised before it.

Thus, we vacate the TERC's decision inasmuch as it addressed whether the parcels were leased at fair market value, whether the NRD could be assessed the tax on the one FEM parcel and the portions of the two FEM parcels it found nonexempt, and whether to assess this tax to the lessees would violate due process.

Without deciding the merits, we reverse that portion of the TERC's decision concerning FEM's due process rights. The lessees' due process rights in this case were only potentially affected when the TERC elected to declare sua sponte any assessment against the NRD void, and we have vacated that portion of the TERC's decision.

We affirm the TERC's decision that one FEM parcel is nonexempt and that portions of two other FEM parcels are nonexempt, to the extent that the TERC reasoned the land was not being used for a public purpose. The nonexempt status of such property is not assigned as error, and we find no plain error in the TERC's conclusion that the property was nonexempt for the alternative reason that it was not being used predominantly for a public purpose.

Because the TERC lacked the statutory authority to decide in this case that it was improper to assess tax liability to the NRD, it should have simply affirmed the assessment against the NRD as to any property it affirmed to be nonexempt. We therefore reverse, and remand with directions for the TERC to affirm the Board's order as to the parcel and portions of parcels it found nonexempt.

The only issue remaining in this appeal is whether the TERC was correct that the parcels it found to be exempt were being used for a public purpose.

2. Use for Public Purpose

The Nebraska Constitution, article VIII, § 2, provides that the property of the state and its governmental subdivisions is exempt from taxation to the extent the property is used for

a public purpose. This has been codified in § 77-202(1)(a), which states in part that "[p]roperty of the state and its governmental subdivisions [shall be exempt from property taxes] to the extent used or being developed for use by the state or governmental subdivision for a public purpose."

Section 77-202(1)(a)(ii)(B) then defines public purpose in relevant part as use of the property "to carry out the duties and responsibilities conferred by law with or without consideration." Section 77-202(1)(a)(ii) also states in part that "[p]ublic purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose."

Under 350 Neb. Admin. Code, ch. 15, § 002.01 (2009), "[p]ublic purpose does not include the leasing of property to a private party for purposes other than a public purpose," and that regulation elaborates that "[i]ncome generated for the state or governmental subdivision, either through leases or other receipts, will not convert a nonpublic use of a property to a tax exempt public purpose use." Agency regulations, properly adopted and filed with the Nebraska Secretary of State, have the effect of statutory law.[25]

We have held that the primary or dominant use of the property, and not an incidental use, is controlling in determining whether property is exempt from taxation.[26] Likewise, 350 Neb. Admin. Code, ch. 15, § 003.06 (2009), explains: "When the assessor or county board of equalization determines the use of property pursuant to this regulation, the dominant or primary use of property shall be considered, such that any incidental use for other purposes shall not effect the tax status of the property." Similarly, § 003.07 provides in relevant part: "When a parcel of governmentally owned property is used for several purposes simultaneously, the determination of taxable

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[25] *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

[26] *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 305, 664 N.W.2d 452 (2003).

status should be based on the predominant use of the property. The predominant use of the property is the primary or dominant use."

Finally, § 003.07A states that in the analysis of mixed use parcels, a number of factors may be considered in determining the predominant use, including whether (1) "the use of the property assists the government entity in meeting a long term or ongoing purpose," (2) "the governmental entity has spent significant money in making the property ready for its public purpose use in comparison with any revenue generated by its nonpublic use," and (3) "the public purpose use is ongoing throughout the year as opposed to the seasonal nature of its nonpublic use."

Generally, statutes exempting property from taxation should be strictly construed, and one contending that property is exempt must clearly show that it is within the exemption provided by statute.[27] This does not mean, however, that there should not be a liberal construction of the language used in order to carry out the expressed intention of the Legislature, but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption.[28] Also, we must apply the plain language of the statutes when they are unambiguous.[29]

The policy behind limiting exempt status to leases utilized for public purposes is a balance of interests. On the one hand, the public should not have to subsidize a private party's profitmaking use at an unfair competitive advantage because the public entity can offer the tax exempt land at a lower rate.[30]

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[27] See *Berean Fundamental Church Council, Inc. v. Board of Equalization*, 186 Neb. 431, 183 N.W.2d 750 (1971).

[28] See *Doane College v. County of Saline*, 173 Neb. 8, 112 N.W.2d 248 (1961).

[29] See *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

[30] See Annot., 54 A.L.R.3d 402, § 3 (1973).

Furthermore, if the leased property were exempt without limitation to leases for a public use, exempt entities would be tempted to acquire and rent property for the sole purpose of generating income, thereby acquiring revenues in excess of those permitted through legal taxation.[31]

On the other hand, if a lease to a private party is for a public purpose other than simply creating revenue, taxation of the leased property would not inure to any public advantage, since the tax debtor would also be the tax creditor.[32] The exemption from taxation of public property used for a public purpose avoids the burden of collecting tax revenues from, and disbursing them to, the same public entity.[33]

Courts addressing similar constitutional and statutory schemes generally hold that a lease is for a public purpose when it procures performance of the exempt function for which the owner would or might have used the property if not leased, regardless of whether private interests of the lessee are also served by such use.[34] Two cases from other jurisdictions have specifically addressed use by a lessee of land acquired for the public purpose use of its aquifer or to prevent soil erosion.

In *Whitehouse v. Tracy*,[35] the court found that a lease to a farmer for his own profit was exclusively for a public purpose. The land was owned by the local government in order to

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[31] See *Pbgh. Sch. Dist. v. Allegheny County, Aplnt.*, 347 Pa. 101, 31 A.2d 707 (1943).

[32] See *Cleveland v. Carney*, 172 Ohio St. 189, 174 N.E.2d 254 (1961).

[33] See *id.*

[34] See, e.g., *First Unitarian Soc. v. Hartford*, 66 Conn. 368, 34 A. 89 (1895); *Central Baptist Church of Miami, Fla. v. Dade County*, 216 So. 2d 4 (Fla. 1968); *People ex rel. Korzen v. Amer. Airlines*, 39 Ill. 2d 11, 233 N.E.2d 568 (1967); *Adams Co. v. Diocese of Natchez*, 110 Miss. 890, 71 So. 17 (1916); *Davis v. Congregation Agudas Achim*, 456 S.W.2d 459 (Tex. Civ. App. 1970); *Hanover County v. Trustees*, 203 Va. 613, 125 S.E.2d 812 (1962); *State v. Kittle et al.*, 87 W. Va. 526, 105 S.E. 775 (1921).

[35] *Whitehouse v. Tracy*, 72 Ohio St. 3d 178, 648 N.E.2d 503 (1995).

utilize the ground water underneath the surface, in a well field that pumped water to the village residents.[36] The government was renting the surface of the land to the farmer for the sole purpose of saving mowing and maintenance expenses that it would otherwise incur under its general obligations as owner of the property.[37] The court held that the private use was sufficiently incidental to the public purpose of the property.[38] Although the court found it significant that there was no lease, and that the government maintained full control over the property, the statutory scheme apparently lacked applicable provisions specifically for leased property.[39]

In *City of Osceola v. Board*,[40] land adjoining an artificial lake constituting part of a city's waterworks was acquired as a watershed to prevent soil wash from filling the lake. The land was withdrawn from cultivation and seeded with grass. The city leased the land to a private entity for pasture. The court found that despite this fact, the land was exempt as devoted entirely to public use and not for profit.[41] The court explained that the grass needed to be either cut or pastured in order to properly maintain it. The city's rental for pasturing, the court explained, was simply an economical way of meeting the city's maintenance obligations for the grassland.[42]

The following three Nebraska cases involving the city of York and the York County Board of Equalization are also relevant to the case at bar. We held in each of these cases that leased public property was used for a public purpose and therefore was tax exempt. In each case, the property was leased to a private party who utilized the surface for his or her private

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[36] See *id.*

[37] See *id.*

[38] See *id.*

[39] See *id.*

[40] *City of Osceola v. Board*, 188 Iowa 278, 176 N.W. 284 (1920).

[41] See *id.*

[42] See *id.*

agricultural operations. We held in each case that such surface agricultural use was merely incidental to predominant public purposes of the property.

City of York v. York Cty. Bd. of Equal.[43] (*York I*) involved city-owned land required by the Federal Aviation Administration to be a buffer zone around an airport. That federal agency also had applicable regulations regarding erosion control. To maintain the land as a buffer zone and to control erosion, the city could either seed and maintain the land on its own or lease the land for agricultural use. The city elected to lease the land, since that was a more economical means of carrying out its duties of maintaining the land and weed control. The revenue from the lease was used to support the airport's operating expenses.[44]

The TERC had found the property to be nonexempt on the ground that the lessees were using the land for private purposes and in direct competition with other agricultural lessees not so fortunate as to be leasing public lands. We reversed, stating in *York I* that the TERC erred on the legal question of whether the lease served a public purpose, which question we reviewed de novo on the record. We held that the lessee's agricultural use was incidental to the primary public purposes of maintaining the area as a buffer zone and ensuring that the buffer zone was properly maintained.[45]

In *City of York v. York County Bd. of Equal.*[46] (*York II*), lots were acquired by the city for the purpose of resale as part of an industrial park meant to attract industry to the community. The lots were being leased for agricultural use until appropriate buyers could be found.[47] The agricultural lease was

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[43] *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003).

[44] See *id.*

[45] See *id.*

[46] *York, supra* note 26.

[47] See *id.*

subject to the sale of the property for industrial use, though no resale was imminent.[48]

We held in *York II* that the primary use of the lots was for a public purpose and that the agricultural use by the lessee was incidental. We noted that the industrial park was part of a comprehensive plan for community development. We also considered the fact that the revenue from the lease, $100 per acre, was small in proportion to the investment of the city of $13,500 per acre to improve the lots for industrial use.

Lastly, in *City of York v. York County Bd. of Equal.*[49] (*York III*), we held that 44 acres acquired as part of the local solid waste agency's long-term waste management and water monitoring planning were for public use, despite the agency's lease of the surface for the lessee's agricultural operations. The property was located adjacent to a landfill, and the agency contemplated it would need to use soil from the land in approximately 30 years. But the more immediate reason for the acquisition of the property was for water monitoring. Three wells placed on the land for such purpose were located along the property line.[50]

We concluded in *York III* that the use of the property by the lessee as irrigated cropland was merely incidental to the public purposes of waste management and water monitoring. We observed that long-term planning was necessary to ensure adequate capacity. We also observed that the income of $135 per acre from the lease was small compared to the $216,191 that the agency paid to acquire the land. We said that "[t]he fact that the [local agency] derives income from the leased property does not change its primary purpose."[51]

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[48] See *id.*

[49] *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 311, 664 N.W.2d 456 (2003).

[50] See *id.*

[51] *Id.* at 316, 664 N.W.2d at 460.

We concluded that the TERC's decision that the land was used primarily for nonpublic, agricultural purposes did not conform to the law.[52]

[9] We reject any assertion by the Board that the public use to be considered in determining the predominant use of the property is limited to one purpose for which the property was primarily acquired, to the exclusion of other public purposes incident to ownership of property. Public purpose is defined in relevant part as carrying out the duties and responsibilities conferred by law.[53] As this language indicates, and *York III* illustrates, those duties and responsibilities are, or the usage to carry out those duties and responsibilities is, not necessarily singular. It would be illogical to read the statutory scheme as making property taxable when it serves several public purposes, but tax exempt when it serves only one. Property can be used by a public entity in more than one way and for more than one public purpose, and all public purpose uses should be considered together in evaluating whether any private use of the property is merely incidental in the analysis under § 77-202(1)(a) of the extent to which the property is used or being developed for use for a public purpose.

As for the Board's focus on the reason for acquisition, nothing in the statutory scheme indicates that the relevant public purpose use must be tied to the reason for acquisition. It would be contrary to public policy to discourage public uses that were not contemplated at the time of purchase. Presumably, a public entity ought to use exempt, publicly owned land for as much public benefit as possible.

We also find no merit to any contention by the Board that the lessees' uses on the surface are the only activities considered in the analysis of whether the leased property is tax exempt as predominantly used for a public purpose. In

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[52] See *York III, supra* note 49.

[53] See § 77-202(1)(a)(ii)(B).

York III, we found the property exempt where the lessee was a farmer who cultivated the surface of the property, even though the only public purpose uses were of the property's underground wells and its development for future use of the soil (to a significant depth).

We find no reason to treat underground uses—in this case the use of the aquifer, wells, and pipeline system—differently from any other use of the property. As the NRD points out, use of the ground water is a derivative right immediately dependent on ownership of the surface over it.[54] We have thus held in other contexts that the ground water is part of the "property" at issue under the exemption statutes.[55] The right to use the ground water "does not float in a vacuum of abstraction but exists only in reference to and results from ownership of the overlying land."[56] We have thus said, "[I]t is clear that the right to use ground water is an attribute of owning fee simple title to land overlying a source of ground water and is inseparable from the land to which it applies."[57]

Accordingly, in our analysis of the public purposes for which the subject property was used, we give weight to the NRD's continual use of the underground aquifer, pipelines, and wells, to carry out the NRD's statutory duties of water management. The duties and responsibilities of the NRD are set forth in § 2-3229, which specifically describes programs to control water supply and conservation.

We held in *Estermann v. Bose*,[58] in the context of condemnation, that an easement sought by a joint water management entity to comply with the Republican River Compact by

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[54] See *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985).

[55] *Id.* at 191, 376 N.W.2d at 548.

[56] *Id.* at 191, 376 N.W.2d at 547.

[57] *Id.* at 191, 376 N.W.2d at 548.

[58] *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017).

augmenting waterflows to a creek and offsetting surface water depletions was for a public purpose. And we said that use of the surface by private irrigators was merely incidental to the overriding public purpose of the project. In evaluating the predominance of the augmentation use in the public purpose analysis, we observed that the failure to comply with the compact could expose the state of Nebraska to significant liability.[59] Likewise here, the water management use of the property is significant not only in its physical scope, but also in its benefit to the public.

But that is not the only public use of the property. We further consider in our predominant use analysis the fact that the NRD implemented a plan on the property for the large-scale reseeding of the Sand Sage Prairie area. This is also encompassed by the duties and responsibilities conferred by law upon the NRD. Described in § 2-3229 is the NRD's purpose to develop and execute programs of soil erosion prevention and control, soil conservation, development and management of fish and wildlife habitat, and range management.

The NRD developed and continuously maintains the ecologically unique surface prairie as part of its public purposes set forth in § 2-3229. As steward of this prairie, the NRD has an ongoing responsibility to control weeds that could destroy the public's investment in this biologically diverse landscape. As steward of the property, the NRD also has a responsibility to prevent the nuisance for the community that would result from a failure to control weeds. The lessees' grazing of the prairie performs, in a more economical way, an exempt function that the NRD would otherwise have to perform itself. We agree with the TERC that the lessees' activities are "for a public purpose," as required by § 77-202(1)(a)(ii).

While the lessees also serve their own interests through the grazing lease and grain storage, the evidence demonstrates

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[59] See *id.*

that these private purposes are merely incidental to the important public purposes for which the NRD uses the property. Besides the predominance of public uses already described, relevant to this conclusion—as described in *York II*, *York III*, and § 003.07A—is the comparatively minor income from the lease in relation to the multimillion-dollar investment in the property's acquisition and conversion to its current public uses. The evidence was undisputed that the lease income was minor even in comparison to the ongoing operations costs of the augmentation project.

The NRD is not making a profit from the lease and thereby acquiring revenues in excess of those permitted through legal taxation. Also, we observe that under the factors weighing in favor of exempt status set forth in § 003.07A, the NRD's public purpose uses are ongoing throughout the year, while the grazing is seasonal.

For all the foregoing reasons, we affirm, in our de novo review of the record,[60] the decision of the TERC insofar as it concluded property was exempt because it was predominantly used for a public purpose. We agree with the TERC that the property was used for the public purposes of water management and the development and maintenance of the prairie. We also agree that these uses were the predominant use of the property. The sorghum cover crop on the Wilder property in 2013 and the lessees' grazing activities served the public purposes associated with the prairie project. Any private use by the lessees is incidental to the public purposes of the property.

VI. CONCLUSION

We affirm the TERC's determination that the Wilder parcels, 10 FEM parcels, and portions of two FEM parcels were used for a public purpose and therefore exempt. We vacate

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[60] See *Harold Warp Pioneer Village Found. v. Ewald*, 287 Neb. 19, 844 N.W.2d 245 (2013).

those parts of the TERC's opinion addressing issues other than whether the property was used for a public purpose. We reverse the TERC's decision and remand the cause with directions for the TERC to affirm the Board's tax assessment to the NRD of the property that the TERC found nonexempt.

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

Funke, J., participating on briefs.

Wright, J., not participating.

Cassel, J., concurring.

I fully understand the social impact to Dundy County and its citizens of exempting at least 6,640 acres from the property tax rolls. The county's land area comprises only 920 square miles.[1] Thus, of approximately 588,800 acres, the decision removes over 1 percent from the tax roll. Taxes are lost that would have funded school districts and other local needs. Effectively, this compels the remaining property taxpayers to pay more. And other projects for Republican River Compact compliance may be looming to imperil even more of the area's tax base.

I join the court's decision, because I believe it faithfully follows existing law. Perhaps another provision of current law, not invoked by the parties before us, is available to address this problem. But only the Legislature is empowered to determine whether current law is adequate or whether the law should be changed to balance the competing public interests differently.

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[1] Nebraska Blue Book 2016-17 at 843.

Nebraska Supreme Court
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Shawn E. on behalf of Grace E., a minor child, appellant, v. Diane S. and State of Nebraska, appellees.

912 N.W.2d 920

Filed June 22, 2018. No. S-17-074.

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. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
3. **Moot Question: Words and Phrases.** The public interest exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
4. **Garnishment.** Garnishment in aid of execution is a provisional remedy created by statute directing the procedure to obtain such relief.
5. **Final Orders: Words and Phrases.** A substantial right is an essential legal right.
6. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
7. **Final Orders: Dismissal and Nonsuit: Appeal and Error.** Without a final order, an appellate court lacks jurisdiction and must dismiss the appeal.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Riedmann, Judge, and Inbody,

Judge, Retired, on appeal thereto from the District Court for Buffalo County, John H. Marsh, Judge. Judgment of Court of Appeals affirmed.

Shawn E., pro se.

Shawn R. Eatherton, Buffalo County Attorney, and Kari R. Fisk for appellee State of Nebraska.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Hall, District Judge.

Cassel, J.

INTRODUCTION

As a matter of first impression, we consider whether a judgment debtor who, using the procedure specified in Neb. Rev. Stat. § 25-1011 (Reissue 2016), unsuccessfully objects to a garnishment may immediately appeal. Because we conclude that a substantial right is not affected until judgment is entered in the garnishment, an appeal must wait. The Nebraska Court of Appeals correctly dismissed Shawn E.'s premature appeal for lack of jurisdiction, and we affirm its decision.

BACKGROUND

The State of Nebraska initiated a garnishment action against Shawn, an inmate residing at the Nebraska State Penitentiary, alleging that he owed $3,097.67 in past due child support and $2,499.54 in medical support for a total of $5,597.21. It caused a summons and order of garnishment to be sent to "the garnishee, [the] Nebraska Department of Corrections," to recover money in its possession belonging to Shawn.

Shawn requested a hearing, asserting that he did not owe the amount of the judgment. A hearing was held, during which Shawn appeared telephonically. The State offered certified copies of Shawn's Department of Health and Human Services child support payment history and medical support payment history, which were received into evidence. The court took

judicial notice of a journal entry establishing Shawn's child support obligation in the amount of $379 per month and cash medical support obligation in the amount of $62 per month. It also took judicial notice of a second journal entry suspending the child support portion of the prior order.

At the hearing, Shawn argued that he did not owe the amount alleged and that there was no way he could make the payments the State claimed he owed. He further alleged that the Department of Health and Human Services "is charging me $62 . . . per month . . . for services that my daughter is not receiving."

The court noted that the cash medical support obligation was never suspended and that the child support arrearage was for arrearage accumulated prior to the suspension of the child support. It therefore found that Shawn's arguments were not a defense to the fact that the debt was owed or that garnishment was appropriate.

Shawn requested a continuance so he could call on witnesses to determine that the "$62 is also suspended" and that the child's mother does not receive services from the Department of Health and Human Services. The district court denied this request and overruled Shawn's objection to the garnishment. In its journal entry and order overruling the objection, it ordered that "the garnishment may proceed."

Shawn appealed and assigned that the district court erred in (1) ordering the garnishment "to proceed on the finding that [he] owes $5,597.27" and (2) disregarding his verbal motion for a continuance.

But, before considering these arguments, the Court of Appeals addressed whether it had jurisdiction in a memorandum opinion filed January 24, 2018. It concluded that because the order did not determine that the State was entitled to funds held by the garnishee and did not order any execution of a garnishment, the order did not affect Shawn's substantial rights. Furthermore, it noted that Shawn's rights could be effectively vindicated in an appeal from the final judgment. Finding no

final order, the Court of Appeals determined that it lacked jurisdiction and dismissed the appeal.

We granted Shawn's petition for further review.

ASSIGNMENT OF ERROR

Shawn asserts that he appealed from a final order, because the order that the garnishment "may proceed" affected a substantial right and was made in a special proceeding.

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.[1]

ANALYSIS

At oral argument, the State confessed that it was abandoning the garnishment in light of the garnishee's answers to interrogatories showing only $0.07 belonging to Shawn. Thus, the State suggests that the appeal may be moot.

[2,3] However, an appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.[2] The public interest exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.[3] Because the finality of orders overruling judgment debtors' objections under § 25-1011 is a public matter deserving authoritative adjudication for future guidance of public officials and is likely to recur, we choose to review the matter.

Shawn argues that the district court's order was a final order, because it affected a substantial right and determined the

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[1] *Deleon v. Reinke Mfg. Co.*, 287 Neb. 419, 843 N.W.2d 601 (2014).

[2] *Nesbitt v. Frakes, ante* p. 1, 911 N.W.2d 598 (2018).

[3] *Id.*

outcome in a special proceeding. While it is well established that garnishment in aid of execution is a legal statutory remedy, we have not always been consistent in describing its nature.[4] At various times we have described garnishment as a legal action[5] or as a special proceeding,[6] and we have even alluded to a challenge to a garnishment as a summary application in an action after judgment is rendered.[7] But, we need not resolve this tangle of garnishment precedents. Clearly, there was no judgment in the garnishment proceeding. And all three types of final orders require that the order affect a substantial right. Here, no substantial right was affected, which is dispositive.

It is first helpful to summarize the procedure for a garnishment in aid of execution. Because this appeal does not involve the garnishment of wages, we omit those statutes which impose additional requirements for the garnishment of wages.

Garnishment Procedure

[4] Garnishment in aid of execution is a provisional remedy created by statute directing the procedure to obtain such relief.[8] A judgment creditor seeking a garnishment in aid of execution begins by filing an affidavit and praecipe for summons, alleging that the garnishee has property of or is indebted to the judgment debtor.[9] The court then issues a summons and interrogatories to be completed by the garnishee.[10]

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[4] See, e.g., *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014) (legal proceeding); *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985) (incident to judgment or ancillary procedure), *disapproved on other grounds, ML Manager, supra* note 4.

[5] See *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998).

[6] See *Western Smelting & Refining Co. v. First Nat. Bank*, 150 Neb. 477, 35 N.W.2d 116 (1948).

[7] See *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016).

[8] *Early v. Belgrade-Hord Co.*, 133 Neb. 884, 277 N.W. 596 (1938).

[9] Neb. Rev. Stat. § 25-1056(1) (Reissue 2016).

[10] *Id.*

When the summons and interrogatories are issued, § 25-1011 provides that a judgment debtor has the right to (1) receive notice of garnishment action by certified mail and (2) a hearing if the judgment debtor (a) believes the court should not allow a garnishment either because the funds sought are exempt or because the requested amount is not owed on the judgment and (b) timely requests a hearing on the issue. It is clear from the record that Shawn followed this procedure in challenging the garnishment.

Although the hearing procedure of § 25-1011 became a part of that section in 1988,[11] we have not addressed the finality of an order denying relief to a judgment debtor following such a hearing. We granted further review to do so.

The procedure for what follows an unsuccessful § 25-1011 challenge is not specifically laid out by statute. However, § 25-1056(1), which sets forth the general procedure for garnishments, provides in part, "Except when wages are involved, the garnishee shall hold the property of every description and the credits of the defendant in his or her possession or under his or her control at the time of the service of the summons and interrogatories *until the further order of the court*." (Emphasis supplied.) This would suggest that even if the challenge is overruled—i.e., the court determines that the funds are not exempt and that the requested amount is owed on the judgment—the court must still enter a final judgment ordering the delivery of the judgment debtor's property to the judgment creditor, in which case the judgment debtor's entitlement to his or her property held by the garnishee is not affected until that final judgment.

Substantial Right Analysis

[5,6] A substantial right is an essential legal right.[12] A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was

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[11] See 1988 Neb. Laws, L.B. 1030, § 14.

[12] See *Cattle Nat. Bank & Trust Co. v. Watson, supra* note 7.

available to an appellant before the order from which an appeal is taken.[13]

In the context of garnishment proceedings, we have held that an order affected a substantial right where it "authorized the seizure of property or money that would otherwise have remained in the [appellants'] ownership and control."[14] However, the order here did not authorize the execution of a garnishment and did not determine that the State was entitled to the requested funds.

Shawn suggests that the order affected a substantial right by providing that the garnishment "may proceed," "because it implicates all manner of means of attachment provided for under title IV-D of the Social Security Act."[15] However, no attachment was actually ordered. Consequently, Shawn's right to the funds was not affected. And, although the order diminished Shawn's defense that the amount alleged was not owed under the judgment, this claim can be effectively vindicated on appeal from the final judgment.

[7] Because the order overruling Shawn's challenge to the garnishment did not affect a substantial right, it was not a final, appealable order. Without a final order, an appellate court lacks jurisdiction and must dismiss the appeal.[16] The Court of Appeals correctly did so, and we affirm its action.

CONCLUSION

Shawn prematurely appealed from a nonfinal order. Because the Court of Appeals correctly determined that it lacked jurisdiction, we affirm its decision dismissing the appeal.

Affirmed.

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[13] *Id.*

[14] *Id.* at 968, 880 N.W.2d at 926.

[15] Brief for appellant in support of petition for further review at 4.

[16] *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).



Nebraska Supreme Court

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State of Nebraska, appellee, v. Anthony L. Wells, appellant.

912 N.W.2d 896

Filed June 22, 2018. No. S-17-359.

1. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
3. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
4. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
5. **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.

6. **Motions to Dismiss: Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.
7. **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.
8. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. 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.
9. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
10. ____: ____. 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.
11. ____: ____. 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.
12. **Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
13. **Effectiveness of Counsel: Presumptions.** The two prongs of the test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.

14. **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.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Affirmed.

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

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Harder and Noakes, District Judges.

Miller-Lerman, J.

I. NATURE OF CASE

Anthony L. Wells appeals his convictions in the district court for Lancaster County for first degree murder, use of a firearm to commit a felony, possession of a firearm by a prohibited person, and unlawful discharge of a firearm. Wells claims, inter alia, that he was prejudiced because the court's instruction regarding transferred intent incorrectly stated the law and that trial counsel provided ineffective assistance. We affirm Wells' convictions and sentences.

II. STATEMENT OF FACTS

The charges against Wells arose from the shooting death of Joshua Hartwig. A group of residents had gathered outside Hartwig's apartment building after hearing a disturbance. Hartwig joined the group after the disturbance appeared to have ended, but several minutes later a man walked up and fired shots at the group. Hartwig was struck by a bullet and

died from the gunshot wound. Testimony of witnesses at Wells' trial established the following:

In the early morning hours of January 31, 2016, Wells and Rhani Henry, the mother of Wells' daughter, got into a physical and verbal altercation outside Henry's apartment building in Lincoln, Nebraska. Both Wells and Henry appeared to be intoxicated. Various residents of the apartment building heard the disturbance, and some residents came outside while the fight between Wells and Henry was ongoing. Certain residents separated Wells and Henry, and some residents told Wells that he needed to leave. Wells briefly argued with the residents, but then he got into his vehicle to leave. Before Wells left, some residents heard him say words to the effect that he would be back.

After Wells left, Hartwig and his father, Douglas Hartwig (Douglas), who were residents of the apartment building, joined the residents who remained outside. The group talked about the incident that had just happened. Approximately 10 to 15 minutes later, members of the group saw or heard a man approach and say some words to the group. The man then fired several shots. Witnesses generally agreed that the man was wearing a dark hooded sweatshirt with the hood pulled up and possibly a bandanna across his face. Although the man's face was obscured, certain witnesses identified the man as Wells based on his voice and physical features.

Douglas testified that he heard the man yell "'hey mother fuckers'" before he began shooting. Douglas turned and told Hartwig to run for cover, and the two ran toward their apartment. Douglas tripped and fell beside a car parked in front of the apartment; when he fell, he saw and heard a bullet hit the bumper of the car. Douglas testified that he heard "[a]t least a half dozen" shots, then a pause, and then "at least a half dozen more." After the shooting stopped, Douglas got up and heard one of the other residents say that Hartwig was "down." Douglas found Hartwig lying face down in front of their apartment door. Douglas went inside to call for emergency

services, and when he returned to Hartwig, Douglas observed what appeared to be a gunshot wound to Hartwig's upper shoulder. When emergency responders arrived, they attempted lifesaving procedures on Hartwig, but after a short period they declared him deceased.

Other testimony presented by the State included the testimony of Artesia Holmes, a friend of Henry. Holmes testified that she, Henry, and Wells went to a bar on the evening of January 30, 2016, to celebrate Henry's birthday. Before they went to the bar, Holmes and Henry had drinks at Holmes' apartment. When Wells arrived to pick them up, Holmes observed that Wells was in possession of a silver and black handgun. Henry also testified at trial, but she stated that she did not remember anything from that night after Wells arrived at Holmes' apartment. Other witness testimony is discussed in the analysis below as it relates to Wells' claims of ineffective assistance of trial counsel.

Physical evidence presented by the State indicated bullet damage to various areas of the apartment building, as well as to vehicles parked near the building. Law enforcement officers collected 13 shell casings, 1 bullet fragment, and 2 bullets from the scene. They found a third bullet inside a window of a house two blocks from the scene. A firearms examiner testified that the shell casings were all fired in the same firearm and that they matched the caliber and manufacturer of an unfired cartridge found in a search of Wells' bedroom. Due to damage to the bullets, the examiner could not determine whether the bullets had been fired from the same gun.

Video from surveillance cameras in the area of the apartment building recorded around the time of the shooting indicated the following: Video from a nearby apartment complex showed a vehicle similar to Wells' leaving the apartment building at 1:16 a.m. A surveillance camera at a business near the apartment recorded the sound of 13 gunshots at 1:26 a.m. A camera located several blocks from the apartment showed a vehicle similar to Wells' driving by at 1:28 a.m.

When that video was enhanced, it appeared to show an object being thrown from the vehicle. Law enforcement officers who searched that location found a black hooded coat with a face mask in the pocket. Testing of DNA on the inside of the mask included Wells as a major contributor.

The State also presented evidence that Wells had a prior conviction for possession of a firearm by a prohibited person.

After the State rested its case, Wells moved for a directed verdict on the count of unlawful discharge of a firearm. The court overruled Wells' motion for a directed verdict, and Wells proceeded to present evidence in his defense.

In his defense, Wells presented testimony by two women who testified that Wells picked them up at a location in Council Bluffs, Iowa, after they finished work at around 2:05 a.m. or 2:10 a.m. on January 31, 2016. He also presented evidence that two of the State's witnesses were unable to identify Wells from a police photographic lineup and that one of the two identified another person in the photographic lineup. Both witnesses had identified Wells as the shooter based on his voice.

The court instructed the jury on the elements of the offenses with which Wells was charged, including first degree murder and the lesser-included offenses of second degree murder and manslaughter. The court also gave an instruction, over Wells' objection, regarding transferred intent. The content of the relevant instructions and Wells' objections thereto are discussed in the analysis below.

The jury found Wells guilty of all four counts charged—first degree murder, use of a firearm to commit a felony, possession of a firearm by a prohibited person, and unlawful discharge of a firearm. The court sentenced Wells to consecutive terms of imprisonment for life for first degree murder, for 20 to 30 years for use of a firearm to commit a felony, for 20 to 40 years for possession of a firearm by a prohibited person (which was a second offense), and for 10 to 10 years for unlawful discharge of a firearm.

Wells appeals his convictions and sentences.

III. ASSIGNMENTS OF ERROR

Wells claims that the district court erred (1) when it gave an instruction regarding transferred intent which incorrectly stated the law and (2) when it overruled his motion for a directed verdict on the count of unlawful discharge of a firearm.

Wells further claims that his trial counsel provided ineffective assistance when counsel (1) failed to object to testimony regarding prior bad acts involving his assaults on Henry, (2) elicited and then failed to object to hearsay testimony regarding Henry's fear of Wells, (3) failed to move for a mistrial based on the State's comments during closing arguments to the effect that a witness feared Wells, and (4) failed to adequately investigate various aspects of his defense.

IV. STANDARDS OF REVIEW

[1-3] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017). In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *Id.*

[4] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt. *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018).

[5] 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. *Id*.

V. ANALYSIS

1. Reading Instructions as a Whole, We Determine the Instruction Regarding Transferred Intent Did Not Misstate the Law and Was Not Misleading

Wells first claims that the district court erred when it gave its instruction regarding transferred intent. He notes that although the instruction referred to "intent," it did not contain a reference to "'deliberate and premeditated malice.'" Brief for appellant at 11. He argues that the instruction incorrectly stated the law as to first degree murder because it conflated "intent" with "'deliberate and premeditated malice'" and "relieved the State of its burden to prove that Wells acted with malice toward at least one of the people in the group" at which he allegedly fired shots. *Id*. at 10. We conclude that the instructions read as a whole correctly stated the law and were not misleading.

In instruction No. 3, the court instructed the jury on "Count I," first degree murder, by setting forth the elements as follows:

> The elements which the State must prove beyond a reasonable doubt in order to convict . . . Wells of Murder in the First Degree are:

1. That . . . Wells killed . . . Hartwig; and
2. That . . . Wells did so purposely; and
3. That . . . Wells did so with deliberate and premeditated malice; and
4. That . . . Wells did so on or about January 31, 2016, in Lancaster County, Nebraska.

Instruction No. 3 continued by instructing on the lesser-included offenses of second degree murder and manslaughter, each of which included an element that Wells killed Hartwig "intentionally."

Over Wells' objection, the court also gave instruction No. 7, a transferred intent instruction, which stated as follows:

> With respect to the charge in Count I, if you find that . . . Wells intended to kill a specific person, and by mistake or accident killed . . . Hartwig, the element of intent is satisfied even though . . . Wells did not intend to kill . . . Hartwig. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

Instruction No. 11, regarding intent, instructed the jury that "[i]n deciding whether . . . Wells acted with intent (purpose, knowledge, wilfulness, premeditation, deliberation) you should consider his words and acts and all the surrounding circumstances."

At the jury instruction conference, Wells objected to instruction No. 7, the transferred intent instruction, on the basis that it was not supported by the evidence. He asserted that the evidence showed that the shooter fired into a crowd but that there did not appear to be a specific intent focused on a single individual. In contrast, the State argued the jury could find Wells guilty of first degree murder based on transferred intent if the jury found that Wells had the requisite intent to kill one or more of the people who had been outside during the earlier altercation with Henry and who had traded words with Wells but that instead he shot Hartwig. The State also argued in the alternative that the jury could find that Wells

had the requisite intent to kill any or all of the people, including Hartwig, who were standing outside the building at the time he fired the shots, regardless of whether they had been present at or involved in the earlier altercation.

Although Wells' objection to instruction No. 7 at trial focused on whether the instruction was supported by the evidence, he argues on appeal that the instruction incorrectly stated the law and was misleading. He notes that in order to convict him of first degree murder, the jury needed to find that he had killed Hartwig both "'purposely'" and "with 'deliberate and premeditated malice.'" Brief for appellant at 14 and 16. He argues that the phrase "the element of intent" in instruction No. 7 refers only to the "'purposely'" element of first degree murder and not to the "'malice'" element. *Id*. at 14 and 15. He contends that instruction No. 7 conflated "intent" and "malice" and allowed the jury to find him guilty of first degree murder if it found that he intended to shoot another person without requiring the jury to also find that he shot at another person "with 'deliberate and premeditated malice.'" *Id*. at 16. The State generally maintains that the jury instructions as a whole did not prejudice Wells.

As we read their arguments, both Wells and the State do not dispute that the concept of transferred intent is applicable to first degree murder, including where, as a general proposition, a defendant shoots into a group of people with intent "to kill at least one person in the group," reply brief for appellant at 3, "even if [the defendant] did not intend for [the] specific" actual victim to be killed, brief for appellee at 14. In this regard, reference is made to *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *disapproved on other grounds, State v. Britt*, 293 Neb. 381, 881 N.W.2d 818 (2016), a first degree murder case, in which we approved of a similar transferred intent instruction where the victims were not the intended target. See *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991) (considering instruction similar to *Gutierrez* instruction in second degree murder case). So the disagreement in

the instant appeal is limited to whether the jury instructions herein satisfactorily conveyed the applicable law to the jury. As explained below, we conclude that the instructions, taken as a whole, were adequate.

Given the nature of Wells' challenge, we must read the instructions as a whole to determine whether they correctly state the law and are not misleading. See *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016). Doing so, contrary to Wells' urging, we do not read the instructions in this case as having relieved the jury of the duty to find all the elements of first degree murder. Instead, we note instruction No. 3 sets forth all the elements of first degree murder, including that Wells killed Hartwig and that he did so both purposely and with deliberate and premeditated malice. Thus, the jury clearly was instructed that in order to find Wells guilty of first degree murder, it must find that the killing was committed both purposely and with deliberate and premeditated malice. We read nothing in instruction No. 7 that relieves the jury of finding any part of these requirements.

Instruction No. 7 does not purport to substitute or eliminate any required element of any offense charged. Instead, instruction No. 7, the transferred intent instruction, provides that if the jury finds that Wells intended to kill another person but by mistake or accident killed Hartwig, then "the element of intent is satisfied" and "the law regards the intent as transferred from the original intended victim to the actual victim." Instruction No. 7 is not intended as a reiteration of the elements of a crime. Instead, it serves as an explication solely regarding "intent."

As noted above, Wells maintains that "the element of intent" in instruction No. 7 refers only to the "'purposely'" element of first degree murder and not the "with 'deliberate and premeditated malice'" element. Brief for appellant at 14 and 16. Contrary to Wells' assertion, the language of instruction No. 7 provides no basis upon which jurors would read "the element

of intent" as referring to purpose but believe they had thereby been instructed to ignore the element of deliberate and premeditated malice. Instead, "the element of intent" refers to the intent required for the specific crime charged.

Our reading of instruction No. 7 is bolstered by instruction No. 11, noted above, in which the court instructed the jury that "[i]n deciding whether . . . Wells acted with intent (purpose, knowledge, wilfulness, premeditation, deliberation) you should consider his words and acts and all the surrounding circumstances." Instruction No. 11 communicates to the jury that "intent" includes, inter alia, "purpose," "premeditation," and "deliberation" when those are required elements of a charge.

We note that Wells compares the wording of instruction No. 7 to the wording of transferred intent instructions given in cases such as *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006), and *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *disapproved on other grounds, State v. Britt*, 293 Neb. 381, 881 N.W.2d 818 (2016). He particularly notes that the instruction in *Gutierrez* refers more generally to "'the crime'" committed rather than to the "element of intent." Brief for appellant at 15 and 16. See, also, *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991). Our analysis in this case is specific to the entirety of the instructions given in this case, and we make no comment on whether the instruction given in this case or the instruction given in another case is the preferable form of an instruction on transferred intent. Our conclusion is merely that the specific instructions given in this case, when read as a whole, correctly state the law, are not misleading, and are supported by the evidence, and there is no prejudicial error necessitating reversal. See *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016).

Because we conclude that the district court did not err when it gave instruction No. 7 over Wells' objection, we reject Wells' first assignment of error.

2. Evidence Was Sufficient to Support Conviction for Unlawful Discharge of a Firearm

[6] Wells next claims that the district court erred when it overruled his motion for a directed verdict on the count of unlawful discharge of a firearm. The record indicates that after the court overruled Wells' motion for a directed verdict, he proceeded to present evidence in his defense. A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence. *State v. Olbricht*, 294 Neb. 974, 885 N.W.2d 699 (2016). Wells assigns error to the overruling of his motion for a directed verdict, but he argues the error as a challenge to the sufficiency of the evidence to support his conviction for unlawful discharge of a firearm. We consider Wells' assignment of error as a challenge to the sufficiency of the evidence, but we conclude that there was sufficient evidence to support the conviction.

Wells was charged with unlawful discharge of a firearm, in violation of Neb. Rev. Stat. § 28-1212.02 (Reissue 2016), which provides that a person is guilty of the offense if the person "unlawfully and intentionally discharges a firearm at[, inter alia,] an inhabited dwelling house, occupied building, [or] occupied motor vehicle." Wells argues that the evidence in this case showed that none of the vehicles that were hit by bullets were occupied and that there was no evidence of bullets hitting doors or windows of specific apartments in the building. He contends that the evidence showed that the shooter was aiming at the people gathered outside the building rather than at the building itself. He notes that a bullet was found inside a window of a house two blocks from the scene but he

argues there was no evidence that the shooter intended to fire at that house.

The State in its response does not rely on the bullets found either in the vehicles or in the house two blocks away as establishing this offense. Instead, the State relies on evidence that bullets were found in parts of the apartment building structure, including the rafters and supporting beams, and contends such evidence establishes that a firearm was discharged at the building. The State asserts that Wells does not dispute that the apartment building was occupied at the time the shots were fired.

The evidence noted by the State supports a finding that Wells fired shots at the apartment building and that the building was occupied at the time. The evidence was also such that the jury could reasonably infer that Wells intended to shoot at the building. The statute requires a finding that the defendant intentionally discharged a firearm at an occupied building; we do not read the statute as requiring that the firearm be aimed at a specific part of the building such as a specific apartment or at a door or window. Evidence that Wells discharged a firearm at the building, that he did so intentionally, and that the building was occupied at the time was sufficient to support the conviction.

We conclude that viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the elements of unlawful discharge of a firearm beyond a reasonable doubt. We reject this assignment of error.

3. Wells' Claims of Ineffective Assistance of Trial Counsel Either Are Without Merit or Cannot Be Determined Based on Record on Direct Appeal

Wells claims that his trial counsel provided ineffective assistance in various respects. He specifically claims that counsel (1) failed to object to testimony regarding prior bad acts involving assaults on Henry, (2) elicited and then failed

to object to hearsay testimony regarding Henry's fear of Wells, (3) failed to move for a mistrial based on the State's comments during rebuttal closing arguments to the effect that a witness feared Wells, and (4) failed to adequately investigate various aspects of his defense. We first set forth applicable standards and then consider each of these specific claims below.

[7] On appeal, Wells has counsel different from his trial counsel. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred. *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018).

[8] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id*. 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. *Id*.

[9-13] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Cotton, supra.* 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. *Id*. 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. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. 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. *Id*.

(a) Testimony Regarding Prior Bad Acts

Wells claims that he received ineffective assistance when trial counsel failed to object to testimony regarding prior bad acts involving assaults on Henry. One witness who observed the altercation between Wells and Henry testified that he said to another witness that "[Henry's] baby daddy is outside beating her up again." Another witness who observed the altercation between Wells and Henry on January 31, 2016, testified that in the summer of 2015, she had witnessed an altercation between Wells and another woman and that at that time, Wells put his hand around Henry's mouth and throat when Henry tried to hold him back from the other woman. Wells' trial counsel did not object to either witness' testimony.

Wells claims on appeal that trial counsel was ineffective for failing to object to what he asserts was inadmissible prior bad acts evidence. He argues that failure to object was deficient performance because in order for the court to admit the evidence, the State would have been required to articulate a proper purpose, other than showing Wells' propensity for violence. He argues that even if the evidence were admitted for some proper purpose, the jury should have been given an instruction limiting use of the evidence to such proper purpose. He argues that trial counsel's failure prejudiced him because the jury was able to consider the evidence as showing that he committed the charged crimes because he had a propensity for violence.

We conclude that whether or not counsel's performance was deficient in this respect, Wells was not prejudiced, because there is not a reasonable probability that the result of the proceeding would have been different if counsel had objected to this testimony. Indeed, an objection and limiting instruction might have highlighted the testimony. In any event, the testimony noted by Wells was minor in the context of all the

evidence that was presented by the State. In this regard, we specifically note that there was other properly admitted testimony regarding Wells' violent behavior toward Henry on the night of the shooting. Given all the evidence, it is not reasonably probable that the testimony noted by Wells significantly affected the jury's verdict. We reject this claim of ineffective assistance of trial counsel.

(b) Hearsay Testimony

Wells next claims that he received ineffective assistance when his trial counsel elicited and then failed to object to hearsay testimony regarding Henry's fear of Wells. Wells' trial counsel asked one of the State's witnesses on cross-examination whether he had talked with Henry about Wells, and the witness testified that he "heard some comments about [Henry's] wanting to get away from" Wells and that Henry said "she loved him and that she was also scared of him."

On appeal, Wells contends that trial counsel was ineffective for eliciting this testimony and for failing to object to the testimony as nonresponsive and as hearsay. He argues that the line of questioning could not be justified as a reasonable strategic decision and that the error was compounded when counsel failed to ask the court to strike the testimony as nonresponsive or as hearsay. He argues he was prejudiced by this testimony because it further portrayed him as having a violent nature.

We conclude that no prejudice was shown because this testimony, like the testimony discussed above, was minor in the context of all the properly admitted evidence and that there is not a reasonable probability the result of the proceeding would have been different if trial counsel either had not elicited the testimony or had objected to it. We reject this claim of ineffective assistance of trial counsel.

(c) Mistrial

Wells next claims that he received ineffective assistance when trial counsel failed to move for a mistrial based on the

State's comments during rebuttal closing arguments regarding a witness' alleged fear of Wells. One of the State's witnesses testified that she knew Wells and had seen him a few times with Henry. The State asked the witness whether she saw Wells in the courtroom, and she replied that she did not. In its closing argument in rebuttal, the State referred to that witness and said:

> I said do you see . . . Wells in the courtroom? What did she do? She sat there and she looked at all of you and looked over here and then she looked up and she was looking at the ceiling. I asked her if she saw . . . Wells in the courtroom. And she would - really? Was he up on the ceiling, or was she for some reason afraid of identifying him?

Wells' trial counsel objected to the prosecutor's statement. The court sustained the objection, struck the comment, and instructed the jury to disregard it. Wells' counsel did not thereafter move for a mistrial.

On appeal, Wells claims trial counsel was ineffective for failing to move for a mistrial because, given other improperly admitted evidence regarding Wells' violent nature, the court's instruction to disregard the State's comment could not "'unring' the bell." Brief for appellant at 26. He argues that his defense was prejudiced because a defense motion would have been sustained and a mistrial would have been granted. Wells relies on the proposition that a mistrial may be warranted where unfairness has been injected into a jury trial and so permeates the proceedings that no amount of admonition to the jury can remove the unfairness to a party. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989).

We disagree with Wells' assessment that a mistrial would have been granted. The court's sustaining Wells' objection and admonishing the jury were a sufficient response to the State's comment, and we do not think the comment injected unfairness that so permeated the proceedings that admonition to the jury could not remove it. There was not a reasonable probability

that a mistrial would have been granted if counsel had moved for it, and we therefore reject this claim of ineffective assistance of counsel.

(d) Cumulative Effect

Wells argues that even if each of the preceding alleged failures is insufficient in itself to establish ineffective assistance of counsel, the cumulative effect of all the alleged deficiencies amounts to ineffective assistance. We determined above that none of the alleged deficiencies prejudiced Wells' defense, and we likewise conclude that the cumulative effect of the alleged deficiencies did not prejudice Wells' defense.

(e) Investigation

Finally, Wells claims that trial counsel was ineffective for failing to adequately investigate various aspects of his defense. He asserts that the record is not sufficient to review these claims of inadequate investigation on direct appeal but that he is raising the claims in order to preserve them for collateral review.

[14] 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. *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018). A claim insufficiently stated is no different than a claim not stated at all. *Id.*

Wells set forth the following claims in his brief:

> Wells' trial counsel provided ineffective assistance when, despite Wells' requests, he failed to independently investigate or present the following defenses, and he failed to interview, depose, or subpoena each of the following entities and potential witnesses who would have provided evidence helpful to Wells' defense:

- Trial counsel received information from . . . Henry that an acquaintance's boyfriend committed the shootings, but [counsel] failed to investigate;
- Trial counsel failed to impeach [a police witness] when he testified that . . . sight of Wells' vehicle [was lost in] the [video] recordings when Wells' vehicle, after leaving the . . . apartments following the argument with Henry, went eastbound . . . , despite trial counsel's possession of police reports in which [the police witness] and/or other officers stated that the video showed Wells traveling eastbound . . . , then Southbound . . . , a route that took Wells to . . . Council Bluffs;
- Trial counsel failed to subpoena cell phone records that would have demonstrated (1) pinging locations making it impossible for him to commit the shooting, and (2) that Wells' regular calling pattern was very similar to the calling pattern relied upon by the State to argue in support of Wells' guilt;
- Trial counsel failed to introduce into evidence a photograph of Wells at the time of the shootings to demonstrate that his hair did not match the witness' descriptions;
- Trial counsel failed to subpoena or otherwise obtain video evidence from businesses along the route from the . . . apartments to . . . Council Bluffs that would have shown he was not present at the . . . apartments at the time of the shootings;
- Trial counsel failed to consult or engage a voice recognition expert to contest the State's witnesses' claims that they recognized the voice of the shooter as Wells[']' despite having very little, if any, exposure to the sound of Wells' voice;
- Trial counsel failed to consult or engage a firearms expert to evaluate and contest the testimony of the State's firearms expert, whose testimony overstated the likelihood that it was a gun like the one Wells allegedly

set on Holmes' bed that fired the bullets and casings found at the scene of the shootings;

- Trial counsel failed to move for testing of swabs taken from Wells' hands that, had they been subjected to gunshot residue testing, would have shown that Wells did not fire a gun at the time of the shootings.

Brief for appellant at 33-34.

We agree that these claims cannot be determined on direct appeal, because the record on appeal does not disclose what steps trial counsel took in regard to these avenues of investigation, what would have been found if the various actions had been taken by counsel, and whether the findings would have helped Wells' defense. We include this listing so that a district court reviewing any petition for postconviction relief that Wells might bring in the future will be able to recognize what claims were brought before this court on direct appeal.

VI. CONCLUSION

We conclude that instruction No. 7, the transferred intent instruction, when read with all the instructions, did not misstate the law; that there was sufficient evidence to support Wells' conviction for unlawful discharge of a firearm; and that Wells' claims of ineffective assistance of trial counsel either are without merit or cannot be determined based on the record in this direct appeal. We therefore affirm Wells' convictions and sentences.

Affirmed.

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

State of Nebraska, appellee, v. Antonio Leon-Simaj, also known as Antonio Leon-Batz, appellant.

913 N.W.2d 722

Filed June 22, 2018. No. S-17-540.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Evidence: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal and Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. **Constitutional Law: Motions for Mistrial.** When the defendant objects to the declaration of a mistrial, the defendant's right to have a trial completed by a particular tribunal will be subordinated to the public's interest in fair trials ending in just judgments, when there was a manifest necessity for the mistrial.
5. **Double Jeopardy: Motions for Mistrial: Prosecuting Attorneys.** When a mistrial is declared at the defendant's request or with the defendant's consent, reprosecution is barred only when the prosecution's conduct was intended to provoke the defendant into moving for or consenting to the mistrial.
6. **Double Jeopardy: Motions for Mistrial: Appeal and Error.** When a mistrial is declared, the important consideration for purposes of the Double Jeopardy Clause is that the defendant retains primary control over the course to be followed in the event of an error.
7. **Motions for Mistrial.** When a mistrial is declared, it is fair to expect the defendant to participate in preserving his or her right to have the trial completed by a particular tribunal.
8. ____. When a court suggests a mistrial, if silence were not construed as consent, attorneys could lull the court into taking actions that could not later be undone.

9. **Double Jeopardy: Motions for Mistrial.** Requiring the defendant to make an affirmative choice concerning a mistrial avoids transforming the protection against double jeopardy into an abusive weapon used by a defendant to avoid prosecution.
10. **Motions for Mistrial.** It is not too onerous to require defense counsel to clearly state whether he or she objects to the court's consideration of a mistrial.
11. **Double Jeopardy: Motions for Mistrial: Prosecuting Attorneys.** Where a mistrial is under sua sponte consideration by the court and the defendant is given the opportunity to object, but fails to timely and explicitly do so, that defendant will be held to have impliedly consented to the mistrial, and double jeopardy will not bar a retrial unless the defendant demonstrates such consent was procured through the prosecutorial conduct intended to provoke the defendant into moving for or consenting to a mistrial.
12. **Judgments: Records: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct—although such correctness is based on a ground or reason different from that assigned by the trial court—an appellate court will affirm.
13. **Constitutional Law: Motions for Mistrial: Records.** Whether the defendant consented to a mistrial involves the application of a constitutional principle to historic facts that are reflected in the record.

Appeal from the District Court for Colfax County: Mary C. Gilbride, Judge. Affirmed.

Christopher J. Roth, of Forney Roth, L.L.C., 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, Judge, and Martinez, District Judge.

Martinez, District Judge.

NATURE OF CASE

The defendant appeals from the denial of his plea in bar, alleging that retrial following a mistrial would violate prohibitions against double jeopardy.[1] The mistrial was declared by the trial court following the court's determination that

[1] See U.S. Const. amend. V; Neb. Const. art. I, § 12.

defense counsel's questioning of the witness, a minor child and hereinafter referred to as "E.Z.," was improper and that the prejudice could not be remedied by a curative jury instruction. Defense counsel did not explicitly object to a mistrial when given the opportunity to do so, but apologized for the improper questioning and, at the court's request, presented case law wherein curative instructions were held to be sufficient to remedy improper references at trial to inadmissible evidence. At issue is whether the defendant implicitly consented to the mistrial and, if not, whether there was a manifest necessity for a mistrial.

BACKGROUND

Antonio Leon-Simaj, also known as Antonio Leon-Batz, was charged with one count of first degree sexual assault and two counts of possession of child pornography stemming from his relationship with E.Z. E.Z. was 14 years old at the time of trial and 13 years old at the time of the events in question.

E.Z.'s Testimony

There are no pretrial motions in the record. Trial began with the testimony of E.Z., who testified that she and Leon-Simaj engaged in sexual intercourse on approximately 10 different occasions.

E.Z. was questioned about exhibits containing text messages between Leon-Simaj and E.Z. She confirmed that several text messages sent to Leon-Simaj contained pictures of her breasts and vagina.

E.Z. testified that at one point, she thought she might be pregnant. She read out loud text messages in which she asked Leon-Simaj to buy her a pregnancy test and in which Leon-Simaj said he would do so if she sent him a picture of herself without her underwear on. She did, and Leon-Simaj purchased a pregnancy test for her. E.Z. was not pregnant.

After E.Z.'s father discovered the relationship between E.Z. and Leon-Simaj, the matter was reported to law enforcement and E.Z. was taken to a hospital, where she was

interviewed. During cross-examination, E.Z. admitted that she deleted all social media messages from Leon-Simaj the day before being interviewed. She also admitted that she had lied at the hospital by telling the interviewer that she had not called Leon-Simaj. E.Z. admitted, further, that she had falsely told the interviewer that she did not have Leon-Simaj's telephone number.

E.Z. initially denied that she lied to the interviewer when she had said she was no longer texting Leon-Simaj. But when confronted with text messages, E.Z. admitted she had lied to the interviewer and had, in effect, just lied to the jury.

Defense counsel elicited testimony from E.Z. in which she described how she had told Leon-Simaj she was pregnant, even though she knew at that point that she was not. E.Z. read for the jury text messages in which she told Leon-Simaj that her pregnancy "hurt" and that she no longer wished to see Leon-Simaj or for him to have a relationship with the baby. In other text messages, E.Z. made reference to Leon-Simaj's having a wife and told Leon-Simaj it was his fault "[m]y baby will not be with his daddy . . . ."

Defense counsel pointed out that a total of 10 text messages referred to a baby that E.Z. knew did not exist. E.Z. admitted that, thus, she had lied 10 times.

At that point, defense counsel moved on to E.Z.'s possible past criminal behavior. Defense counsel asked E.Z., "Now . . . you've been arrested before; correct?" E.Z. answered, "Yes." Defense counsel immediately asked, "For breaking into people's yards and stealing bicycles?"

Objection and Declaration of Mistrial

The prosecution objected to this line of questioning as involving improper character evidence.

Defense counsel initially responded that he wished to make an offer of proof. Outside the presence of the jury, the court expressed its opinion that the line of questioning was improper and asked defense counsel for further explanation as to what

defense counsel's offer of proof was and why it should come in. Defense counsel withdrew the request.

After a short recess to confer with the guardian ad litem, the prosecutor asked for a curative instruction. But when further pressed by the district court whether the prosecutor thought a curative instruction was "enough," it was at that point she responded, "No."

The court thereafter asked the prosecutor what the other option would be. The prosecutor responded that the other option would be to call for a mistrial.

The court asked defense counsel for his argument. Defense counsel conceded that it was improper to ask E.Z. if she had been arrested. Defense counsel apologized and explained that he had thought it was proper under Neb. Rev. Stat. § 27-608 (Reissue 2016) to elicit testimony as to specific instances of conduct.

The prosecutor pointed out that she had prosecuted E.Z. in the case that defense counsel was referencing and stated, "I can personally tell you no one was robbed, no one was stolen from, with regard to that. That is an absolute fabrication, the facts of that case, and I know it personally."

The court directed the parties to research whether an instruction could cure the error, granting them a short recess to do so.

After the recess, the prosecutor presented case law and argued that it would be appropriate for the court to call for a mistrial. The prosecutor also stated, "There is a mechanism if the defense wishes to object to a mistrial."

Defense counsel did not respond with an objection to the court's declaring a mistrial. Instead, defense counsel apologized, explaining that he had believed he was "within 608," but that he "was wrong," at least inasmuch as he failed to understand the applicability of Neb. Rev. Stat. § 27-404 (Reissue 2016). Defense counsel presented for the court's consideration three cases where curative instructions were held to be sufficient to remedy improper references at trial to inadmissible evidence.

The court announced that it would be declaring a mistrial. The court reasoned that the proverbial "bell . . . cannot be unrung." The court explained that in the middle of impeachment, defense counsel elicited improper testimony that E.Z. had been arrested, as well as details of an offense that "had nothing to do with truthfulness and was not, obviously, a felony." Defense counsel was silent and at no point objected to the court's expressed intention to declare a mistrial.

The court brought the jurors back into the courtroom and discharged them.

Plea in Bar

Approximately 1 month later, defense counsel filed a plea in bar. Defense counsel alleged that the court's evidentiary ruling was erroneous; therefore, there was no manifest necessity to declare a mistrial.

The State responded that despite having the opportunity, defense counsel did not object to a mistrial. The State also pointed out that defense counsel never offered into evidence E.Z.'s deposition or evidence of E.Z.'s alleged conviction. Further, any "crime" would be an inadmissible juvenile adjudication, as well as "petit larceny," which would not qualify as a crime of dishonesty under Neb. Rev. Stat. § 27-609 (Reissue 2016). Finally, the State asserted the testimony was excludable under Neb. Rev. Stat. § 27-403 (Reissue 2016) and § 27-404.

At the hearing on the plea in bar, defense counsel stated he realized that "the defense never did specifically say we objected to a mistrial at the hearing." Defense counsel explained he still agreed with the prosecutor that the line of questioning was not permitted by § 27-609. But he did not research "the 608 issue" during the time they were given "to research the issues" before the court decided whether to declare a mistrial.

Defense counsel said, "So that's why we didn't specifically object, but we did submit three cases to the case [sic] saying a curative instruction was more proper."

Defense counsel explained that after the mistrial, he conducted more research and concluded that his line of questioning had been proper under § 27-608. Therefore, defense counsel believed there was no manifest necessity for the mistrial.

Defense counsel expressed to the court that the "test really is whether the defendant consents to the mistrial," and "we would submit that the cases we submitted, argument for the curative objection, were, in effect, our objection to the mistrial."

Defense counsel also asserted that E.Z.'s deposition testimony had supported the factual basis for his questioning.

The record does not contain any exhibits. And the record indicates that no exhibits were offered at trial, during the proceedings outside the presence of the jury, or at the hearing on the plea in bar.

Order Denying Plea in Bar

The court denied Leon-Simaj's plea in bar. The court did not address whether Leon-Simaj had consented to the mistrial. Rather, the court concluded that jeopardy was not terminated when improper questioning by defense counsel resulted in unfair prejudice to the State, which could not be cured by a limiting instruction.

The court elaborated that the proper procedure under § 27-609 would have been to simply ask E.Z. if she had been convicted of a felony or a crime of dishonesty. Instead, defense counsel asked questions about an "'arrest'" and "spread details of the alleged crime before the jury."

Moreover, given the age of E.Z., the court stated that "[a]ny 'arrest' or conviction she might have is, in all likelihood, a juvenile adjudication," inadmissible under § 27-609.

Finally, the court explained that to the extent defense counsel was attempting to elicit evidence of prior bad acts in order to show conformity therewith, such evidence was inadmissible and should have been considered during a hearing outside the presence of the jury.

Leon-Simaj appeals the denial of his plea in bar.

ASSIGNMENTS OF ERROR

Leon-Simaj assigns that the district court erred in (1) determining that defense counsel's question to E.Z. regarding her prior act of burglary was an improper question under § 27-609, without giving regard or analysis to whether the question was proper under § 27-608, both at the mistrial hearing and at the plea in bar hearing, and (2) finding manifest necessity for a mistrial given that there was no violation of the evidence rules.

STANDARD OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law.[2] On a question of law, an appellate court reaches a conclusion independent of the court below.[3]

ANALYSIS

[3] The issue in this appeal is whether retrial of Leon-Simaj, after his first trial ended in a mistrial, would violate his Fifth Amendment right not to be placed twice in jeopardy. The Double Jeopardy Clause of the U.S. Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[4] The Double Jeopardy Clauses of both the federal and Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[5]

Underlying this constitutional safeguard is the belief that

> "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him

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[2] *State v. Bedolla*, 298 Neb. 736, 905 N.W.2d 629 (2018).

[3] *Id.*

[4] U.S. Const. amend. V. Accord Neb. Const. art. I, § 12.

[5] *State v. Lavalleur*, 298 Neb. 237, 903 N.W.2d 464 (2017).

> to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[6]

In addition, the defendant has a right to have his trial completed by a particular tribunal.[7]

On the other hand, "retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused."[8] "[I]t is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense."[9]

[4] Society, for its part, has a strong interest in giving the prosecution one complete opportunity to convict those who have violated its laws.[10] And a criminal trial is, "even in the best of circumstances, a complicated affair to manage."[11] Thus, "a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide."[12] When the defendant objects to the declaration of a mistrial, the defendant's right to have a trial completed by a particular tribunal will be subordinated to the public's interest in fair trials

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[6] *United States v. Dinitz*, 424 U.S. 600, 606, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976).

[7] See *id.*

[8] *Arizona v. Washington*, 434 U.S. 497, 505, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978).

[9] *United States v. Jorn*, 400 U.S. 470, 483-84, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971). See, also, e.g., *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982).

[10] See *Arizona v. Washington, supra* note 8.

[11] *United States v. Jorn, supra* note 9, 400 U.S. at 479.

[12] *Id.*, 400 U.S. at 480.

ending in just judgments, when there was a manifest necessity for a mistrial.[13]

[5] But the analysis is different when a mistrial was granted at the defendant's request or with the defendant's consent. Where "the defendant himself has elected to terminate the proceedings against him . . . the 'manifest necessity' standard has no place in the application of the Double Jeopardy Clause."[14] When a mistrial is declared at the defendant's request or with the defendant's consent, reprosecution is barred only when the prosecution's conduct was intended to provoke the defendant into moving for or consenting to the mistrial.[15]

The U.S. Supreme Court has also rejected any contention that the defendant's consent to a mistrial depends on demonstrating a knowing, voluntary, and intelligent waiver of the right to be free from double jeopardy.[16] Rather, a mistrial "at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause."[17]

[6] The important consideration for purposes of the Double Jeopardy Clause, the U.S. Supreme Court has said, is that the defendant retains primary control over the course to be followed in the event of an error.[18] The defendant retains primary control when he or she exercises the option whether or not to take the case from the jury, when circumstances occur that may be thought to warrant a declaration of a mistrial.[19]

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[13] See, e.g., *id.*; *State v. Todd*, 296 Neb. 424, 894 N.W.2d 255 (2017). Compare *Gori v. United States*, 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961).

[14] *Oregon v. Kennedy, supra* note 9, 456 U.S. at 672.

[15] See, *Oregon v. Kennedy, supra* note 9; *Camden v. Circuit Court of Second Judicial Circuit*, 892 F.2d 610 (7th Cir. 1989); *State v. Bedolla, supra* note 2.

[16] See *United States v. Dinitz, supra* note 6.

[17] *Id.*, 424 U.S. at 608.

[18] *United States v. Dinitz, supra* note 6.

[19] *United States v. Jorn, supra* note 9.

The U.S. Supreme Court has illustrated that a defendant may conclude, for instance, that a mistrial would result in less anxiety, expense, and delay than a potential retrial after a protracted appeal process if the tainted proceedings continued.[20] If the defendant chooses to request or consent to a mistrial, it would defeat the defendant's right of primary control to reject a mistrial motion on the grounds that it was not required by manifest necessity.[21]

Consent arises most often when the trial court, as here, sua sponte declares a mistrial.[22] While the U.S. Supreme Court has yet to squarely address the issue, courts generally agree that implied consent, just like express consent, removes any double jeopardy bar to a retrial.[23]

Courts articulate different standards for determining when a defendant has implicitly consented to a mistrial. The majority of courts addressing the issue, both federal[24] and state,[25] have held that a defendant's failure to object to an expressly contemplated declaration of a mistrial, when the defendant has

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[20] See *United States v. Dinitz, supra* note 6.

[21] See *id.*

[22] See *Benson v. State*, 111 Nev. 692, 895 P.2d 1323 (1995).

[23] See *U.S. v. You*, 382 F.3d 958 (9th Cir. 2004).

[24] See, *U.S. v. DiPietro*, 936 F.2d 6 (1st Cir. 1991); *Love v. Morton*, 112 F.3d 131 (3d Cir. 1997); *U.S. v. Ham*, 58 F.3d 78 (4th Cir. 1995); *U.S. v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011); *U.S. v. Gilmore*, 454 F.3d 725 (7th Cir. 2006); *United States v. Smith*, 621 F.2d 350 (9th Cir. 1980); *United States v. Puleo*, 817 F.2d 702 (11th Cir. 1987).

[25] See, e.g., *People v. Ortiz*, 196 Colo. 438, 586 P.2d 227 (1978); *Brock v. State*, 955 N.E.2d 195 (Ind. 2011); *People v. Dahlberg*, 355 Ill. App. 3d 308, 823 N.E.2d 649, 291 Ill. Dec. 357 (2005); *State v. Wittsell*, 275 Kan. 442, 66 P.3d 831 (2003); *State v. Carey*, 77 A.3d 471 (Me. 2013); *Pellegrine v. Com.*, 446 Mass. 1004, 844 N.E.2d 608 (2006); *People v. Ackah-Essien*, 311 Mich. App. 13, 874 N.W.2d 172 (2015); *State v. Tolliver*, 839 S.W.2d 296 (Mo. 1992); *Marte v. Berkman*, 16 N.Y.3d 874, 949 N.E.2d 479, 925 N.Y.S.2d 388 (2011); *State v. Ellis*, 200 N.C. 77, 156 S.E. 157 (1930); *State v. Leath*, 461 S.W.3d 73 (Tenn. Crim. App. 2013); *State v. Cram*, 46 P.3d 230 (Utah 2002); *Com. v. Washington*, 263 Va. 298, 559 S.E.2d 636 (2002).

been provided with a sufficient opportunity to object, constitutes consent to the mistrial. The U.S. Supreme Court eluded to this standard in *United States v. Jorn*,[26] when, in concluding that retrial was prohibited by the Double Jeopardy Clause, it noted that the trial judge had acted so abruptly in discharging the jury that there was no opportunity for the defendant to object.

Some of these courts will utilize a totality of the circumstances test to determine whether the defendant consented to a mistrial in the event there was no opportunity to raise a timely objection.[27] Other courts articulate a more general totality of the circumstances test to determine if the defendant has implicitly consented to a mistrial.[28] But many of those courts declaring a totality of the circumstances test hold that the failure to object when given the opportunity to do so weighs heavily in favor of finding consent.[29]

Finally, a minority of courts hold that consent will not be inferred from mere silence in the face of a possible mistrial.[30]

Courts that refuse to imply consent from silence emphasize the importance of the right to have the trial completed by a

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[26] *United States v. Jorn, supra* note 9.

[27] See, *United States v. Goldstein*, 479 F.2d 1061 (2d Cir. 1973); *U.S. v. Gantley*, 172 F.3d 422 (6th Cir. 1999); *Camden v. Circuit Court of Second Judicial Circuit, supra* note 15.

[28] See, *Glover v. McMackin*, 950 F.2d 1236 (6th Cir. 1991); *Camden v. Circuit Court of Second Judicial Circuit, supra* note 15; *Stanley v. Superior Court*, 206 Cal. App. 4th 265, 141 Cal. Rptr. 3d 675 (2012); *State v. Saunders*, 267 Conn. 363, 838 A.2d 186 (2004); *State v. Stevens*, 126 Idaho 822, 892 P.2d 889 (1995); *Benson v. State, supra* note 22; *Torres v. State*, 614 S.W.2d 436 (Tex. Crim. App. 1981).

[29] See, *Camden v. Circuit Court of Second Judicial Circuit, supra* note 15; *State v. Saunders, supra* note 28. See, also, *Davidson v. U.S.*, 48 A.3d 194 (D.C. 2012); *State v. Stevens, supra* note 28; *Torres v. State, supra* note 28.

[30] See, *State v. Grayson*, 90 So. 2d 710 (Fla. 1956); *Cardine v. Com.*, 283 S.W.3d 641 (Ky. 2009); *People v Hoffman*, 81 Mich. App. 288, 265 N.W.2d 94 (1978); *State v. Bertrand*, 133 N.H. 843, 587 A.2d 1219 (1991); *Com. v. Kelly*, 797 A.2d 925 (Pa. Super. 2002).

particular tribunal.[31] These courts also reason that criminal trials are adversarial and that the State bears the burden; thus, defendants should not be forced to voice an objection and risk "forgoing a win" or "snatching defeat from certain victory" by implicitly consenting to a mistrial that ultimately would not have been supported by manifest necessity.[32]

But we have rejected defendants' use of constitutional shields as swords of gamesmanship.[33] Particularly, we have found that defendants who remain silent in the face of trial error impacting important constitutional rights, and who gamble on a favorable outcome or raise the objection only once the alleged error can no longer be remedied, have waived the error.[34]

[7] We are persuaded by the reasoning underlying the majority rule. Courts holding that defendants implicitly consent when they fail to object, despite the opportunity to do so, point out that "[w]hether the defendant wants a verdict is something he knows best, and when the occasion for choice comes he must choose . . . ."[35] It is fair to expect the defendant to participate in preserving his or her right to have the trial completed by a particular tribunal.[36] And bringing the objection to the court's attention affords the trial court the opportunity to consider the defendant's arguments and prevent any error.[37]

[8,9] Moreover, these courts reason that a defendant who remains silent when the court suggests a mistrial leaves "the false impression of acquiescence even while anticipating a

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[31] See, e.g., *Commonwealth v. Bartolomucci*, 468 Pa. 338, 362 A.2d 234 (1976) (citing cases).

[32] *Cardine v. Com., supra* note 30, 283 S.W.3d. at 652.

[33] See *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

[34] See, *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011); *State v. Mills*, 199 Neb. 295, 258 N.W.2d 628 (1977).

[35] *United States v. Buljubasic*, 808 F.2d 1260, 1266 (7th Cir. 1987).

[36] See *Davidson v. U.S., supra* note 29.

[37] See *People v. Bean*, 26 Ill. App. 3d 1090, 325 N.E.2d 679 (1975).

subsequent objection."[38] If silence were not construed as consent, attorneys could "lull the court into taking actions that could not later be undone."[39] Requiring the defendant to make an affirmative choice "avoids transforming the protection against double jeopardy into an abusive weapon used by a defendant to avoid prosecution."[40]

What occurred in Leon-Simaj's trial well illustrates the reasons for the majority rule. After the court sustained the State's objection to defense counsel's line of questioning of E.Z., the court gave defense counsel and the State the express opportunity to state their positions as to a possible mistrial. At no point did defense counsel express that he was opposed to the court's declaring a mistrial. Instead, he apologized for his improper line of questioning. And it was the court, not defense counsel, who suggested that the parties present research on the adequacy of a curative instruction.

After a recess, defense counsel still did not return with an objection to the mistrial under consideration. Defense counsel presented cases where curative instructions were adequate, but did not argue that those cases were analogous or that a curative instruction would cure the improper questioning defense counsel admitted had occurred in Leon-Simaj's trial. Even when the State pointed out that "[t]here is a mechanism if the defense wishes to object to a mistrial," defense counsel failed to offer an objection. Finally, when, after hearing the arguments, the court announced its intention to declare a mistrial, defense counsel still remained silent.

Later, at the hearing on the plea in bar, defense counsel argued that double jeopardy barred reprosecution, because the line of questioning he had previously conceded was improper was actually proper. And, while defense counsel admitted he

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[38] *Marte v. Berkman, supra* note 25, 16 N.Y.3d at 876, 949 N.E.2d at 481, 925 N.Y.S.2d at 390.

[39] *Id.*

[40] *Brock v. State, supra* note 25, 955 N.E.2d at 203.

had not expressly objected to the mistrial, he asserted that his presentation of case law at the court's request should be sufficient to preclude implicit consent.

Intentionally or not, defense counsel had lulled the court into taking action that could not later be undone, only to subsequently attempt to bar reprosecution on the ground that the court erred in concluding the very thing that defense counsel had previously conceded.

[10,11] Even under a totality of the circumstances test, it would appear from these events that defense counsel implicitly consented to the mistrial. But we hold that a totality of the circumstances test is unnecessary when the defendant fails to object to the court's sua sponte consideration of a mistrial, when the court gives defense counsel an opportunity to respond. It is not too onerous to require defense counsel to clearly state whether he or she objects. We hold that where a mistrial is under sua sponte consideration by the court and the defendant is given the opportunity to object, but fails to timely and explicitly do so, that defendant will be held to have impliedly consented to the mistrial, and double jeopardy will not bar a retrial unless the defendant demonstrates such consent was procured through the prosecutorial conduct intended to provoke the defendant into moving for or consenting to a mistrial. Where the defendant has thereby elected to terminate the proceedings against him, the manifest necessity standard has no place in the application of the Double Jeopardy Clause.

[12,13] Although the district court denied the plea in bar on the ground that manifest necessity justified the mistrial, we may affirm on grounds different than those expressed below. Where the record adequately demonstrates that the decision of a trial court is correct—although such correctness is based on a ground or reason different from that assigned by the trial court—an appellate court will affirm.[41] Whether the defendant

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[41] *State v. Jasa*, 297 Neb. 822, 901 N.W.2d 315 (2017).

consented to a mistrial involves the application of a constitutional principle to historic facts that are reflected in the record.[42] The record reflects that Leon-Simaj was given several opportunities to express his explicit objection to the mistrial under consideration and that he failed to do so. Accordingly, he consented to the mistrial and the district court did not err in denying his plea in bar. Having so concluded, we need not address Leon-Simaj's assignments of error pertaining to whether manifest necessity warranted the mistrial.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

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[42] See, *Camden v. Circuit Court of Second Judicial Circuit, supra* note 15; *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

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

Applied Underwriters Captive Risk Assurance Company, Inc., an Iowa corporation, appellee, v. Oceanside Laundry, LLC, doing business as Campus Laundry, appellant.

912 N.W.2d 912

Filed June 22, 2018. No. S-17-576.

1. **Motions to Vacate: Appeal and Error.** The decision to vacate an order is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.
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. **Service of Process: Waiver.** A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof.
4. **Jurisdiction: Pleadings: Parties.** A party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party.
5. **Default Judgments.** When determining whether to set aside a default judgment, two competing interests must be considered: the right of a litigant to defend the action on the merits and judicial efficiency.
6. **Default Judgments: Proof: Time.** Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.
7. **Default Judgments: Motions to Vacate: Words and Phrases.** In the context of a motion to vacate a default judgment, a meritorious or substantial defense or cause means one which is worthy of judicial inquiry

because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.

8. **Default Judgments: Motions to Vacate.** Although a defendant seeking to vacate a default judgment is required to present a meritorious defense, it is not required that the defendant show he will ultimately prevail in the action, but only that the defendant show that he has a defense which is recognized by the law and is not frivolous.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Reversed and remanded with directions.

Kristopher J. Covi, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Jeffrey A. Silver for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Vaughan, District Judge.

Vaughan, District Judge.

INTRODUCTION

This appeal involves a default judgment against Oceanside Laundry, LLC, doing business as Campus Laundry (Oceanside). Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA), filed a breach of contract action against Oceanside. When Oceanside did not file a responsive pleading, the district court for Douglas County granted AUCRA's motion for default judgment. The district court subsequently denied Oceanside's motion for reconsideration or, in the alternative, to set aside the default judgment on the basis of several defenses. Oceanside now appeals the district court's orders. Because we conclude that Oceanside made prompt application to set aside the default judgment and demonstrated at least one meritorious defense in support of its motion, we reverse, and remand with directions to vacate the default judgment and allow Oceanside a reasonable time in which to file an appropriate responsive pleading.

BACKGROUND

Oceanside, a California-based limited liability company doing business as Campus Laundry, entered a reinsurance participation agreement (RPA) with AUCRA, an Iowa corporation with its principal place of business in Douglas County, Nebraska. On December 12, 2016, AUCRA brought a breach of contract action against Oceanside in the district court for Douglas County.

Initially, AUCRA unsuccessfully attempted to serve process on Oceanside via certified mail, using a California address for Campus Laundry. AUCRA next filed a praecipe that requested personal service at the same address by an authorized process server in California. According to the proof of service, on January 25, 2017, a civil process server personally served "'John Doe' (Caucasian male, 30's, 5′9″, 200 lbs., Brown eyes, Brown hair) Person in Charge."

Oceanside did not file a responsive pleading.

On March 23, 2017, AUCRA filed a motion for default judgment and sent notice of the hearing to the same address it used to serve Oceanside the summons.

At the hearing on the motion for default judgment, counsel for Oceanside made an appearance and opposed the motion, alleging improper service of process. The district court received Oceanside's affidavit evidence that AUCRA did not serve a summons on any person authorized by the company to receive service of process on its behalf.

In support of AUCRA's motion for default judgment, it offered an exhibit consisting of a copy of the RPA, a series of statements for Oceanside's account with AUCRA, and an affidavit designating the most recent balance as the amount due and owing. The RPA provides that it shall be governed exclusively by the laws of Nebraska and that any matter shall be resolved exclusively by the courts of Nebraska. Additionally, the RPA states that AUCRA may apply to a court of competent jurisdiction for relief in the event of breach.

Oceanside's counsel objected to AUCRA's exhibit on relevance grounds and argued that the balance cited by AUCRA as the amount due and owing may not be accurate because the balances fluctuate over time. The district court received AUCRA's exhibit over Oceanside's objection. Oceanside's counsel then reiterated the position that the district court should overrule the motion for default judgment based on insufficient service.

On May 4, 2017, the district court found that Oceanside was duly served pursuant to Neb. Rev. Stat. §§ 25-540 and 25-513.01 (Reissue 2016) and failed to file a responsive pleading. Accordingly, the district court entered a default judgment against Oceanside for moneys owed under the contract.

On May 22, 2017, Oceanside filed a motion to reconsider or, in the alternative, to set aside the default judgment and allow Oceanside to file a responsive pleading. In support of the motion to set aside, Oceanside alleged as defenses lack of personal jurisdiction and improper venue. Oceanside also challenged the amount due and owing, asserting that such amount was unliquidated and based on terms found to be illegal and void by another court of law.

At a hearing on Oceanside's motions, Oceanside focused on the motion to set aside the default judgment. The district court received the affidavit of the chief executive officer of Oceanside, doing business as Campus Laundry. He stated that Campus Laundry had no connections to the State of Nebraska. Instead, he stated that the RPA was purchased through a California broker; that the RPA provided coverage for employees in California; that all payments were drawn from Campus Laundry's accounts in California; that all witnesses, documents, and other sources of proof were located in California; and that the same dispute was being litigated in California. Additionally, Oceanside presented the analysis and order of the California Department of Insurance determining that the RPA violates the California Insurance Code and the California Code of Regulations and is void and unenforceable. In arguing

against Oceanside's motion to set aside, AUCRA's counsel pointed out that Oceanside had not offered any reason why it failed to provide a responsive pleading to the complaint. Oceanside's counsel responded that Oceanside did not file a responsive pleading because it did not want to waive the right to challenge service of process.

On May 30, 2017, the district court overruled Oceanside's motion to reconsider or, in the alternative, to set aside the default judgment, without explanation.

On June 2, 2017, Oceanside filed its notice to appeal the district court's May 4 and 30 orders.

ASSIGNMENTS OF ERROR

Oceanside assigns, rephrased, that the district court erred in (1) granting AUCRA's motion for default judgment against Oceanside and (2) denying Oceanside's motion to set aside the default judgment after Oceanside showed meritorious defenses.

STANDARD OF REVIEW

[1,2] The decision to vacate an order is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.[1] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[2]

ANALYSIS

On appeal, Oceanside disputes both the default judgment and the district court's denial of Oceanside's motion to set aside such default judgment. For the reasons stated below, we

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[1] *Miller v. Steichen*, 268 Neb. 328, 682 N.W.2d 702 (2004). See *Carrel v. Serco Inc.*, 291 Neb. 61, 864 N.W.2d 236 (2015).

[2] *Hartley v. Metropolitan Util. Dist.*, 294 Neb. 870, 885 N.W.2d 675 (2016).

determine that the district court abused its discretion in denying Oceanside's motion to set aside. Because we conclude that the default judgment should be set aside, we need not consider whether the district court correctly entered the default judgment in the first place.[3]

We begin our analysis of the motion to set aside by noting, as asserted by Oceanside, that the record in this case raises questions about the validity of service of process and personal jurisdiction. While we do not reach the issue of service of process, we conclude that Oceanside has not waived every objection to personal jurisdiction.

[3,4] Under Neb. Rev. Stat. § 25-516.01(1) (Reissue 2016), the voluntary appearance of a party is the equivalent of service of process. Section 25-516.01(2) goes on to state that participation in the proceedings on any issue other than the defenses of lack of jurisdiction over the person, insufficiency of process, or insufficiency of services of process, waives all such issues except as to the objection that the party is not amenable to process issued by a court of this state.[4] Thus, a general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof.[5] A party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party.[6]

Here, counsel for Oceanside appeared at the hearing on the motion for default judgment and opposed it, alleging

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[3] See *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

[4] See *Burns v. Burns*, 293 Neb. 633, 879 N.W.2d 375 (2016). See, also, *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015).

[5] *Burns v. Burns, supra* note 4. See, also, *Friedman v. Friedman, supra* note 4.

[6] *Burns v. Burns, supra* note 4.

improper service of process. In objecting to evidence offered by AUCRA, Oceanside's counsel contested the balance cited by AUCRA as the amount due and owing. Oceanside's departure from the issue of service of process resulted in a general appearance, and Oceanside has therefore waived that issue.[7]

However, we reach a different conclusion concerning personal jurisdiction. As noted above, § 25-516.01(2) provides, among other things, that participation in the proceedings on any issue other than the defense of lack of jurisdiction over the person waives that defense, "except the objection that the party is not amenable to process issued by a court of this state." Consequently, a party may waive objections to personal jurisdiction based on defective service of process while retaining objections to personal jurisdiction based on amenability to service of process by a court of this state.[8]

Oceanside's motion to set aside as well as evidence at the resulting hearing alleged that the district court lacked personal jurisdiction because Oceanside has no business ties to the State of Nebraska, and Oceanside's appellate brief contains similar contentions. Oceanside, therefore, has argued that it is not amenable to process issued by a court of this state. For purposes of personal jurisdiction, the voluntary appearance of a party is the equivalent of service of process.[9] Thus, through its general appearance at the hearing on the motion for default judgment, Oceanside subjected itself to the jurisdiction of the district court.[10] But Oceanside's general appearance did not waive the issue of personal jurisdiction insofar as it relates to Oceanside's amenability to process issued by a Nebraska court.[11]

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[7] See *Friedman v. Friedman, supra* note 4 (party who contested service of process and amount of garnishment entered general appearance).

[8] See *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006). See, also, § 25-516.01(2).

[9] § 25-516.01(1); *Burns v. Burns, supra* note 4.

[10] See *id.* See, also, *Miller v. Steichen, supra* note 1.

[11] See *Burns v. Burns, supra* note 4.

Having determined that Oceanside prospectively subjected itself to the jurisdiction of the district court, our analysis shifts to whether the district court erred in not setting aside the default judgment on one of two alternate grounds: (1) that Oceanside had demonstrated the existence of a meritorious defense or (2) that the default judgment was void when it was entered, because Oceanside was not amenable to process issued by a court of this state and the district court therefore lacked personal jurisdiction.[12]

[5,6] When determining whether to set aside a default judgment, two competing interests must be considered: the right of a litigant to defend the action on the merits and judicial efficiency.[13]

> Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.[14]

This court has also recognized that while it is the policy of the law to give a litigant an opportunity to present his contention in court and to give relief against slight and technical omissions, it is the duty of the courts to prevent an abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice.[15]

At the hearing on AUCRA's motion for default judgment, Oceanside's counsel explained that no responsive pleading had been filed on behalf of Oceanside to avoid waiving the issue of improper service of process. The record shows that Oceanside

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[12] See *Miller v. Steichen, supra* note 1.

[13] *Carrel v. Serco Inc., supra* note 1.

[14] *Steinberg v. Stahlnecker*, 200 Neb. 466, 467, 263 N.W.2d 861, 862 (1978). See, also, *Miller v. Steichen, supra* note 1.

[15] *Miller v. Steichen, supra* note 1; *Steinberg v. Stahlnecker, supra* note 14.

next made a prompt application to set aside the default judgment that followed. Under Neb. Rev. Stat. § 25-2001(1) (Reissue 2016), the district court has the inherent power to vacate or modify its judgments or orders during term. The district court for Douglas County has a term coextensive with the calendar year.[16] The district court entered the default judgment on May 4, 2017. On May 22, Oceanside filed its motion to reconsider or, in the alternative, to set aside the default judgment and allow Oceanside to file a responsive pleading. Thus, Oceanside invoked the district court's inherent power to vacate the default judgment by filing its motion to set it aside within term.

AUCRA argues that Oceanside's motion to set aside the default judgment was effectively a motion to alter or amend that was untimely filed more than 10 days after the entry of judgment. While it is true that a motion to alter or amend must be filed no later than 10 days after the entry of judgment,[17] this argument is misplaced. We have explained that a motion for reconsideration is nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.[18] In some contexts, a motion for reconsideration may also be treated as a motion to alter or amend a judgment *for purposes of terminating the 30-day appeal period*.[19] The rule upon which AUCRA relies pertains to terminating the appeal period, but timeliness of the appeal is not at issue in this case.

[7,8] Given that Oceanside has made a prompt application to set aside the default judgment, we turn to whether it tendered proof disclosing a meritorious defense. In the context

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[16] See Rules of Dist. Ct. of Fourth Jud. Dist. 4-1(C) (rev. 1995).

[17] See Neb. Rev. Stat. § 25-1329 (Reissue 2016).

[18] *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 296 Neb. 501, 894 N.W.2d 308 (2017).

[19] *Id.* See, also, Neb. Rev. Stat. § 25-1912(3) (Reissue 2016); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

of a motion to vacate a default judgment, a meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.[20] Although a defendant seeking to vacate a default judgment is required to present a meritorious defense, it is not required that the defendant show he will ultimately prevail in the action, but only that the defendant show that he has a defense which is recognized by the law and is not frivolous.[21] We note that such meritorious defense need not be tendered exclusively as a proposed answer, as AUCRA asserts, but may also be in the form of "other proof."[22]

In its motion to set aside the default judgment, Oceanside alleged, in part, that AUCRA's claim for amounts owed was based on the terms of the RPA, which had been deemed illegal and void by the commissioner of the California Department of Insurance. At the hearing on Oceanside's motion, Oceanside presented evidence that it lacked ties to the State of Nebraska but had significant ties to the State of California. Oceanside further presented evidence that the California Department of Insurance had determined that the RPA violates the California Insurance Code and the California Code of Regulations and is void and unenforceable. Taken as a whole, this evidence begs the question whether the RPA is void for the purposes of this litigation. And resolving the issue requires further judicial inquiry. Accordingly, we conclude that Oceanside tendered proof disclosing a meritorious defense.

In light of the meritorious defense promptly alleged by Oceanside, we conclude that allowing the default judgment to stand would unfairly deprive Oceanside of a substantial right

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[20] *Miller v. Steichen, supra* note 1; *Carrel v. Serco Inc., supra* note 1.

[21] *Id.*

[22] *Steinberg v. Stahlnecker, supra* note 14, 200 Neb. at 467, 263 N.W.2d at 862. See, also, *Miller v. Steichen, supra* note 1.

and produce an unjust result. Therefore, we determine that the district court abused its discretion in denying Oceanside's motion to vacate the default judgment.

While we conclude that Oceanside made a showing sufficient to warrant setting aside the default judgment in order to resolve the parties' dispute on the merits, we express no opinion as to whether Oceanside will ultimately prevail. We further note that while we have resolved this appeal based on a single meritorious defense, such defense is but one in an array of defenses available to Oceanside on remand, as is a lack of personal jurisdiction based on Oceanside's amenability to service by a court of this state.

CONCLUSION

For the foregoing reasons, we conclude that the district court erred in overruling Oceanside's motion to vacate the default judgment, and we reverse, and remand with directions to the district court to (1) vacate the default judgment entered against Oceanside on May 4, 2017, and (2) give Oceanside a reasonable time in which to file an appropriate responsive pleading.

Reversed and remanded with directions.

Papik, 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. Jesse M. Dill, appellant.

913 N.W.2d 470

Filed June 22, 2018. No. S-17-991.

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. **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: Probation and Parole.** When a court sentences a defendant to postrelease supervision, it may impose any conditions of postrelease supervision authorized by statute.
4. **Rules of the Supreme Court: Records: Appeal and Error.** Neb. Ct. R. App. P. § 2-109(D)(1)(f) and (g) (rev. 2014) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief. The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist.
5. **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.
6. ____. An appellate court does not consider errors which are argued but not assigned.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, and John C. Jorgensen for appellant.

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

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

Cassel, J.

INTRODUCTION

Jesse M. Dill appeals from a sentence imposing both imprisonment and postrelease supervision in a criminal case. But she assigns error only to the fees and payments required under the postrelease supervision order. We have not previously considered the issue in this context. Because we find no abuse of discretion, we affirm.

BACKGROUND

The district court accepted Dill's no contest plea to a Class IIIA felony. The court imposed a determinate sentence of 1 year's imprisonment followed by 18 months of postrelease supervision. The court ordered Dill to pay a number of fees in connection with the postrelease supervision: a $30 administrative enrollment fee, a $25 monthly programming fee, and a $5 monthly fee for chemical testing. The court also ordered Dill to pay costs associated with any evaluations, counseling, or treatment undertaken at the direction of her postrelease supervision officer.

At the sentencing hearing, neither party offered any evidence. Both parties disclaimed any additions or corrections to the presentence report.

Dill's counsel objected to a number of the postrelease supervision conditions. With regard to the various fees Dill was ordered to pay, counsel stated that Dill previously had been determined to be indigent and without the financial means to pay fees. Counsel also stated that there had "been no further assessment in regards to her ability to pay." The court overruled the objections and entered a postrelease

supervision order containing the same conditions as had been orally announced.

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

ASSIGNMENT OF ERROR

Dill assigns that the court abused its discretion by imposing costs and fees of postrelease supervision upon her.

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.[1] 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.[2]

ANALYSIS

Postrelease supervision is a relatively new concept in Nebraska sentencing law.[3] As such, our case law on the subject is scant. Last year, a defendant sought to challenge the validity of postrelease supervision conditions imposed upon him, but we determined that because he did not challenge those conditions at the sentencing hearing, he waived his challenge.[4] Here, Dill raised her objections at the time of sentencing. This appeal presents our first opportunity to address a preserved challenge to the conditions imposed in connection with a sentence of postrelease supervision. But before we reach Dill's specific arguments, we examine the statutory structure concerning postrelease supervision.

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[1] *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

[2] *Id.*

[3] *State v. Kennedy*, 299 Neb. 362, 908 N.W.2d 69 (2018). See, also, Neb. Rev. Stat. §§ 28-105 (Supp. 2017) and 29-2204.02 (Reissue 2016).

[4] See *State v. Phillips*, 297 Neb. 469, 900 N.W.2d 522 (2017).

Statutory Framework

The Nebraska Probation Administration Act defines terms pertinent to postrelease supervision.[5] The definition of postrelease supervision is "the portion of a split sentence following a period of incarceration under which a person found guilty of a crime . . . is released by a court subject to conditions imposed by the court and subject to supervision by the [Office of Probation Administration]."[6] "Probation," which "includes post-release supervision," is "a sentence under which a person found guilty of a crime upon verdict or plea or adjudicated delinquent or in need of special supervision is released by a court subject to conditions imposed by the court and subject to supervision."[7] And a person sentenced to postrelease supervision is called a "[p]robationer."[8] The legislative intent is clear. Postrelease supervision is to be treated as a form of probation, and the usual rules of law governing probation will ordinarily apply to postrelease supervision.

A sentence of postrelease supervision is statutorily mandated for certain lower-level felonies. Except when a term of probation is required by law, statutes compel the imposition of a determinate sentence along with a sentence of postrelease supervision for an offender convicted of a Class III, IIIA, or IV felony.[9] But an offender convicted of one of those enumerated felonies is not subject to postrelease supervision if he or she is also sentenced to imprisonment for a felony with a higher penalty classification.[10] When a court sentences an offender to postrelease supervision, the court shall specify the term of such postrelease supervision.[11]

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[5] See Neb. Rev. Stat. §§ 29-2246 to 29-2269 (Reissue 2016 & Supp. 2017).

[6] See § 29-2246(3) and (13).

[7] § 29-2246(4).

[8] § 29-2246(5).

[9] See §§ 28-105(1) and 29-2204.02.

[10] See 28-105(6).

[11] § 29-2263(2).

Other statutes apply procedures of probation to postrelease supervision. All sentences of postrelease supervision are served under the jurisdiction of the Office of Probation Administration and are subject to conditions imposed under § 29-2262 and subject to sanctions authorized under § 29-2266.02.[12] A court may revoke a probationer's postrelease supervision upon finding that the probationer violated one of its conditions.[13]

Statute and Rule Implementing Postrelease Supervision

The legislation that introduced postrelease supervision into Nebraska's statutes[14] authorized the adoption of rules and regulations governing probation, which, as we have observed, includes postrelease supervision. The Nebraska Probation Administration Act now defines "[r]ules and regulations" to mean "policies and procedures written by the [Office of Probation Administration] and approved by the Supreme Court."[15]

The act speaks broadly. It authorizes rules and regulations

- "as may be necessary or proper for the operation of the [Office of Probation Administration] or [Nebraska Probation System],"[16]
- "for transitioning individuals on probation across levels of supervision and discharging them from supervision consistent with evidence-based practices,"[17]
- to "ensure supervision resources are prioritized for individuals who are high risk to reoffend,"[18]

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[12] § 28-105(5).

[13] § 29-2268(2).

[14] See 2015 Neb. Laws, L.B. 605.

[15] § 29-2246(14).

[16] § 29-2252(11).

[17] *Id.*

[18] *Id.*

- for "transitioning individuals down levels of supervision intensity,"[19]
- for "establish[ing] incentives for earning discharge from supervision,"[20]
- "for the creation of individualized post-release supervision plans,"[21]
- for governing supervision of probationers, advising courts of situations requiring modification of conditions or warranting termination, and providing additional duties for district probation officers,[22] and
- for dealing with violations of probation imposed for misdemeanors[23] and felonies.[24]

In accordance with this broad authority, the probation administrator proposed—and this court adopted—a rule to address orders of postrelease supervision.[25] There is no challenge to the constitutionality or validity of the rule in this appeal. Indeed, Dill does not cite to or otherwise recognize the existence of the rule. Nonetheless, we apply the rule to this appeal.

The rule dictates that the postrelease supervision be pronounced at sentencing.[26] The timing is logical, because postrelease supervision is part of the sentence.[27] Under the rule, the court shall impose the term of postrelease supervision and shall also enter a separate postrelease supervision order that sets forth conditions under § 29-2262.[28] Thus, the imposition of conditions is not deferred to a later time.

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[19] *Id.*

[20] *Id.*

[21] § 29-2252(19).

[22] See § 29-2258.

[23] See § 29-2266.01.

[24] See § 29-2266.02.

[25] Neb. Ct. R. § 6-1904 (rev. 2016).

[26] See § 6-1904(A).

[27] See, generally, *State v. Phillips, supra* note 4.

[28] See § 6-1904(A).

Statutes Regarding Fees and Costs

[3] We have said that when a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.[29] Because postrelease supervision is a form of probation, the same rule necessarily follows for postrelease supervision. We now hold that when a court sentences a defendant to postrelease supervision, it may impose any conditions of postrelease supervision authorized by statute. Thus, the question turns to what the statutes authorize as to such fees and payments.

As part of the governing structure, the Legislature delineated certain fees that an adult probationer must pay. These include (1) a one-time administrative enrollment fee of $30,[30] (2) a monthly probation programming fee of $25 for the duration of the postrelease supervision,[31] and (3) a larger monthly programming fee where intensive supervision probation or participation in non-probation-based programs or services is involved.[32] The fees imposed pursuant to § 29-2262.06 are specifically authorized as a condition of probation under § 29-2262(2)(t).

As to these monthly programming fees, the statute requires a court to waive payment 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."[33] But the waiver must be limited to "the period of time that the probationer . . . is unable to pay his or her monthly probation programming fee."[34] Thus, the statute contemplates that the assessment of undue hardship may change during postrelease

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[29] *State v. Rieger*, 286 Neb. 788, 839 N.W.2d 282 (2013).

[30] § 29-2262.06(3)(a).

[31] § 29-2262.06(3)(b).

[32] § 29-2262.06(3)(c).

[33] § 29-2262.06(4).

[34] *Id.*

supervision. In other words, the monthly fee may go up or down.

The monthly probation programming fee is separate and apart from fees that may be imposed for tests to determine the presence of drugs or alcohol, psychological evaluations, offender assessment screens, and rehabilitative services required in the identification, evaluation, and treatment of offenders.[35] But as to such tests, evaluations, screens, and services, the probationer shall be required to pay them only if the "offender has the financial ability to pay."[36] There is no suggestion in the statute that such "ability to pay" is a static concept that cannot be reassessed during the period of postrelease supervision.

At the time of sentencing, the court makes an initial determination regarding the existence of an undue hardship regarding monthly programming fees and, if § 29-2262(2)(m) services are ordered, the ability to pay for them. Its decision is informed by factual information gathered in connection with the preparation of a presentence report or by evidence adduced at the time of sentencing.

This inquiry differs from that regarding indigency for the purpose of the right to court-appointed counsel. At the time of a felony defendant's first appearance before a court, the court advises him or her of the right to court-appointed counsel if he or she is indigent.[37] Indigent means the "inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."[38] If the defendant asserts indigency, "the court shall make a reasonable inquiry to determine his or her financial condition and may require him or her to execute an affidavit of indigency."[39]

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[35] See §§ 29-2262(2)(m) and 29-2262.06(8).

[36] § 29-2262(2)(m).

[37] Neb. Rev. Stat. § 29-3902 (Reissue 2016).

[38] Neb. Rev. Stat. § 29-3901(3) (Reissue 2016).

[39] § 29-3902.

Modification

There are multiple points at which the conditions of postrelease supervision may be modified. Prior to an individual's anticipated date of release from the Department of Correctional Services or local county jail, the court shall receive a postrelease supervision plan from the probation office.[40] Based upon the plan, "[t]he court shall consider modification to the post-release supervision order, upon application and recommendation . . . ."[41] If the court modifies the postrelease supervision order, it must do so prior to the individual's anticipated date of release.[42] Later, during the term of postrelease supervision, the conditions of the court's order may be modified or eliminated under § 29-2263(3).[43]

Although the sentencing court can later modify the conditions of postrelease supervision, it is important to raise any objections to the conditions when they are first announced. If a condition would be unlikely to promote rehabilitation or reintegration or would be disproportionate, the alleged deficiency should be brought to the sentencing court's attention for possible elimination or modification at the outset. With all of this in mind, we now turn to Dill's assigned error.

Dill's Arguments

Dill challenges the imposition of fee-based conditions, which she contends were excessive. She asserts that her challenge "essentially present[s] . . . a modified excessive sentence case."[44] And she implicitly recognizes that our review is for "an abuse of discretion."[45] She specifically challenges four fees: the administrative enrollment fee of $30, programming fees of $25 per month, chemical testing fees of $5 per

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[40] See § 6-1904(B) and (C).

[41] *Id.*

[42] § 6-1904(D).

[43] See § 6-1904(A).

[44] Brief for appellant at 7.

[45] *Id.*

month, and unspecified fees associated with § 29-2262(2)(m) services. The first two are governed by § 29-2262.06. The last two fall under § 29-2262(2)(m). For the reasons that follow, we find no abuse of discretion in the order establishing the conditions of postrelease supervision.

Dill first complains that these fees amount to a de facto fine for anyone on postrelease supervision. We disagree. As discussed above, the fees are mandated by the Legislature.[46] And Dill does not challenge the constitutionality of the statutes or the validity of the rule adopted to implement postrelease supervision. Instead, she submits a lengthy discussion of sentencing philosophy.

[4] Dill fails to advance any specific argument, regarding either undue hardship or inability to pay, tied to the record. She refers to what might "typically" or "frequently" occur.[47] But we are confined to the record before us. And her brief does not cite to either the bill of exceptions or the presentence report regarding facts that might support her argument. We have said that Neb. Ct. R. App. P. § 2-109(D)(1)(f) and (g) (rev. 2014) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief. The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist.[48] We decline to scour the record in search of facts that might support a claim of undue hardship or inability to pay.

Dill also seems to argue that appointment of counsel and waiver of appeal costs, ipso facto, dictate that postrelease enrollment and programming fees would constitute an undue hardship and that she lacks the ability to pay § 29-2262(2)(m) rehabilitation expenses. But she cites no authority for this proposition, and we are aware of none. Indeed, as we have already outlined, separate statutes with differing standards

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[46] See §§ 29-2262 and § 29-2262.06.

[47] Brief for appellant at 10.

[48] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

apply to each question. We reject the notion that application of one statutory standard mandates the same result under a different standard prescribed by a separate statute.

As we have already observed, the statute establishing the monthly programming fee contemplates reevaluation during the period of postrelease supervision. Should Dill later show that the monthly programming fee constitutes an undue hardship, she has a potential remedy. And, of course, based on the postrelease supervision plan prepared by the probation office prior to Dill's release from prison, the court may modify its postrelease supervision order.[49]

[5,6] Dill also argues that the district court improperly delegated authority with respect to one of the conditions. But this argument addresses the propriety of the court's allowing the postrelease supervision officer to direct Dill to "satisfactorily attend and successfully complete any alcohol, drug, and/or mental health evaluation, counseling, or treatment." And Dill did not assign this as error; rather, she assigned only that the court "abused its discretion by imposing costs and fees of postrelease supervision." 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.[50] An appellate court does not consider errors which are argued but not assigned.[51] We do not consider Dill's improper-delegation argument as fairly within the scope of her sole assignment of error. Accordingly, we do not address this argument.

CONCLUSION

Because the district court did not abuse its discretion in its imposition of conditions of postrelease supervision regarding fees and payments, we affirm its sentence.

Affirmed.

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[49] See § 6-1904(B).

[50] *State v. Chacon*, 296 Neb. 203, 894 N.W.2d 238 (2017).

[51] *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017).

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

In re Interest of Jordan B., a child under 18 years of age. State of Nebraska, appellee, v. Jordan B., appellant.

913 N.W.2d 477

Filed June 22, 2018. No. S-17-1092.

1. **Constitutional Law: Due Process: Appeal and Error.** Whether the procedures given an individual comport with constitutional requirements for procedural due process presents a question of law that an appellate court reviews independently of the lower court.
2. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
3. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.
4. **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.
5. **Indictments and Informations.** In a criminal case, due process requires that an information must inform the accused with reasonable certainty of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.
6. ____. Generally, to charge a defendant with the commission of a criminal offense, the information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime, or in language equivalent to the statutory terms defining the crime charged.

7. **Indictments and Informations: Lesser-Included Offenses: Notice.** The defendant is by implication charged with the lesser offense when charged with the greater offense, and due process is satisfied so long as the nature of the crime charged was sufficient to give the defendant notice that he or she could be convicted of the lesser-included offense.
8. **Juvenile Courts: Criminal Law.** Juvenile proceedings are not criminal prosecutions.
9. **Juvenile Courts: Due Process.** It violates due process to adjudicate a juvenile, whose freedom could be curtailed, of committing acts constituting a separate and distinct offense for which the juvenile was not specifically charged.
10. **Sexual Assault.** Third degree sexual assault is a separate and distinct offense from the crime of first degree sexual assault.
11. **Juvenile Courts: Double Jeopardy.** Jeopardy attaches in juvenile delinquency proceedings when the juvenile court, as the trier of the facts, begins to hear evidence.
12. **Statutes: Appeal and Error.** Appeals under specific statutory provisions require strict adherence to the statute's procedures.
13. **Juvenile Courts: Jurisdiction: Appeal and Error.** An appellate court lacks jurisdiction to consider the State's exceptions that fail to fully comply with the statutory procedures outlined in Neb. Rev. Stat. § 29-2317 (Reissue 2016), as incorporated by Neb. Rev. Stat. § 43-2,106.01 (Reissue 2016).

Appeal from the County Court for Hall County: Timothy E. Hoeft, Judge. Reversed and remanded with directions.

Mitchell C. Stehlik, of Lauritsen, Brownell, Brostrom & Stehlik, P.C., L.L.O., for appellant.

Matthew C. Boyle, Deputy Hall County Attorney, for appellee.

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

Heavican, C.J.

I. NATURE OF CASE

In adjudication proceedings under Neb. Rev. Stat. § 43-247(2) (Reissue 2016), the only law violation alleged in the petition was first degree sexual assault. After a hearing,

the juvenile court found that the State failed to prove the juvenile, Jordan B., committed acts constituting first degree sexual assault. Nevertheless, the juvenile court adjudicated Jordan based on its finding that he committed third degree sexual assault. The court believed that third degree sexual assault was a lesser-included offense of first degree sexual assault, and could thus be raised sua sponte. Because third degree sexual assault is not a lesser-included offense of first degree sexual assault, we reverse, and remand with directions.

II. BACKGROUND

1. Juvenile Petition

The county attorney filed a petition asking the juvenile court to adjudicate Jordan as a juvenile who committed an act that would constitute a felony under the laws of this State pursuant to § 43-247(2). The felony alleged was first degree sexual assault as described in Neb. Rev. Stat. § 28-319 (Reissue 2016). The petition alleged that Jordan committed such acts on or between January 25 and November 8, 2016.

2. Evidence at Hearing

Jordan was 17 years old at the time of the hearing on the petition. He lived at home with his mother, a childcare provider (the provider), as well as with his 19-year-old brother, Tyler B. The provider operates a daycare out of her home, taking care of eight children. Jordan's alleged victim was a child in the provider's care, who was cared for Mondays through Fridays during the time period alleged in the petition. The victim's older brother also attended the daycare when he was not in school.

(a) State's Evidence

The State's evidence consisted of the testimony of the victim, her mother, her older brother, and the investigator who interviewed Jordan regarding the allegations.

The victim was 5 years old at the time of the hearing. The victim testified that on at least one occasion, Jordan took her

to his room downstairs, shut the door, took off her shorts and underwear, had her lie down on the bed and put her legs up, and "sticked his wiener in my butt." The victim described her "butt" as "where I pee out and that's where I poop." She described "wiener" as "the part that boys pee out of." The victim said it hurt "really bad." The victim's testimony was inconsistent as to whether this had occurred once or twice, but she ultimately testified that it occurred only once.

The victim's brother was 8 years old at the time of the hearing. The brother testified the victim told him that while in Jordan's room, Jordan "stuck his wiener up her butt" and that Jordan told the victim she should not tell anybody. The brother testified that sometimes, the provider left the house during daycare hours to run errands. At such times, Jordan's grandmother usually would watch the children. The brother reported that sometimes Jordan or Tyler would watch the children, but that whenever Jordan and Tyler were home, either the provider or the grandmother was also there. However, when the victim's brother was recalled to testify after his mother's testimony, he stated that there were times when neither the provider nor the grandmother was at the daycare and Tyler was responsible for watching the children.

The victim's mother testified that on November 7, 2016, the victim told her that "Jordan tried to stick his wiener in her butt" and that Jordan had told the victim not to tell anybody. On cross-examination, the mother reiterated that the victim told her that Jordan had "tried" to "stick his wiener in her butt" and that the victim had never told her whether there was penetration. The mother testified that the victim told her this attempt occurred only one time.

The mother worked for the Department of Health and Human Services, investigating allegations of child abuse and neglect, including sexual abuse. She told her children that her "job is to help kids." She testified that she did not otherwise discuss her job with her children. She did sometimes discuss her work with her husband when the children were at home,

but she testified that she did not discuss things that were confidential. Thus, the mother affirmed that she had never discussed around her family the specific allegations of any cases she worked on.

The investigator testified that he interviewed Jordan on November 17, 2016. Jordan consistently denied the allegations against him. Jordan speculated that the victim could have been angry with him for correcting her at some point. Jordan further told the investigator that if something of that nature had occurred to the victim, it was someone else who committed the alleged acts.

(b) Defense

Jordan testified in his own defense and presented the testimony of the provider, the grandmother, and Tyler. Jordan also entered into evidence the video of the interview of the victim conducted at a child advocacy center.

The video was offered by Jordan to show the victim stated that the assault occurred twice, contradicting her trial testimony. The video reflects that in her interview, the victim said that Jordan had "put his wiener in [her] butt" and that then she "kicked him because it was too hard." The victim described that this happened in Jordan's room after he had her lie down on her back in his bed and had taken her shorts and underwear off. At the time, the provider was not home and Jordan and Tyler were watching the children. The victim repeatedly said this occurred twice, once when she was 4 years old and once when she was 5 years old.

Jordan testified that he was never alone with the victim and denied committing any of the alleged acts. Jordan denied touching the victim in any way. Jordan testified that he was never home alone with the daycare children. When the provider was not there, either the grandmother or Tyler was in charge of the children. Though Jordan sometimes watched certain daycare children on the weekends, he never babysat the victim. Jordan explained that he told the investigator it must have been

someone else who had sexually assaulted the victim, based on things he had heard the victim's mother say. Due to a hearsay objection, Jordan did not elaborate.

The provider testified that she never left Jordan alone with the daycare children. She explained that it is part of the licensing requirements that she never leave the children alone with anyone younger than 18 years of age. When she has to leave the home while children are in her care, she leaves them with the grandmother, who is also a licensed daycare provider, or with Tyler.

The provider denied there was ever any occasion in which Jordan could have been alone in his bedroom with any of the daycare children. The provider stated that she, the grandmother, and Tyler had been trained to keep all eight children in sight at all times. Thus, there was never a time when she was home that the victim was out of her sight.

The provider described that when the children are outside, one adult is outside and another is inside the house, so that children running inside to use the restroom or get a snack are never unsupervised. Specifically, there was never a time when Jordan would have been in the house alone with a child while she was outside with other children. The provider testified that sometimes, the victim's mother shared with her the details of cases she worked on at the Department of Health and Human Services.

The grandmother testified that during the time in question, she had shut down her daycare due to her husband's health. Therefore, approximately three or four times a month, she was able to assist the provider in caring for the daycare children. The grandmother testified that there was no occasion when she worked at the daycare that Jordan was also present in the home.

Tyler testified that he helped with the daycare once or twice a week and that there was never a time when Tyler had primary care of the children that both Jordan and the victim were there. Also, when Tyler was home, while the provider

had primary care of the children, he never saw the victim go with Jordan into his room. He never saw Jordan interact with the victim at all.

3. Motion to Amend Petition and Argument

Before closing arguments, the State asked the court to amend the petition to conform to the evidence. The county attorney explained, "I believe it more appropriate maybe — a charge in this case, based off the evidence that was elicited at trial, would be attempted sexual assault in the first degree." Jordan's counsel objected. The court never ruled on the motion, but stated its belief that the court had "authority sua sponte to consider less or [sic] included defenses in a trial to the bench."

The county attorney proceeded to argue that the State met its burden with regard to a charge of attempted first degree sexual assault. Jordan's attorney argued that the State had not met its burden for adjudication under the petition, noting, among other things, the lack of opportunity. The juvenile court took the matter under advisement.

4. Trial Court's Order

The court adjudicated Jordan as a child within the meaning of § 43-247(1). The court found that the State failed to meet its burden of proof with respect to the offense of first degree sexual assault as charged. Nevertheless, the court raised sua sponte the "lesser included offense" of third degree sexual assault, contrary to Neb. Rev. Stat. § 28-320(1) and (3) (Reissue 2016), a Class I misdemeanor. The court explained that it found the victim credible, that the State had proved sexual contact, that Jordan knew or should have known that the victim was incapable of appraising the nature of his conduct, and that the conduct did not cause serious personal injury to the victim.

Jordan appeals the adjudication.

III. ASSIGNMENT OF ERROR

Jordan assigns and argues on appeal that the evidence was insufficient for the juvenile court to adjudicate him on the "lesser included offense of third degree sexual assault."

IV. STANDARD OF REVIEW

[1] Whether the procedures given an individual comport with constitutional requirements for procedural due process presents a question of law that an appellate court reviews independently of the lower court.[1]

[2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions 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]

[3] Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.[4]

V. ANALYSIS

[4] We hold that the juvenile court plainly erred by adjudicating Jordan on a law violation that was not pled and was not a lesser-included offense of the crime pled. Plain error may be asserted for the first time on appeal or noted by the appellate court on its own motion.[5] 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

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[1] See *In re Interest of Alan L.*, 294 Neb. 261, 882 N.W.2d 682 (2016).

[2] *In re Interest of K.M.*, 299 Neb. 636, 910 N.W.2d 82 (2018).

[3] *Id.*

[4] *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009).

[5] *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

damage to the integrity, reputation, and fairness of the judicial process.[6]

The federal Constitution provides that under the Due Process Clause, no state "shall . . . deprive any person of life, liberty, or property, without due process of law."[7] Neb. Const. art. I, § 3, similarly provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." We have interpreted the Nebraska Constitution's due process and equal protection clauses to afford protections coextensive to those of the federal Constitution.[8]

[5] In a criminal case, due process requires that an information must inform the accused with reasonable certainty of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.[9] We have said that an indictment or information meets all constitutional requirements (1) if it shows that the acts which the defendant is charged with committing amounted to a crime which the court had power to punish and that it was committed within the territorial jurisdiction of the court, (2) if it informs the defendant of the nature of the charge against him or her, and (3) if it constitutes a record from which it can be determined whether a subsequent proceeding is barred by the former adjudication.[10]

[6] Generally, to charge a defendant with the commission of a criminal offense, the information or complaint must allege each statutorily essential element of the crime charged,

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[6] *Houser v. American Paving Asphalt*, 299 Neb. 1, 907 N.W.2d 16 (2018).

[7] U.S. Const. amend. XIV, § 1.

[8] *Keller v. City of Fremont*, 280 Neb. 788, 790 N.W.2d 711 (2010).

[9] See *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

[10] *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984); *Cowan v. State*, 140 Neb. 837, 2 N.W.2d 111 (1942).

expressed in the words of the statute which prohibits the conduct charged as a crime, or in language equivalent to the statutory terms defining the crime charged.[11] Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.[12] However, when the charging of a crime in the language of the statute leaves the information insufficient to reasonably inform the defendant as to the nature of the crime charged, additional averments must be included to meet the requirements of due process.[13]

[7] Due process does not generally require that the State explicitly set forth in the information the lesser-included offense of the crime charged.[14] The defendant is by implication charged with the lesser offense when charged with the greater offense, and due process is satisfied so long as the nature of the crime charged was sufficient to give the defendant notice that he or she could be convicted of the lesser-included offense.[15] We have accordingly held that in a bench trial, the court in its discretion may dismiss or acquit on the charge in the information but nevertheless convict the defendant of a lesser-included offense not explicitly set forth in the information.[16] Likewise, in a jury trial, the court on its own motion may instruct the jury as to lesser-included offenses not explicitly set forth in the information.[17]

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[11] *State v. Van, supra* note 9.

[12] *Id.*

[13] *Id.*

[14] See, *State v. James*, 265 Neb. 243, 655 N.W.2d 891 (2003); *State v. Keup, supra* note 5; *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988).

[15] See *State v. James, supra* note 14.

[16] See, *State v. James, supra* note 14; *State v. Keup, supra* note 5; *State v. Foster, supra* note 14.

[17] See, *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986); Neb. Rev. Stat. § 29-2025 (Reissue 2016).

But it is fundamental that no person may be convicted of a crime for which he or she was not charged.[18] The U.S. Supreme Court has said that doing so would be "'sheer denial of due process.'"[19] The Nebraska Court of Appeals has thus recognized plain error when the defendant was convicted of a crime which was not charged and which was not a lesser-included offense of the crime charged.[20]

[8] Juvenile proceedings are not criminal prosecutions.[21] Nevertheless, where the juvenile is in jeopardy of having his or her freedom curtailed, the notice protections guaranteed by due process are the same.[22] The U.S. Supreme Court held, in *In re Gault*,[23] that while the 14th Amendment does not require that the hearing at the adjudicatory stage conform with all the requirements of a criminal trial, where juvenile delinquency proceedings could result in curtailing the juvenile's freedom, the Due Process Clause requires application of "'the essentials of due process and fair treatment.'"

[9] Under *In re Gault*, a juvenile offender in a delinquency adjudication in which the juvenile's freedom could be curtailed has the same constitutional rights as an adult with regard to four specific due process rights: (1) to receive notice of the charges, (2) to be represented by counsel, (3) to confront and cross-examine witnesses, and (4) to invoke the privilege

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[18] See *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

[19] *Id.*, 310 U.S. at 96.

[20] *State v. Newman*, 5 Neb. App. 291, 559 N.W.2d 764 (1997), *overruled on other grounds, State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998).

[21] See, *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005); *In re Interest of Leo L.*, 258 Neb. 877, 606 N.W.2d 783 (2000).

[22] See, *In re Gault, supra* note 21; *In re Interest of Heather R. et al., supra* note 21; *In re Interest of Leo L., supra* note 21.

[23] *In re Gault, supra* note 21, 387 U.S. at 30. See *In re Interest of Leo L., supra* note 21. See, also, *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

against self-incrimination.[24] Regarding notice, the Court in *In re Gault* held that in juvenile proceedings, courts must comply with the due process requirements

> that the child and his parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.[25]

We agree with numerous other courts that hold that under *In re Gault*, it violates due process to adjudicate a juvenile, whose freedom could be curtailed, of committing acts constituting a separate and distinct offense for which the juvenile was not specifically charged.[26]

[10] Third degree sexual assault is a separate and distinct offense from the crime of first degree sexual assault that was described in the petition. The juvenile court was incorrect in concluding that third degree sexual assault under § 28-320 is a lesser-included offense of first degree sexual assault under § 28-319.[27]

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[24] See *In re Interest of Leo L., supra* note 21.

[25] *In re Gault, supra* note 21, 387 U.S. at 33-34. See, also, *In re Interest of Juan L.*, 6 Neb. App. 683, 577 N.W.2d 319 (1998).

[26] See, *In Interest of Bryant*, 18 Ill. App. 3d 887, 310 N.E.2d 713 (1974); *In re Areal B.*, 177 Md. App. 708, 938 A.2d 43 (2007); *In Interest of J.T.*, 447 S.W.3d 212 (Mo. App. 2014); *State ex rel. Juv. Dept. v. Henson*, 97 Or. App. 26, 775 P.2d 325 (1989); *In re Interest of Becker*, 370 Pa. Super. 487, 536 A.2d 1370 (1988). See, also, *In re Davis*, 114 N.C. App. 253, 441 S.E.2d 696 (1994).

[27] See, also, *State v. Malcom*, 7 Neb. App. 286, 583 N.W.2d 45 (1998).

In 1993, we adopted a statutory elements test to determine whether an offense is a lesser-included offense of another.[28] Under this test, we look to the elements of the crime rather than the facts of the case, and to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time committing the lesser.[29]

First degree sexual assault as described in § 28-319(1) is as follows:

> 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.

Penetration is defined in Neb. Rev. Stat. § 28-318(6) (Reissue 2016) as

> sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen.

Second and third degree sexual assault is set forth in § 28-320(1):

> Any person who subjects another person to sexual contact (a) without consent of the victim, or (b) who knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct is guilty of sexual assault in either the second degree or third degree.

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[28] *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

[29] See *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003).

Sexual assault under § 28-320(3) is in the third degree "if the actor shall not have caused serious personal injury to the victim." Sexual contact is defined by § 28-318(5) as

> the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. Sexual contact shall also include the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual assault of a child under sections 28-319.01 and 28-320.01.

Comparing the elements of § 28-319 to § 28-320, it is possible to have sexual penetration under § 28-319 without having sexual contact under § 28-320. As explained by the Court of Appeals in *State v. Schmidt*,[30] and reiterated by this court in *State v. Kibbee*,[31] third degree sexual assault requires that the touching be for the purpose of sexual arousal or gratification, while sexual assault in the first degree does not.

Jordan was adjudicated based on a finding that he had committed acts constituting third degree sexual assault. The petition described only first degree sexual assault, and the State never suggested any underlying law violation other than the lesser-included offense of attempted first degree sexual assault.[32]

The court specifically found that the State failed to prove beyond a reasonable doubt that Jordan committed first degree

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[30] *State v. Schmidt*, 5 Neb. App. 653, 562 N.W.2d 859 (1997).

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

[32] See *State v. James, supra* note 14.

sexual assault as charged. Further, there is nothing in the court's order indicating a finding of acts constituting an attempt to commit first degree sexual assault. Although at one point in its order, the court found that the State met its burden of proving "Third Degree Sexual Assault contrary to 28-318," there is no third degree sexual assault in § 28-318. And the court clearly articulated that the elements of third degree sexual assault found in § 28-320 had been demonstrated beyond a reasonable doubt. The court found that the State had proved that Jordan had "sexual contact" with the alleged victim, which "did not cause serious personal injury."

This adjudication on the grounds of third degree sexual assault unfairly denied Jordan the opportunity to raise the defense that the alleged touching could not be reasonably construed as being for the purpose of sexual arousal or gratification of either party. The adjudication for neither a law violation specifically alleged in the petition nor a lesser-included offense of the violation alleged in the petition was a "'sheer denial of due process'"[33] constituting plain error.

The State concedes that it was plain error to adjudicate Jordan on third degree sexual assault. It suggests, however, that we may affirm the adjudication for the alternative reason that Jordan committed the implicitly charged lesser-included offense of attempted first degree assault. In essence, the State asserts that the juvenile court erred in failing to adjudicate Jordan on the grounds that he committed acts constituting attempted first degree sexual assault.

[11] But the State did not appeal the juvenile court's order. Neb. Rev. Stat. § 43-2,106.01 (Reissue 2016) provides that an appeal in any case determining delinquency issues in which the juvenile has been placed legally in jeopardy may only be taken by exception proceedings pursuant to Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 2016). The U.S. Supreme

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[33] *Thornhill v. Alabama, supra* note 18, 310 U.S. at 96.

Court held in *Breed v. Jones*[34] that jeopardy attaches in juvenile delinquency proceedings when the juvenile court, as the trier of the facts, begins to hear evidence.

[12] Appeals under specific statutory provisions require strict adherence to the statute's procedures.[35] Section 29-2317 requires, among other things, that the prosecuting attorney appeal the county court judgment to the district court sitting as an appellate court. We held in *In re Interest of Sean H.*[36] that any reference to the county court in §§ 29-2317 to 29-2319 applies to the separate juvenile court and that we lack jurisdiction to consider the State's exceptions that fail to fully comply with the statutory procedures outlined in § 29-2317, as incorporated by § 43-2,106.01.

Despite the fact that Jordan was placed in jeopardy, the State did not adhere to the requirements of § 29-2317. It cannot circumvent the requirements of § 29-2317 by appealing to our de novo review.

The State misunderstands the nature of our de novo review of a juvenile adjudication under § 43-247(2). In a review de novo on the record, we reappraise the evidence as presented by the record and reach our own independent conclusions with respect to the matters at issue.[37] It is still a review, however, in which we determine whether to affirm or reverse the decision of the lower court.

We may, where appropriate, affirm the right result reached below for the wrong reason.[38] But the focus of our review in

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[34] *Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975).

[35] *In re Interest of Sean H.*, 271 Neb. 395, 711 N.W.2d 879 (2006).

[36] *Id*. See, also, *In re Interest of Rebecca B.*, 280 Neb. 137, 783 N.W.2d 783 (2010); *In re Interest of Lori S.*, 20 Neb. App. 152, 819 N.W.2d 736 (2012).

[37] *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984).

[38] See, e.g., *State v. Kolbjornsen*, 295 Neb. 231, 888 N.W.2d 153 (2016); *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004); *Ochs v. Makousky*, 249 Neb. 960, 547 N.W.2d 136 (1996); *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995).

an adjudication for a law violation is on whether as a factual matter the juvenile committed acts constituting a violation of the underlying criminal statute.[39]

Leaving aside the double jeopardy implications of affirming an adjudication on a lesser-included offense implicitly presented to but not found by the juvenile court,[40] it is not within the normal scope of our appellate review to make such a factual finding for the first time on appeal. We decline to do so here. Although a trial court in a bench trial may in its discretion consider all properly considered evidence relative to a lesser-included offense where the State fails to demonstrate a prima facie case on the crime charged,[41] we are not a trial court. The State cites to no authority supporting the proposition that an appellate court, even under a de novo review, may consider whether the juvenile has committed acts constituting a lesser-included offense where the State failed to demonstrate a prima facie case on the crime charged and the juvenile court did not adjudicate the juvenile on the lesser-included offense.

[13] We lack jurisdiction to consider the State's exceptions that fail to fully comply with the statutory procedures outlined in § 29-2317, as incorporated by § 43-2,106.01.

VI. CONCLUSION

Because the juvenile court adjudicated Jordan on grounds for which he had no notice, in violation of the Due Process Clauses of the U.S. and Nebraska Constitutions, we reverse, and remand with directions to vacate the adjudication.

Reversed and remanded with directions.

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[39] See, e.g., *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007).

[40] See, *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); *Breed v. Jones, supra* note 34; *U.S. v. Parker*, 989 F.2d 948 (8th Cir. 1993); *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). See, also, *In re Interest of Rebecca B., supra* note 36.

[41] See *State v. Keup, supra* note 5.

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

State of Nebraska, appellee, v.
Kenneth W. Blair, appellant.
914 N.W.2d 428

Filed June 29, 2018. No. S-17-436.

1. **Criminal Law: Rules of Evidence: Pretrial Procedure: Appeal and Error.** The decision whether to reveal the identity of a confidential informant is controlled by Neb. Rev. Stat. § 27-510 (Reissue 2016), and judicial discretion is involved only to the extent § 27-510 makes discretion a factor in determining that question. Where § 27-510 commits a question at issue to the discretion of the trial court, an appellate court reviews the trial court's determination for an abuse of discretion.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **Trial: Evidence.** Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined by the trial court on a case-by-case basis.
4. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
5. **Criminal Law: Rules of Evidence: Pretrial Procedure: Testimony: Appeal and Error.** A ruling made under the initial step of Neb. Rev. Stat. § 27-510(3)(b) (Reissue 2016), regarding whether an informer may be able to give testimony necessary to a fair determination, requires a court to use its judgment and thus exercise its discretion. An appellate court therefore reviews such a ruling for an abuse of discretion.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Matthew R. Kahler and Beau G. Finley, of Finley & Kahler Law Firm, P.C., L.L.O., for appellant.

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

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Schreiner, District Judge.

Miller-Lerman, J.

NATURE OF CASE

Kenneth W. Blair appeals his conviction and sentence in the district court for Douglas County for possession of a deadly weapon by a prohibited person. Blair claims on appeal that the district court erred when it overruled his motion to reveal the identity of a confidential informant and when it admitted a gun into evidence over his objection. We affirm Blair's conviction and sentence.

STATEMENT OF FACTS

The State filed an information against Blair in which it alleged three counts: possession of a deadly weapon by a prohibited person; possession of a stolen firearm; and manufacturing, distributing, or possessing with intent to distribute a controlled substance, cocaine. The charges against Blair were based on evidence obtained from the execution of a search warrant for Blair's house and for his person. After it found probable cause based on the sworn affidavit and application of Officer Lisa Villwok of the Omaha Police Department, the Douglas County Court issued the search warrant on August 16, 2015. The warrant authorized police to search for and seize items including, inter alia, cocaine and related paraphernalia and records and any firearms and companion equipment relating to such firearms. The affidavit indicated that Villwok obtained much of the information supporting her application from a confidential informant. The search warrant was executed on August 22.

Prior to trial, Blair filed a motion to suppress evidence obtained from the search. He asserted that Villwok's affidavit did not establish probable cause, because it was "based solely

on statements made by an unnamed confidential informant, with insufficient information regarding his or her reliability, and a complete lack of independent evidence corroborating the statements made by said confidential informant." Blair also filed a motion to reveal the identity of the confidential informant. He asserted that the confidential informant had "provided information to the State and was an actual participant or eye witness to the alleged offenses with which [Blair] is charged in that the confidential informant set up the alleged transaction for which [Blair] has been charged." Blair further asserted that knowledge of the identity of the confidential informant was "necessary to the preparation of the defense herein" and that without such knowledge, he was "unable to adequately prepare a defense of this case and address any informant who apparently has personal knowledge of the events which are the subject of the Information."

The court held a hearing on the two motions on June 14, 2016. Blair asked the court to take up the two motions together, because the matters were intertwined and because Villwok was the sole witness as to both matters. Shortly before the hearing started, on the State's motion, the court dismissed without prejudice the charge of manufacturing, distributing, or possessing with intent to distribute a controlled substance, cocaine. This left two charges for trial: (1) possession of a deadly weapon by a prohibited person and (2) possession of a stolen firearm.

Villwok testified as follows at the hearing on the two motions. Villwok had been a police officer for over 12 years and had been assigned to the "[g]ang unit" for over 5 years. In that assignment, she commonly used confidential informants who provided information regarding investigations involving gangs, narcotics, and gun-related matters. She would attempt to verify the accuracy of information provided by confidential informants before using the information to obtain search warrants. In August 2015, a confidential informant with whom she had previous experience provided Villwok

information regarding Blair. Villwok knew the confidential informant to have provided accurate information, including information that in the past had led to arrests and the seizure of illegal narcotics. The confidential informant told Villwok that Blair was selling cocaine out of his residence; the confidential informant had been inside Blair's residence and had observed Blair using a digital scale to measure cocaine, then packaging the cocaine in a plastic baggie and selling it to an individual in exchange for money. The confidential informant gave Villwok a physical description of Blair and told Villwok where Blair lived.

Villwok followed up on the physical description by searching a law enforcement database for information regarding Blair and determining that the physical description of Blair in the database was similar to the description given by the confidential informant. Villwok printed a photograph of Blair from the database and showed the photograph to the confidential informant, who identified Blair as the person he had observed selling cocaine. Villwok also had the confidential informant direct her to the area where Blair lived and point out the house in which Blair lived. Villwok determined the address for the house, and by referencing the county assessor's website, she learned that Blair was listed as the owner of the house. Villwok also verified that two local utility companies listed Blair as the person responsible for services at the house. Villwok checked Blair's criminal history and learned that he had been arrested for various offenses, including, inter alia, possessing different types of narcotics, including cocaine, and being a prohibited person in possession of a gun.

Villwok included the information she obtained from the confidential informant in an affidavit that she used to apply to the county court for a search warrant for Blair's house and his person. The county court issued the search warrant based on Villwok's affidavit. Villwok and other officers executed the search warrant on August 22, 2015. The confidential informant did not accompany Villwok and was not present at Blair's

house during the execution of the search warrant. Villwok found Blair in a bedroom of the house. During the search, another police officer found a Smith & Wesson 9-mm handgun located under a pillow at the head of the bed in the bedroom in which Blair was found. There was no one other than Blair in the room when police officers arrived.

Based on the gun and other evidence found in the search, Blair was placed under arrest, and Villwok interviewed him at the house. In the interview, Blair "took no claim to the residence" and "denied any knowledge of the gun or of the narcotics located inside of the residence as well as the paraphernalia and the other items."

Villwok continued to use information from the confidential informant after the search in this case. Villwok testified that the confidential informant had not been charged with a crime and did not have any pending criminal case at the time the informant provided the information regarding Blair but that the confidential informant was paid money for information the informant provided that resulted in an arrest. Villwok testified that the confidential informant had not been promised that he or she would not have to testify in this case but that the confidential informant and Villwok both had concerns for the informant's safety because of possible retaliation if the role as a confidential informant were exposed.

On cross-examination, Villwok testified that between August 16, 2015, when the search warrant was issued, and August 22, when it was executed, she had conducted surveillance of Blair's house, but that she did not attempt to make a controlled purchase from Blair. Villwok also testified that she obtained and executed another search warrant for Blair's house in February 2016. The information to support the second search warrant was provided by the same confidential informant as in this case. During the investigation related to cocaine found in the house in the second search, another resident of the house admitted that the cocaine was his. The other resident was arrested for possession with intent to

distribute cocaine. Blair was also arrested after the second search but was charged with only possession with intent to deliver marijuana.

Villwok further testified on cross-examination that prior to the search in August 2015, the confidential informant had told her that "Blair may be in possession of a long gun." However, the gun that was found in the August 2015 search was a handgun, and Villwok testified that no "long gun" was found in the search. In the affidavit that was submitted to obtain the search warrant in August, Villwok included that the confidential informant had stated that Blair "may be in possession of a long gun in his bedroom."

Other than his cross-examination of Villwok, Blair did not present evidence at the hearing on the motion to suppress and the motion to reveal the identity of the confidential informant. The court overruled the motion to suppress, because it concluded that there was sufficient probable cause to issue the search warrant and, alternatively, that the warrant was executed in good faith. The court also overruled the motion to reveal the identity of the confidential informant. The court noted that Neb. Rev. Stat. § 27-510 (Reissue 2016) generally provides for "a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer" but that under § 27-510(3)(b), subject to certain conditions, disclosure may be required "'[i]f it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case.'" The court noted that although the confidential informant was a witness to a drug transaction carried out by Blair, "Blair is no longer charged with a drug offense, but with a weapons offense." The court therefore found that "because [Blair] is not charged with a drug offense, the [confidential informant] cannot . . . give testimony which is material to the offense charged."

Blair thereafter waived his right to a jury trial on the two remaining charges. At the bench trial, the State's witnesses included Chris Brown, an Omaha Police Department officer assigned to the gang unit. Brown was part of the team that assisted Villwok in executing the search warrant for Blair's house on August 22, 2015. Brown was tasked with searching the bedroom in which Blair had been found. Brown testified that he "picked up the pillow that was on the bed and observed a black firearm." The State offered into evidence pictures that had been taken of the bed and the pillows. Brown testified that the pictures depicted how things appeared at the time of the search. He noted that some of the pictures showed the gun partially visible underneath the pillow, and he testified that the pictures depicted where the gun was when he found it. The State then showed Brown a gun that was marked as an exhibit. Brown testified that the exhibit was the gun that he found in the bedroom and that he was able to identify the gun because it was the same make and model and it had the same serial number. He testified that the gun appeared to be in generally the same condition as it was when he found it. The State offered the gun into evidence, and Blair objected to admission of the gun based on foundation.

Blair had previously objected on the same basis when Brown first testified that he had found the gun. On both occasions, Blair was allowed to voir dire Brown with regard to the gun. Blair's questioning after Brown's first mention of the gun was directed toward the return and inventory that was filed after the search warrant was executed. Brown testified that he personally did not prepare the return and inventory and that another officer on the team had done so. After Blair had Brown read the return and inventory, Brown testified that while other items he had found in the search of the bedroom were listed in the document, the gun was not listed. The court sustained the State's objection to Blair's line of questioning based on relevance. Blair suspended his voir dire at that time

but continued it after he objected to the State's offer of the gun into evidence. Blair began to question Brown about an alleged discrepancy between the item number on the gun and the list of items in the return and inventory. After the court sustained the State's objection to the line of questioning, Blair concluded the voir dire. He then argued to the court that the State did not establish foundation for admission of the gun into evidence. He generally argued that because the gun was not listed on the return and inventory, the State had not established a chain of custody for the gun, and that therefore, it was not admissible.

After hearing argument from both Blair and the State, the court overruled Blair's objection and admitted the gun into evidence. The court reasoned that Brown had testified that the gun being offered into evidence was the same make and model and had the same serial number as the gun he found in the bedroom.

Brown's testimony continued after the gun was admitted into evidence. Brown testified that after he saw the gun, he placed the pillow back where he had found it and "immediately contacted the crime lab unit to come retrieve" the gun. He stated that this was standard practice for collecting a gun. Brown did not touch the gun himself, but he remained in the bedroom and continued searching for other items. He found various items, including letters addressed to Blair and other items connected to Blair. He also found two 9-mm gun magazines. Brown testified that the gun he had found was a Smith & Wesson 9-mm handgun. Brown packaged these other items and provided them to the officer who was preparing the inventory. Brown was still in the bedroom when a forensic technician from the crime laboratory arrived to collect the gun. Brown was present as she photographed the gun and the room.

Kimberly Van den Akker, whom Brown identified as the forensic technician who collected the gun, also testified at trial. Van den Akker was directed to the bedroom when she arrived at Blair's house. She took photographs of the bedroom

as it appeared when she entered the room. She had been told that the gun was under a pillow, so she moved the pillow to reveal the gun, and she then took additional pictures of the gun in the location where it was found. Van den Akker was shown the gun that had been admitted into evidence during Brown's testimony, and she identified it as the gun she saw in the bedroom. After photographing the gun, she put on fresh gloves, removed the gun from under the pillow, and placed the gun onto a clean paper bag. She unloaded the gun and took another picture of it. She then placed the gun into another clean paper bag and placed the magazine and round that she had unloaded from the gun into a separate envelope. She then transported the items to the crime laboratory. Van den Akker testified that from the point she arrived in the bedroom until she returned to the crime laboratory, she was the only person who had possession of or touched the gun. At the crime laboratory, the items were placed into a secured locker. Van den Akker was the sole technician who did further processing on the gun. Such processing included swabbing the surface of the gun for possible DNA. She packaged the swab, sealed and labeled the package, and turned it over to the evidence property unit.

At the end of its case, the State presented certain testimony to which Blair had stipulated. The State asserted that the gun that had been entered into evidence had been test fired by a forensic technician and that the technician would testify that it was "a weapon which is designed to expel any projectile by the action of an explosive or frame or receiver of such weapon." The State further asserted that a crime laboratory technician had collected a buccal swab from Blair and that the buccal swab and the swab Van den Akker had taken from the gun were submitted for DNA testing. The State offered into evidence the DNA report containing the results of a comparison of the two swabs. The report stated that Blair was not excluded as a partial profile contributor to the DNA tested. The court allowed the DNA report into evidence over Blair's objection. Blair

stated that his objection to the DNA report, which was also his general objection to the stipulated testimony presented by the State, was "just [his] foundational objection again . . . to the underlying firearm." The court also allowed, without objection by Blair, evidence that Blair had a prior felony conviction from 1999.

The State rested its case, and Blair moved to dismiss both counts. After Blair and the State argued the motion to dismiss, Blair rested his defense without providing evidence. The parties made closing arguments, and the court stated that it would announce its verdict at a later date. At that later date, the court found Blair guilty of possession of a deadly weapon by a prohibited person, but it found him not guilty of possession of a stolen firearm. The court later sentenced Blair to imprisonment for a mandatory minimum of 3 years and a maximum of 6 years.

Blair appeals his conviction and sentence.

ASSIGNMENTS OF ERROR

Blair claims that the district court erred (1) when it overruled his motion to reveal the identity of the confidential informant and (2) when it admitted the gun into evidence over his objection.

STANDARDS OF REVIEW

In *State v. Wenzel*, 196 Neb. 255, 260, 242 N.W.2d 120, 123 (1976), we stated that "[t]he disclosure of the name of the [confidential] informant was within the discretion of the trial judge." In *Wenzel*, we relied mainly on federal case law to set forth standards relating to the decision whether the identity of a confidential informant should be disclosed, and we did not cite to § 27-510, which was enacted in 1975 and did not govern the trial court's decision in *Wenzel*.

The decision whether to reveal the identity of a confidential informant is now governed by § 27-510, which is part of the rules of evidence and creates a privilege for the State to refuse

to disclose the identity of a confidential informant. The standard we generally apply on appeal when reviewing decisions regarding issues of admissibility under the rules of evidence is as follows: In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *State v. Hill*, 298 Neb. 675, 905 N.W.2d 668 (2018).

[1] The language of § 27-510 guides and sets the parameters for a court's decisions regarding whether the identity of an informer should be disclosed; certain determinations within § 27-510 are based on judicial discretion. Applying these standards to § 27-510, we hold: The decision whether to reveal the identity of a confidential informant is controlled by § 27-510, and judicial discretion is involved only to the extent § 27-510 makes discretion a factor in determining that question. Where § 27-510 commits a question at issue to the discretion of the trial court, an appellate court reviews the trial court's determination for an abuse of discretion.

[2] To the extent appellate review of a trial court's decision whether to reveal the identity of a confidential informant involves interpretation of § 27-510, statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *State v. Kennedy*, 299 Neb. 362, 908 N.W.2d 69 (2018).

[3,4] Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined by the trial court on a case-by-case basis. *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016). A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *Id*.

ANALYSIS

District Court Did Not Err When It Overruled Blair's Motion to Reveal Identity of Confidential Informant.

Blair claims that the district court erred when it overruled his motion to reveal the identity of the confidential informant. As we explained above, the court in its discretion overruled the motion based on its determination under § 27-510(3)(b) that the confidential informant did not have necessary testimony to offer regarding the issue of Blair's guilt or innocence in connection with the charges still pending against him. We determine that the court did not abuse its discretion when it overruled the motion to reveal the informer's identity on this basis.

As noted above, taken as a whole, § 27-510 creates a privilege for the State to refuse to disclose the identity of a confidential informant, as well as circumstances where the privilege must yield to other considerations.

Section 27-510(1) describes the privilege as follows:

> The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

Subsection (2) of § 27-510 indicates who may claim the privilege.

Subsection (3) indicates certain circumstances in which the privilege is limited or must give way to other concerns. Subsection (3)(a) indicates that no privilege exists if the confidential informant appears as a witness or if the confidential informant's identity has already been disclosed by either the confidential informant or the holder of the privilege to "those who would have cause to resent the communication." Subsection (3)(b) provides procedures to address situations including, inter alia, where the confidential informant "may

be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case." Subsection (3)(c) provides procedures to address the situation in which "information from [a confidential informant] is relied upon to establish the legality of the means by which evidence was obtained" and the judge has reason to believe the informant's information may not have been reliable or credible.

In the present case, there was no indication that the State planned to call the confidential informant as a witness and no indication that the identity of the confidential informant had been disclosed by the State or by the confidential informant. Therefore, subsection (3)(a) was not at issue. Also, Blair indicated at the hearing in this case that he was not specifically challenging the reliability or credibility of the confidential informant's information for purposes of his motion to suppress. Therefore, subsection (3)(c) was not at issue.

Instead, Blair contends that the limitations on the privilege found in subsection (3)(b) of § 27-510 were applicable. Section 27-510(3)(b) provides, in relevant part:

> If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case . . . and the government invokes the privilege, the judge shall give the government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing may be in the form of affidavits or testimony, as the judge directs. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the government elects not to disclose his [or her] identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his [or her] own motion.

Therefore, when the defendant in a criminal case moves for disclosure of the identity of a confidential informant,

§ 27-510(3)(b) sets up a series of steps to determine whether the identity may be disclosed or whether the State's privilege should be honored.

As the first step under § 27-510(3)(b), the judge must determine whether it appears that the confidential informant may be able to give testimony necessary to a fair determination of the issue of guilt or innocence of the pending charges. If the testimony is not necessary, then the judge need proceed no further under § 27-510(3)(b) and may overrule the defendant's motion on the basis that the identity of the confidential informant is not relevant to the charges against the defendant.

If, however, it does appear that the confidential informant may be able to give such testimony, then the government must decide whether to invoke the privilege afforded it under § 27-510(1). If the government decides not to invoke the privilege, then the court may order disclosure.

If, however, the government invokes the privilege, then the judge must hold an in camera hearing to allow the government an opportunity to present facts relevant to show whether the confidential informant can in fact supply testimony necessary to a fair determination of the issue of guilt or innocence. If, based on the in camera hearing, the judge finds that there is not a reasonable probability that the informer can give the testimony, then the court may overrule the defendant's motion to disclose the identity of the confidential informant.

If, however, the judge finds that there is a reasonable probability that the informer can give testimony that is necessary, then the government may elect to waive the privilege and disclose the identity of the confidential informant. If the government does not so elect, then the defendant may move to dismiss the charges to which the testimony would relate or the court may dismiss the charges on its own motion.

This understanding of the framework of how § 27-510(3)(b) operates factors into our review of the court's ruling in which it denied Blair's motion to reveal the identity of the confidential informant. In addition to arguing that the court erred in

determining as a substantive matter that it did not appear that the confidential informant could give testimony relevant to the charges against him, Blair also makes two procedural arguments regarding the district court's alleged error in overruling his motion. First, he contends that the judge erred by failing to hold the in camera hearing identified in § 27-510(3)(b). Second, he contends that it was improper for the State to dismiss the drug charge in order to avoid disclosing the identity of the confidential informant. We find no merit to either of these procedural contentions.

As to the first procedural argument, we note that the court made the initial determination that it did not appear that the confidential informant "may be able to give" testimony necessary to a fair determination of the issue of guilt or innocence with respect to the charges that were still pending in this case—possession of a deadly weapon by a prohibited person and possession of a stolen firearm. Because the court made this initial determination, it did not need to go further than this first step under § 27-510(3)(b). An in camera hearing would have been required only if the court had found that it appeared the confidential informant "may be able to give" testimony regarding Blair's guilt or innocence and the State had thereafter invoked its privilege. Thus, Blair's assertion that an in camera hearing was required is without merit.

As to the second procedural argument, we do not find it improper that the State dismissed the drug charge before the court could order it to disclose the identity of the confidential informant. As we read the progression laid out in § 27-510(3)(b), the State's actions in this case were anticipated by the statute. When there is a reasonable probability that the confidential informant can give testimony necessary to a fair determination of the issue of guilt or innocence on a specific charge, then the State has the option to either waive its privilege and disclose the identity of its confidential informant or invoke the privilege and, thus as a practical matter, face the possibility of dismissal of the charges by

the court on its own motion or on the motion of the defendant. The ultimate relief that was available to Blair under § 27-510(3)(b) was dismissal of the charge to which the confidential informant's testimony would be necessary. By the State's dismissal of that charge, Blair obtained that relief, and we do not find it improper for the State to have made the choice to maintain confidentiality of the informer and to dismiss the drug-related charge.

[5] Finally, we find no error in the court's conclusion that it did not appear that the confidential informant in this case may be able to give testimony necessary to a fair determination of the issue of guilt or innocence on the charges still pending against Blair. This ruling was made under the initial step of § 27-510(3)(b), which requires the court to use its judgment and thus exercise its discretion. We therefore review the ruling for an abuse of discretion.

At the time the court considered Blair's motion, the charges remaining against Blair were for possession of a deadly weapon by a prohibited person and possession of a stolen firearm. The evidence relevant to those charges related to whether Blair was in possession of the gun found on the day of the search, whether he was a prohibited person on that day, whether the gun was stolen, and whether Blair knew the gun was stolen. There was no indication that the confidential informant had information relevant to any pending issue other than whether Blair had previously been in possession of a weapon. But even regarding possession, there was no indication that the confidential informant was present during the execution of the search warrant and therefore no indication he could provide information relevant to whether Blair was in possession of the gun on the day of the search. There was evidence that the confidential informant had previously observed Blair to be in possession of a "long gun" on an earlier date; however, such evidence was not relevant to and likely would not have been allowed in connection with the charges in this case stemming from possession of a handgun.

The court was correct in its assessment that although testimony of the confidential informant may have been necessary to a drug-related charge on the issue of intent, it would not be necessary to the charges that remained after dismissal of the drug-related charge. We determine that the district court did not abuse its discretion when it ruled that it did not appear that the confidential informant in this case may be able to give testimony necessary to a fair determination of the issue of guilt or innocence on the charges pending against Blair and when it therefore overruled Blair's motion to reveal the identity of the confidential informant.

District Court Did Not Abuse Its Discretion When It Allowed Gun Into Evidence.

Blair also claims that the court erred when it admitted the gun into evidence over his objection. We conclude that the district court did not abuse its discretion when it determined that there was adequate foundation to allow the gun into evidence.

Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined by the trial court on a case-by-case basis. *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016). A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *Id.*

In this case, the gun was offered into evidence in connection with the testimony of Brown, who had found the gun during the search of the bedroom. Before offering the gun into evidence, the State showed the gun to Brown. Brown testified that it was the gun that he found in the bedroom and that he was able to identify the gun because it was the same make and model and, notably, it had the same serial number as the gun he had found. Brown further testified that the gun appeared to be in generally the same condition as it was when he found it. This testimony by Brown was sufficient to provide foundation for admission of the gun into evidence.

Blair's objection at trial and his argument on appeal focus on a chain of custody and the alleged failure of law enforcement personnel to include the gun on the return and inventory that was prepared and filed after the search warrant was executed. It is generally understood that a "chain of custody for physical evidence may have to be established as part of the foundation for its admission as in cases where physical evidence is not readily identifiable or may be susceptible to tampering, contamination, or exchange." 23 C.J.S. *Criminal Procedure and Rights of Accused* § 1150 at 598 (2016). However, a chain of custody is not logically necessary to establish the foundation of an item of physical evidence bearing a serial number or other unique identifier.

Rather than going to admissibility, we believe Blair's argument goes to the weight to be accorded to the evidence. We have previously discussed this issue in *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). In *Bradley*, we concluded that where a witness at trial identified a gun offered into evidence as being the one he had retrieved from the defendant's home, there was sufficient foundation to admit the gun into evidence and the defendant's assertions regarding defects in the chain of custody went merely to the weight to be given to the evidence rather than to admissibility of the evidence.

We further note for completeness that in his "chain of custody" argument, Blair does not appear to assert that the gun may have been tampered with or altered. Instead, his argument regarding the failure to include the gun on the return and inventory relates more to whether law enforcement officers followed proper procedure in conducting the search. But Blair's objection at trial and his assignment of error on appeal do not challenge the search or the court's having overruled his motion to suppress evidence obtained in the search.

Brown's testimony in this case provided sufficient foundation, because the gun was readily identifiable to him based on its make, model, and serial number. In addition, Brown was able to address concerns regarding tampering by testifying that

the gun was in generally the same condition as when he found it. We conclude that the district court did not abuse its discretion when it admitted the gun into evidence.

CONCLUSION

We conclude that the district court did not err when it overruled Blair's motion to reveal the identity of the confidential informant or when it admitted the gun into evidence. We therefore affirm Blair's conviction and sentence for possession of a deadly weapon by a prohibited person.

Affirmed.

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

State of Nebraska, appellee, v. Coty J. Conn, appellant.

914 N.W.2d 440

Filed June 29, 2018. No. S-17-721.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. The lower court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Limitations of Actions.** If the facts of a case are undisputed, the issue as to when the statute of limitations begin to run is a question of law.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Postconviction: Time: Appeal and Error.** Once the timeliness of a postconviction motion is challenged and a hearing is held on the issue, an inmate must raise all applicable timeliness arguments to the district court to preserve them for appellate review.
5. **Appeal and Error.** It is well established that an appellate court will not consider questions not presented to the district court.
6. **Limitations of Actions.** The doctrine of equitable tolling permits a court to excuse a party's failure to comply with the statute of limitations where, because of disability, irremediable lack of information, or other circumstances beyond his or her control, the plaintiff cannot be expected to file suit on time.
7. ____. Equitable tolling requires no fault on the part of the defendant. It does, however, require due diligence on the part of the claimant.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

Peder Bartling, of Bartling Law Offices, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Daugherty, District Judge.

Stacy, J.

Coty J. Conn filed a motion seeking postconviction relief. The State responded with a motion to dismiss, arguing the motion was filed outside the 1-year limitations period under Neb. Rev. Stat. § 29-3001(4) (Reissue 2016). After conducting a hearing, the district court found the motion was time barred and granted the State's motion to dismiss. Conn filed this timely appeal.

FACTS

In November 2011, as part of a plea agreement involving four cases, Conn pled no contest to one count of attempted assault on an officer and admitted he was a habitual criminal. On January 27, 2012, he was sentenced to 20 to 35 years' imprisonment, with the sentence to be served concurrently with identical sentences in the other three cases. Conn was represented by counsel at the time of the plea and sentencing. No direct appeal was filed.

On May 28, 2013, Conn filed the instant motion for postconviction relief. The motion, summarized, alleged trial counsel was ineffective for failing to file a direct appeal after Conn asked that he do so. The same day, Conn moved for appointment of postconviction counsel.

On February 4, 2014, the district court appointed counsel for Conn. Three days later, the State moved to dismiss Conn's postconviction motion, arguing it was filed outside the 1-year limitations period under § 29-3001(4). After a delay of several years that is not fully explained by the record, the court held a hearing on the State's motion. After the hearing, the district

court granted the State's motion to dismiss, finding Conn's postconviction motion was filed out of time. Conn filed this appeal, which we moved to our docket on our own motion.[1]

ASSIGNMENT OF ERROR

Conn assigns that the district court erred in dismissing his postconviction motion as time barred pursuant to § 29-3001(4).

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.[2] The lower court's findings of fact will be upheld unless such findings are clearly erroneous.[3]

[2] If the facts of a case are undisputed, the issue as to when the statute of limitations begin to run is a question of law.[4]

ANALYSIS

Pursuant to § 29-3001(4), a 1-year limitations period applies to motions for postconviction relief. That period runs from the later of:

> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United

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

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

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

[4] *State v. Shannon*, 293 Neb. 303, 876 N.W.2d 907 (2016).

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.[5]

Motion Was Not Timely Filed Under § 29-3001(4)(a)

Conn was sentenced on January 27, 2012. The 30-day appeal period expired on a Sunday, so he had until February 27 to file a direct appeal.[6] No appeal was filed. But Conn asks us to find that his conviction did not become final until May 28, 2012, making his postconviction motion filed 1 year later on May 28, 2013, timely. We address his rationale below, but note he preserved this argument for appellate review because he raised it before the district court at the hearing on the State's motion to dismiss, and he assigned and argued it in his brief to this court.

In arguing that his January 27, 2012, judgment did not become final until May 28, Conn relies in part on our opinion in *State v. Reeves*.[7] The relevant issue in *Reeves* was whether a new rule of constitutional criminal procedure applied to a case before us on postconviction. *Reeves* held that such rules are generally not applicable to "'those cases which have become final before the new rules are announced,'"[8] and then explained: "A conviction is final where the judgment of

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[5] § 29-3001(4).

[6] See Neb. Rev. Stat. § 25-1912 (Reissue 2016) (appeals must be filed within 30 days after entry of judgment).

[7] *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *vacated* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409.

[8] *Id.* at 749, 453 N.W.2d at 383.

conviction was rendered, the availability of appeal exhausted, and the time for petition of certiorari has lapsed."[9]

The time to petition for certiorari is governed by rule 13 of the Rules of the Supreme Court of the United States. That rule provides that a petition for writ of certiorari is timely if filed within 90 days of the entry of final judgment.[10]

Conn relies on *Reeves*, rule 13, and § 25-1912 to argue his postconviction motion was timely filed. He reasons that his sentence was imposed on January 27, 2012, and his direct appeal date expired on February 27,[11] so he had until May 28, 2012, to petition for a writ of certiorari. Conn's postconviction motion was filed exactly 1 year later, on May 28, 2013.

Conn's briefing does not explain how, when no direct appeal was filed, there would be any basis for petitioning the U.S. Supreme Court for a writ of certiorari.[12] But regardless, in *State v. Huggins*,[13] we rejected the argument that the finality determination under § 29-3001(4)(a) must include an additional 90-day period so the time to petition for a writ of certiorari can lapse.

In *Huggins*, the defendant's direct appeal was denied by the Nebraska Court of Appeals. Huggins petitioned for further review, which this court denied. He did not thereafter petition for writ of certiorari, and the Court of Appeals issued its mandate on September 17, 2012. On November 27, 2013, he moved for postconviction relief. The State raised the 1-year limitations period in its response, and the district court found the postconviction motion was untimely, because the 1-year limitations period ran from the date the Court of Appeals issued its mandate. On appeal, the defendant argued the 1-year period did not begin to run until the expiration of

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[9] *Id.* at 750, 453 N.W.2d at 383.

[10] Sup. Ct. R. 13(1).

[11] See § 25-1912.

[12] See, 28 U.S.C. § 1257(a) (2012); rule 13(1).

[13] *State v. Huggins*, 291 Neb. 443, 866 N.W.2d 80 (2015).

the 90-day period in which he could have petitioned for a writ of certiorari. He relied on *State v. Lotter*[14] which, like *Reeves*, addressed whether a new rule of constitutional criminal procedure could apply to a case on collateral review. In that context, *Lotter* stated, "A criminal conviction is final for purposes of collateral review when the judgment of conviction is rendered, the availability of appeal is exhausted, and the time for petition for certiorari has lapsed."[15]

Huggins rejected the inmate's argument. It reasoned the plain language of § 29-3001(4)(a) referenced the "conclusion of a direct appeal," and that meant the date the Court of Appeals issued its mandate. To the extent *Lotter* referenced the 90-day certiorari period, *Huggins* distinguished *Lotter* by noting § 29-3001(4) did not exist at the time *Lotter* was decided, and thus the description in *Lotter* of a final conviction could not be considered a comment on the meaning of the language of § 29-3001(4).

A similar rationale applies here, where the facts presented require that we interpret the statutory reference in § 29-3001(4)(a) to "the expiration of the time for filing a direct appeal." Section 25-1912(1) explicitly provides that appeals must be filed "within thirty days after the entry" of the judgment, decree, or final order. The expiration of Conn's "time for filing a direct appeal" under the plain language of § 29-3001(4)(a) was therefore 30 days after the date of sentencing on January 27, 2012. To the extent Conn relies on *Reeves* and *Lotter* to suggest that a 90-day period for filing a writ of certiorari should be included in the calculation under § 29-3001(4)(a), neither case dictates such a result. *Reeves* and *Lotter* were decided at a time when the limitations period in § 29-3001(4)(a) did not exist, and because both cases referred to final convictions in the context of a retroactivity

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[14] *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003) (superseded in part by statute as stated in *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015)).

[15] *Id*. at 254, 664 N.W.2d at 903.

analysis, and not in the context of interpreting § 29-3001(4), they do not provide support for Conn's contention. Further, because Conn did not appeal from the judgment of conviction and sentence, there is no decision by the highest court of the State on which to premise a petition for writ of certiorari in the first instance.[16]

[3] 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.[17] Based on the plain language of §§ 25-1912 and 29-3001(4)(a), the 1-year limitations period began to run on February 27, 2012. The district court correctly found Conn's postconviction motion, filed May 28, 2013, was outside this period and thus time barred by § 29-3001(4)(a).

Timeliness Under § 29-3001(4)(b) Not Preserved

Conn's postconviction motion did not allege any basis other than § 29-3001(4)(a) in asserting the motion was timely. Nor did he argue any other basis to the district court at the hearing on the motion to dismiss. But in his brief on appeal, Conn assigns and argues that his motion was also timely under § 29-3001(4)(b). He contends he filed the motion within 1 year of discovering his trial counsel had not filed the direct appeal as instructed, and thus claims he filed the motion within 1 year of the "date on which the factual predicate of the constitutional claim or claims" was "discovered through the exercise of due diligence."[18]

The State argues this assignment has not been preserved for appellate review because, among other reasons, Conn did not

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[16] See 28 U.S.C. § 1257(a) (under certain circumstances, "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari").

[17] *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018).

[18] § 29-3001(4)(b).

argue timeliness under § 29-3001(4)(b) when defending against the motion to dismiss. We agree.

[4,5] The record demonstrates that Conn did not present an argument based on § 29-3001(4)(b) to the district court in response to the State's motion to dismiss. Once the timeliness of his postconviction motion was challenged and a hearing was held on the issue, Conn had to raise all applicable arguments to the district court if he wanted to preserve them for appellate review. It is well established that an appellate court will not consider questions not presented to the district court.[19] Because the applicability of § 29-3001(4)(b) was not raised to the district court, it has not been preserved for appellate review.

No Equitable Tolling

Conn argues the doctrine of equitable tolling should apply to overcome any finding that his postconviction motion was not timely filed. His postconviction motion did not expressly use the term "equitable tolling," but it did allege that he asked his trial counsel to file an appeal after the sentencing hearing and then asked "at least two more times," but "was told that he wasn't able to appeal, and that he could only appeal the sentence." Conn raised this argument, which he now frames as one of equitable tolling, to the postconviction court in response to the State's motion to dismiss.

[6,7] The doctrine of equitable tolling permits a court to excuse a party's failure to comply with the statute of limitations where, because of disability, irremediable lack of information, or other circumstances beyond his or her control, the plaintiff cannot be expected to file suit on time.[20] Equitable tolling requires no fault on the part of the defendant.[21] It does, however, require due diligence on the part of the claimant.[22]

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[19] See *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

[20] *In re Estate of Fuchs*, 297 Neb. 667, 900 N.W.2d 896 (2017).

[21] *Id.*

[22] *Id.*

Nebraska has considered the principle that a statute of limitations can be equitably tolled.[23] But all of our cases applying the doctrine have involved situations where a claimant was prevented from bringing a timely claim due to the alleged actions of a court or governmental entity.[24] In that regard, we observe that a similar principle is already found in the statutory tolling language of § 29-3001(4)(c). Consequently, it is difficult to conceive of a circumstance outside § 29-3001(4)(c) that would support application of the equitable tolling doctrine in a postconviction motion.

In *State v. Huggins*,[25] this court acknowledged that the U.S. Supreme Court has applied equitable tolling in federal habeas actions if the prisoner shows (1) he or she has been pursuing his or her rights diligently and (2) some extraordinary circumstance stood in the way and prevented timely filing of a petition.[26] But *Huggins* declined to decide whether equitable tolling applies to the postconviction limitations period under § 29-3001(4). This court in *Huggins* reasoned that because the prisoner was claiming equitable tolling applied only with respect to the time period he was in federal (not state) custody, and because that time period did not encompass the entire 1-year limitations period of § 29-3001(4), the circumstances of the case would not support equitable tolling even if the principle applied.

Here, Conn argues equitable tolling applies because his postconviction motion alleged that he "requested, on three (3) occasions, that trial counsel file a direct appeal of the District Court's January 27, 2012, sentence; and, trial counsel failed to do so."[27] He argues that he "acted reasonably" when

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[23] See *id.*

[24] *Id.*

[25] *Huggins, supra* note 13.

[26] *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010).

[27] Brief for appellant at 11.

he believed that instructing his counsel to file an appeal was "tantamount to trial counsel filing such an appeal."[28] He contends that his lack of legal training, his imprisonment, and his detrimental reliance on the instruction he gave to trial counsel all prevented him from filing his postconviction motion until May 28, 2013.

Even assuming these allegations are true, they do not satisfy the tolling provisions of § 29-3001(4)(c). And the allegations would not support equitable tolling even if the principle applied. Thus, as in *Huggins*, this case does not require us to decide whether the doctrine of equitable tolling could ever apply to § 29-3001(4), because the doctrine is unsupported on the facts presented.

Appointment of Postconviction Counsel

Conn also argues the postconviction court implicitly found his postconviction motion was timely filed when it granted his motion to appoint counsel to represent him in the postconviction action. The motion appointing counsel was granted before the State responded to Conn's motion and raised the affirmative defense that it was barred by the limitations period of § 29-3001(4). Moreover, there is no correlation between a court's appointment of postconviction counsel and a finding that the motion was timely filed. This argument is without merit.

CONCLUSION

For the foregoing reasons, the files and records affirmatively show that Conn's postconviction motion was time barred, and the judgment of the district court dismissing the motion is affirmed.

Affirmed.

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[28] *Id*. at 12.

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

State of Nebraska, appellee, v. Adam T. Petsch, appellant.

914 N.W.2d 448

Filed June 29, 2018. No. S-17-997.

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: Arrests.** 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. Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection. A tier-two police-citizen encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning. A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention. Tier-two and tier-three police-citizen encounters are

seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.

5. **Warrantless Searches: Probable Cause: Police Officers and Sheriffs.** 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, which would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.
6. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.
7. **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.
8. **Probable Cause: Police Officers and Sheriffs.** An arresting officer's state of mind is irrelevant to the existence of probable cause.
9. **Probable Cause: Appeal and Error.** Appellate courts should avoid an excessively technical dissection of the factors supporting probable cause. The test to be employed is whether the totality of the circumstances would suggest that probable cause existed.

Appeal from the District Court for Lancaster County, Robert R. Otte, Judge, on appeal thereto from the County Court for Lancaster County, Timothy C. Phillips and Thomas E. Zimmerman, Judges. Judgment of District Court affirmed.

Brad Roth, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, 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, Funke, and Papik, JJ., and Johnson, District Judge.

Heavican, C.J.

INTRODUCTION

Adam T. Petsch was charged with aggravated driving under the influence and displaying unlawful or fictitious license plates. His motion to suppress was denied, and he was convicted following a stipulated bench trial. He appeals.

We moved this case to our docket because it presented similar facts to, and Petsch relied upon the Nebraska Court of Appeals' opinion in, *State v. Botts*.[1] We recently reversed the Court of Appeals' opinion in *Botts* on petition for further review.[2] We affirm Petsch's convictions.

BACKGROUND

On November 20, 2015, at approximately 11:25 a.m., Troy Aksamit, an officer with the Lincoln, Nebraska, police department, observed a white sport utility vehicle (SUV) with an expired license plate. Aksamit was traveling in his patrol vehicle in the opposite direction, and so he conducted a U-turn and proceeded to follow the SUV. The SUV had turned left by that time, so Aksamit also turned left. Aksamit testified he felt that the driver was "attempting to speed up and flee from me." At that time, Aksamit activated his patrol vehicle's overhead lights and sirens. Despite this, the SUV did not pull over and continued to make left turns before eventually coming to a stop.

A review of the video of the stop supports Aksamit's testimony that the SUV was attempting to flee from him. The video shows that it took Aksamit approximately 20 seconds to catch up to the SUV. At that time, Aksamit activated his patrol vehicle's lights and sirens. From that point, the SUV drove on for over 45 seconds, making left turns on mostly deserted side streets and also stopping at a stop sign, but then crossing that street, with Aksamit's patrol vehicle following behind with lights flashing.

While stopped behind the SUV, Aksamit noted that it had tinted windows and some equipment stored in the back, but testified that he could see some movement inside the SUV. After about 30 seconds, Aksamit made contact with Petsch, the driver of the SUV. The video shows that Aksamit approached the SUV with his service revolver drawn from its holster, but

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[1] See *State v. Botts*, 25 Neb. App. 372, 905 N.W.2d 704 (2017).

[2] See *State v. Botts*, 299 Neb. 806, 910 N.W.2d 779 (2018).

held the revolver pointed down to the ground. As soon as Petsch exited the SUV and indicated compliance through his actions, Aksamit holstered his revolver. The revolver remained unholstered for under 30 seconds and was never brandished in a threatening manner. Askamit testified that he drew the weapon for officer safety reasons because he was unaware of whether there was another occupant in the SUV; it transpired that Petsch was the only occupant of the SUV.

After exiting the SUV, Petsch was handcuffed without incident; Aksamit testified that he also handcuffed Petsch for officer safety reasons. After other officers arrived at the scene, Aksamit placed Petsch in the back of his patrol vehicle. Petsch declined to undergo field sobriety tests and refused consent for a search of his SUV.

Aksamit testified that he noticed Petsch seemed "impaired" and had a "slowed response" and that he "had to ask him four times, basically, the same question." Aksamit was concerned that Petsch might be having a medical episode. Aksamit also testified that he noted Petsch had a "little bit of a problem walking." Aksamit left Petsch alone in the patrol vehicle for a few minutes; upon returning, Aksamit "immediately detected a strong odor of alcoholic beverage." The record shows that a second officer also detected this odor.

Aksamit testified that he did not see anything in plain view when he looked into Petsch's SUV, but that he later searched it. In so searching, Aksamit found a cup in the SUV that contained a "strong alcoholic beverage." Aksamit also found one empty 50-milliliter bottle and two unopened 50-milliliter bottles of "Jack Daniel's Tennessee Honey" whiskey.

Because of Petsch's "reactions to the questions, me asking questions four or five times, him slow to respond, acting as though he was confused . . . a very strong odor of alcoholic beverage," Aksamit concluded that Petsch was under the influence of alcohol. Upon being transported to "detox," a chemical test was performed and Petsch's breath test registered at .286 of a gram of alcohol per 210 liters of breath.

Petsch was cited for driving under the influence (DUI), fleeing to avoid arrest, and failing to attach renewal decals to his license plate. While Aksamit testified that Petsch's SUV's front license plate did not have an updated sticker, he testified that the back license plate did have such a sticker.

Petsch was charged in the county court with DUI and driving with fictitious plates. Petsch filed a motion to suppress "any and all evidence regarding observations made of [Petsch], statements . . . made by [Petsch], any results of chemical tests of [Petsch's] blood, breath, or urine or evidence of any kind that was obtained by law enforcement personnel as a result of the stop and subsequent arrest." As relevant to this appeal, Petsch alleged that law enforcement lacked (1) reasonable suspicion to stop and seize his SUV, (2) probable cause to handcuff him, and (3) probable cause to arrest him for DUI.

Following a hearing, the county court denied Petsch's motion to suppress. Petsch was eventually found guilty in a stipulated bench trial. For the DUI conviction, Petsch was sentenced to probation, with a 30-day term of house arrest and a $1,000 fine. For the fictitious plates conviction, Petsch was fined $50. Petsch appealed to the district court, which affirmed. He appeals.

ASSIGNMENTS OF ERROR

Petsch assigns that the district court erred in (1) finding that he was not arrested when he was handcuffed at gunpoint, (2) finding sufficient probable cause to arrest him for DUI, (3) overruling his motion to suppress, and (4) finding him guilty of second-offense DUI and unlawful/fictitious display of license plates.

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.[3]

[3] *Id.*

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.[4] 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.[5]

[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.[6]

ANALYSIS

The crux of Petsch's appeal is that the county court erred in denying his motion to suppress. Petsch contended in the motion to suppress that law enforcement lacked (1) reasonable suspicion to stop and seize his vehicle, (2) probable cause to handcuff him, and (3) probable cause to arrest him for DUI. Petsch sought the suppression of "any and all evidence regarding observations made of [Petsch], statements . . . made by [Petsch], any results of chemical tests of [Petsch's] blood, breath, or urine or evidence of any kind that was obtained by law enforcement personnel as a result of the stop and subsequent arrest."

Before turning to the issues on appeal, we note what is *not* at issue on appeal. In his motion to suppress, Petsch contends that the stop of his SUV was not supported by reasonable suspicion. Aksamit testified that the initial reason for stopping Petsch was for operating a vehicle with fictitious plates. And on appeal, Petsch assigns that the court erred in finding him

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[4] *Id.*

[5] *Id.*

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

guilty of that charge. But Petsch does not challenge the stop in his appeal, and does not further argue his assignment of error regarding the fictitious plates conviction. Accordingly, we will not address either contention.

[4] We begin with a refresher on police-citizen encounters and probable cause. 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. 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]

[5-7] 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, which would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.[11] Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.[12] An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.[13]

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

[12] *Id.*

[13] *Id.*

Law Enforcement Had Probable Cause to Arrest Petsch Based Upon Petsch's Flight.

We turn first to Petsch's contention set forth in his first assignment of error: that he was arrested when Aksamit placed him in handcuffs after stopping his SUV and that probable cause to do so was lacking. We observe that Aksamit testified that he did not arrest Petsch at the time he handcuffed him, but, rather, restrained Petsch for officer safety reasons. However, we do not opine on the propriety of Aksamit's action insofar as it relates to officer safety, because we conclude that there was probable cause to arrest Petsch as a result of his flight from Aksamit.[14]

[8] The U.S. Supreme Court explained in *Devenpeck v. Alford*[15] that

> an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. . . . That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, "'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" . . . "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." . . . "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."

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[14] See Neb. Rev. Stat. § 28-905 (Reissue 2016).

[15] *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004) (citations omitted).

In this case, the fact that Aksamit's subjective belief was that he was handcuffing Petsch for officer safety reasons is immaterial. Aksamit knew that Petsch had attempted to flee from him when Aksamit activated his patrol vehicle's lights and sirens and tried to stop Petsch. Indeed, Aksamit referenced in his testimony that Petsch "just took off from me," as support for his decision to place Petsch in handcuffs. A reasonable officer could have believed that Petsch was operating a "motor vehicle to flee in such vehicle in an effort to avoid arrest or citation" as prohibited by § 28-905(1).

There was probable cause to support Petsch's arrest for operating a motor vehicle to avoid arrest. As such, we find no merit to Petsch's first assignment of error.

Probable Cause to Support DUI Arrest.

In his second assignment of error, Petsch assigns that law enforcement lacked probable cause to arrest him for DUI. We again disagree.

Aksamit testified that Petsch had a slow reaction time, appeared confused, and had to be asked questions multiple times. According to Aksamit, Petsch stumbled while walking to Aksamit's patrol vehicle. After being in that vehicle for a short period of time, both Aksamit and another officer noticed the odor of alcoholic beverage. Aksamit's report, which was part of the trial stipulation, noted that prior to Petsch's being placed into the patrol vehicle, the vehicle did not smell like alcohol. In other words, the record shows that the smell of alcohol was emanating from Petsch and not from another source.

Finally, Aksamit testified that he was concerned Petsch had tried to flee and that he, Aksamit, was unaware of what Petsch was doing inside his SUV during and immediately after the vehicle stop.

On appeal, Petsch contends that there were other indicia that would suggest that he was not under the influence of alcohol—for example, he did not engage in other erratic driving;

did not admit to drinking; did not have watery or bloodshot eyes; did not have slurred speech; was cooperative; and walked appropriately and did not fall, stagger, or sway. Also, no field sobriety tests were conducted and no preliminary breath test was requested.

[9] Relying on U.S. Supreme Court case law, we recently noted in *State v. Botts* that "appellate courts should avoid an '"excessively technical dissection" of the factors supporting probable cause.'"[16] The test to be employed is whether the totality of the circumstances would suggest that probable cause existed. We went on to observe that "[i]n 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."'"[17] And in applying that rationale here, we note that the fact that these indicia of DUI were not present does not mean that Aksamit was not permitted to consider the signs that were present—chief among these being the strong odor of alcohol and Petsch's apparent confusion and slowed reaction time.

Petsch also argues that no field sobriety tests or preliminary breath test were conducted, and he further asserts that any suggestion that he declined those tests was not reflective of the record. But one of the responding officers testified, and the recording of the stop confirmed, that the officer tried to conduct a field sobriety test involving the alphabet. Petsch declined to participate and indicated that he would first speak to his lawyer. It was not unreasonable, given this request, that no further field sobriety testing or preliminary breath testing was sought.

We find that given the totality of these circumstances, probable cause existed to support the DUI arrest. There is no merit

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[16] *State v. Botts*, *supra* note 2, 299 Neb. at 816, 910 N.W.2d at 788 (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018)).

[17] *Id.* at 817, 910 N.W.2d at 788.

to Petsch's second assignment of error. And because there was probable cause to support Petsch's detention and arrest, the county court's denial of the motion to suppress was not in error. There is no merit to Petsch's third assignment of error.

No Error in Guilty Finding.

Finally, Petsch assigns that the court erred in finding him guilty of DUI and driving with fictitious plates. As we noted above, Petsch does not argue the assignment of error as it relates to the fictitious plates. And while Petsch does preserve his assignment of error as to the DUI conviction, this contention is based upon his assertion, which we have above rejected, that the county court erred in denying his motion to suppress.

We have concluded that there was probable cause to arrest Petsch. And we further note that when alcohol breath testing was later completed at a detoxification center, the content of alcohol in Petsch's breath was .286, which is 3½ times the legal limit and sufficient to support Petsch's conviction for DUI.[18] There is no merit to Petsch's final assignment of error.

CONCLUSION

The decision of the district court affirming the county court's convictions is affirmed.

Affirmed.

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[18] See Neb. Rev. Stat. §§ 60-6,196 (Reissue 2010) and 60-6,197.03(5) (Supp. 2015).

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

Michelle M. Hill, appellant, v. AMMC, Inc., doing business as Morrissey Motor Company, appellee.

915 N.W.2d 29

Filed June 29, 2018. No. S-17-1075.

1. **Motions to Dismiss: Summary Judgment: Pleadings.** When matters outside the pleadings are presented to and not excluded by the court, a motion to dismiss is treated as one for summary judgment.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
3. **Judgments: Claim Preclusion: Issue Preclusion: Appeal and Error.** The applicability of claim and issue preclusion is a question of law. On a question of law, an appellate court reaches a conclusion independent of the court below.
4. **Judgments: Jurisdiction: Claim Preclusion.** Under Nebraska law, 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.
5. **Judgments: Claim Preclusion: States: Courts.** A Nebraska state court must apply federal law to determine the preclusive effect of a federal court judgment.
6. **Judgments: Jurisdiction: Claim Preclusion: States: Courts.** For judgments in federal question jurisdiction cases, federal claim preclusion law applies to the analysis, but for judgments in federal diversity jurisdiction cases, federal common law applies to the preclusion analysis. Federal common law, in turn, incorporates the rules of preclusion applied by state courts in the state in which the federal diversity court sits.

7. **Claim Preclusion: Final Orders: States: Courts.** Under federal law as stated by the U.S. District Court for the District of Nebraska, claim preclusion bars the relitigation of a claim if the prior judgment was a final judgment on the merits rendered by a court of competent jurisdiction and if the same cause of action and the same parties or their privies were involved in both cases.

Appeal from the District Court for Lancaster County: Jodi L. Nelson, Judge. Affirmed.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Robert S. Keith and Philip O. Cusic, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Welch, Judge.

Stacy, J.

The Lancaster County District Court dismissed an action filed by Michelle M. Hill, finding it was barred by the doctrine of claim preclusion. Hill filed this timely appeal. We affirm.

I. FACTS

1. Hill's 2016 Complaint

On July 14, 2016, Hill filed a complaint in the district court for Lancaster County against her former employer, AMMC, Inc., doing business as Morrissey Motor Company. The complaint presented two claims: one alleging a violation of title VII of the Civil Rights Act of 1964,[1] and the other alleging "wrongful discharge . . . in violation of Nebraska law and public policy."

According to the factual allegations of Hill's complaint, she was hired by AMMC in May 2014. AMMC sold motor vehicles, and Hill alleged that during the course of her employment she was (1) subjected to severe and pervasive sexual

[1] See 42 U.S.C. § 2000e et seq. (2012 & Supp. IV 2016).

comments by a coworker in violation of title VII and (2) asked to physically alter customers' credit scores and indicate to financing companies that vehicles subject to purchase by AMMC customers were "fully loaded" when the vehicles actually were not. The complaint alleged Hill was constructively discharged in October 2014 when she resigned rather than falsify records.

Hill's complaint alleged she had filed "charges" with both the Nebraska Equal Opportunity Commission (NEOC) and the federal Equal Employment Opportunity Commission (EEOC). The complaint alleged the EEOC issued a right to sue letter on July 6, 2016, but was silent as to any final action taken by the NEOC.

On August 17, 2016, AMMC removed Hill's action to the U.S. District Court for the District of Nebraska. After the action was removed, AMMC filed a motion to dismiss Hill's state law wrongful discharge claim, arguing it was time barred under the statute of limitations in the Nebraska Fair Employment Practice Act (NFEPA).[2] Specifically, AMMC argued Hill failed to file her state law claim within 90 days of the NEOC's final action in the case.[3] At the hearing on the motion to dismiss, evidence was received without objection, so the federal court treated the motion as one for partial summary judgment.[4]

Hill resisted the motion, arguing her state law claim was not brought under the NFEPA, but instead was a common-law tort claim subject to a 4-year statute of limitations. In an order entered October 7, 2016, the federal court granted summary judgment in favor of AMMC on Hill's state law wrongful discharge claim, specifically finding the claim was governed by the NFEPA and was not a general state law tort claim for wrongful discharge. Hill's title VII claim remained pending in the federal court.

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[2] Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 2010 & Cum. Supp. 2016).

[3] See § 48-1120.01.

[4] See Fed. R. Civ. P. 12(d) and 56.

2. Hill's 2017 Complaint

Approximately 5 months later, on March 1, 2017, Hill filed the instant complaint against AMMC in the district court for Lancaster County. Her complaint alleged only one claim: that AMMC wrongfully discharged Hill "in violation of Nebraska law and public policy." The factual allegations regarding wrongful discharge were substantially identical to those alleged in her 2016 complaint. However, the 2017 complaint contained additional detail regarding the illegality of the actions AMMC allegedly asked Hill to take regarding customers' credit scores and vehicle financing. Specifically, Hill's 2017 complaint alleged the actions AMMC asked her to take would have amounted to forgery under Neb. Rev. Stat. § 28-603 (Reissue 2016) and would have violated Neb. Rev. Stat. § 28-619 (Reissue 2016), which prohibits issuing a false statement for the purpose of obtaining a financial transaction device.

AMMC moved to dismiss the 2017 complaint, asserting it failed to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6). AMMC argued the state law claim was barred by the doctrine of claim preclusion, because the federal court had already decided the claim on the merits and dismissed it as time barred.

A hearing on AMMC's motion was held, and evidence was offered by both parties and received without objection. The court concluded Hill's wrongful discharge claim was barred by the doctrine of claim preclusion. It specifically found the federal court's dismissal of Hill's state law claim was a final judgment on the merits, was rendered by a court of competent jurisdiction, involved the same issues, and involved the same parties. The district court subsequently entered an order dismissing the complaint and taxing costs to Hill.

Hill filed this timely appeal, which we moved to our docket on our own motion.[5]

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

II. ASSIGNMENTS OF ERROR

Hill assigns, restated, that the district court erred in (1) finding her state law claim was not governed by the general 4-year tort statute of limitations and (2) finding her state law claim was barred by the doctrine of claim preclusion.

III. STANDARD OF REVIEW

[1,2] AMMC moved to dismiss Hill's complaint pursuant to § 6-1112(b)(6), arguing it failed to state a claim under Nebraska law. However, at the hearing on the motion to dismiss, the district court received exhibits from both parties with no objection. When matters outside the pleadings are presented to and not excluded by the court, a motion to dismiss is treated as one for summary judgment.[6] 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 fact or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[7]

[3] The applicability of claim and issue preclusion is a question of law.[8] On a question of law, an appellate court reaches a conclusion independent of the court below.[9]

IV. ANALYSIS

1. District Court Made No Finding on Applicable Statute of Limitations

In her first assignment of error, Hill argues the district court erred in finding her wrongful discharge claim was governed by the limitations period under the NFEPA rather than the general 4-year tort statute of limitations. This assignment of error lacks merit for two reasons.

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[6] See, § 6-1112; *Brothers v. Kimball Cty. Hosp.*, 289 Neb. 879, 857 N.W.2d 789 (2015).

[7] *Brothers, supra* note 6.

[8] *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

[9] *Id.*

First, contrary to Hill's assertion, the district court made no independent finding regarding the nature of Hill's claim or the applicable statute of limitations. Instead, as discussed below, the court's decision was based solely on the conclusion that the doctrine of claim preclusion applied to bar Hill's 2017 wrongful discharge claim. In other words, the district court determined the federal court had already conclusively decided the question of which statute of limitations was applicable, and expressed no opinion on whether the federal court's conclusion was correct.

Moreover, to the extent Hill argues the district court should have concluded the federal court's determination was erroneous, her complaint is of no moment.[10] Hill may not overcome the effect of claim preclusion by collaterally attacking the correctness of the federal court's judgment.[11]

2. Claim Preclusion

[4] In her second assignment of error, Hill argues the district court erred in finding her state law claim was barred by the doctrine of claim preclusion. Under Nebraska law, 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.[12] This is the test the district court applied to determine whether the federal court's dismissal of Hill's state law claim had preclusive effect.

[5,6] Previously, this court has held that a Nebraska state court must apply federal law to determine the preclusive effect

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[10] See *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 500 N.W.2d 566 (1993).

[11] *Id.*

[12] *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018).

of a federal court judgment.[13] The U.S. Supreme Court has also so held.[14] However, in *Semtek Int'l Inc. v. Lockheed Martin Corp.*,[15] the U.S. Supreme Court clarified the application of this rule. It explained that for judgments in federal question jurisdiction cases, federal claim preclusion law applies to the analysis,[16] but for judgments in federal diversity jurisdiction cases, federal common law applies to the preclusion analysis.[17] Federal common law, in turn, incorporates the rules of preclusion applied by state courts in the state in which the federal diversity court sits.[18]

Here, the federal court was exercising federal question jurisdiction over Hill's title VII claim[19] and was exercising supplemental jurisdiction over her state law claim.[20] The U.S. Supreme Court has not squarely addressed whether federal preclusion rules or the federal common law (incorporating state preclusion rules) apply in a case such as this.[21] But this case does not require us to decide the question, because, as relevant here, the only difference between the two bodies of law is a slight difference in how the elements of claim preclusion are stated. And as explained below, whether we analyze these elements under the federal or state authority, we reach the same conclusion.

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[13] *Millennium Laboratories v. Ward*, 289 Neb. 718, 857 N.W.2d 304 (2014); *VanDeWalle, supra* note 10.

[14] *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001).

[15] *Id.*

[16] See, also, *Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008).

[17] *Taylor, supra* note 16; *Semtek, supra* note 14.

[18] *Id.*

[19] See 28 U.S.C. § 1331 (2012).

[20] See 28 U.S.C. § 1367 (2012).

[21] See *Paramount Pictures v. Allianz Risk Transfer*, 31 N.Y.3d 64, 96 N.E.3d 737, 73 N.Y.S.3d 472 (2018).

[7] As noted, under Nebraska law, 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.[22] Under federal law as stated by the U.S. District Court for the District of Nebraska, claim preclusion bars the relitigation of a claim if the prior judgment was a final judgment on the merits rendered by a court of competent jurisdiction and if the same cause of action and the same parties or their privies were involved in both cases.[23]

In this case, Hill concedes that the wrongful discharge claim presented in her 2017 complaint is the same state law claim she presented in her 2016 complaint. And the parties agree the federal court's dismissal of Hill's state law claim was rendered by a court of competent jurisdiction and involved the same parties as this action. The dispute on appeal centers on just two elements of the claim preclusion analysis: whether the federal court's dismissal was on the merits and whether the federal court's dismissal was a final judgment. These elements are considerations under both the state and the federal court's articulation of the doctrine, and our analysis of these elements leads us to the same conclusion regardless of the applicable law.

(a) Judgment Was on Merits

Hill argues the federal court's judgment of dismissal was based on the statute of limitations and therefore was not on the merits. We disagree.

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[22] *Fetherkile, supra* note 12.

[23] *Jenkins v. General Collection Co.*, 538 F. Supp. 2d 1165 (D. Neb. 2008). See, also, *Millennium Laboratories, supra* note 13, citing *Carlisle Power Transmission Products v. The Union*, 725 F.3d 864 (8th Cir. 2013); *VanDeWalle, supra* note 10, citing *Armstrong v. Norwest Bank, Minneapolis, N.A.*, 964 F.2d 797 (8th Cir. 1992).

Here, the issue decided by the federal court was not based solely on the application of a statute of limitations. Rather, the issue decided was whether Hill's state law wrongful discharge claim was a claim under the NFEPA or, as she argues, a common-law claim. The federal court concluded it was a claim subject to NFEPA, and consequently found the claim was time barred under NFEPA's 90-day limitations period. Although the statute of limitations period was part of the federal court's analysis, its dismissal of the claim was not based solely on the statute of limitations.

For the sake of completeness, we note that even if the federal court judgment is characterized as one based on the statute of limitations, it was still on the merits. Generally, federal claim preclusion law holds that a judgment dismissing a claim based on a limitations period is on the merits and bars a second action on the same claim if the limitations period examined by the second court would be the same period examined by the first court.[24] Federal law further holds the second action is barred even though the plaintiff may seek to advance new arguments for avoiding the limitations period.[25]

Although Nebraska has never directly addressed whether a judgment based on the statute of limitations is on the merits, we have held that a judgment is on the merits when it involves a determination of the substantive rights at issue in the action.[26] Judgments falling within this definition include judgments based on the following: the outcome of a trial, the grant of a motion for a directed verdict, the grant of a motion for judgment notwithstanding the verdict, summary judgment, consent judgment, default judgment, and orders to dismiss an

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[24] 18A Charles Alan Wright et al., Federal Practice and Procedure § 4441 (3d ed. 2017). See *Martel v. Stafford*, 992 F.2d 1244 (1st Cir. 1993).

[25] See 18A Wright et al., *supra* note 24.

[26] See *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994) (superseded by statute on other grounds as stated in *Stacy M. v. Jason M.*, 290 Neb. 141, 858 N.W.2d 852 (2015)).

action for failure to state a claim upon which relief can be granted.[27] Conversely, we have held that judgments on jurisdictional or procedural grounds are not on the merits,[28] including: dismissal for lack of personal or subject matter jurisdiction, failure to effect proper or timely service, failure to join a necessary party, and failure to prosecute.[29] In light of this body of case law, we hold, as have other jurisdictions in similar circumstances,[30] that the federal judgment in the instant case is a judgment on the merits.

Here, both the federal district court and a Nebraska state court would apply a 90-day limitations period to a claim subject to the NFEPA. Thus, to the extent the federal judgment was based on the 90-day statute of limitations, it was a judgment on the merits under either federal claim preclusion law or federal common law (incorporating Nebraska law).

(b) Final Judgment

Hill argues the federal court's dismissal of her state law claim was not final for purposes of claim preclusion because it was not a final judgment for purposes of appeal. At the time Hill filed her 2017 complaint in state court, the federal court had dismissed her state law claim for wrongful discharge, but her related title VII claim against AMMC remained pending. The federal court's order dismissing the state law claim did not provide that it was immediately appealable,[31] and Hill contends she was procedurally unable to appeal the ruling on her state

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[27] John P. Lenich, Nebraska Civil Procedure § 8:7 (2018) (and cases cited therein).

[28] *DeVaux, supra* note 26.

[29] Lenich, *supra* note 27.

[30] See, *Avery v. Auto-Pro, Inc.*, 313 Ill. App. 3d 747, 731 N.E.2d 319, 246 Ill. Dec. 791 (2000); *Reese v. Barbee*, 134 N.C. App. 728, 518 S.E.2d 571 (1999); *Nitz v. Nitz*, 456 N.W.2d 450 (Minn. App. 1990); *Meegan S. v. Donald T.*, 64 N.Y.2d 751, 475 N.E.2d 449, 485 N.Y.S.2d 982 (1984).

[31] See 28 U.S.C. § 1292 (2012).

law claim until the title VII claim was disposed of.[32] Because of this, Hill argues the district court erred in treating the federal court's dismissal as a final judgment for purposes of claim preclusion.

We decline to address the merits of this argument because, even if we found it had merit, it would have no effect on the ultimate disposition of this appeal.[33] At oral argument, the parties advised the court that after the appeal in this case was filed, the federal court dismissed Hill's title VII claim on summary judgment. No party appealed that judgment, and the time for appeal has now run. Consequently, regardless of whether the district court erred in treating the federal court's earlier dismissal of the state law claim as final, there is no dispute it is final now for purposes of claim preclusion under both Nebraska law and federal law. The doctrine of claim preclusion bars Hill from asserting her state law claim in another court, and remanding the matter with directions to make a new finality determination would serve no purpose.

V. CONCLUSION

Based on the foregoing, the wrongful discharge claim asserted in Hill's 2017 complaint is barred by the doctrine of claim preclusion. We therefore affirm the district court's dismissal.

Affirmed.

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[32] See, 28 U.S.C. § 1291 (2012); *Spring Creek Expl. & Prod. v. Hess Bakken Inv.*, 887 F.3d 1003 (10th Cir. 2018) (holding final decision is one that ends litigation on merits and leaves nothing for court to do but execute judgment).

[33] See *Eilts v. Bendt*, 162 Neb. 538, 76 N.W.2d 623 (1956) (case will not be reversed for errors against party not entitled to succeed in any event).

Nebraska Supreme Court
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Debra J. Junker et al., appellants, v. Elwyn Carlson and Joel Carlson, defendants and third-party plaintiffs, appellees, SLS Partners, appellee, and Michael Carlson, also known as Mike Carlson, third-party defendant, appellee.

915 N.W.2d 542

Filed July 6, 2018. No. S-17-356.

1. **Actions: Trusts: Equity.** An action to impose a constructive trust is an equitable action.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. ____: ____. On appeal from an equity action, when credible evidence is in conflict on material issues of fact, the court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Trusts: Property: Title: Unjust Enrichment: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.
5. **Trusts: Property: Title: Equity: Proof.** Regardless of the nature of the property upon which a constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
6. **Appeal and Error.** Appellate courts do not consider arguments and theories raised for the first time on appeal.

Appeal from the District Court for Kearney County: Terri S. Harder, Judge. Affirmed.

George G. Vinton for appellants.

Steve Windrum, of Malcom, Nelsen & Windrum, L.L.C., for appellees Elwyn Carlson and Joel Carlson.

Donald J. Pepperl, P.C., L.L.O., for appellee SLS Partners.

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

Cassel, J.

I. INTRODUCTION

A trust's grantors and beneficiaries asserted claims for constructive trusts against other parties who had dealt with the trustee. After a bench trial, the district court dismissed the claims. Because we agree that the claims failed either for lack of proof or because of Neb. Rev. Stat. § 30-38,101 (Reissue 2016), which protects third parties dealing in good faith with a trustee, we affirm.

II. BACKGROUND

In 1997, Dale E. Carlson and Carol A. Carlson (collectively Grantors), husband and wife, conveyed certain real estate to a trust known as Mill Creek Trust Company. Although the trust instrument is not a part of our record, evidence and testimony established that the intended beneficiaries of this trust were Grantors' three children: Debra J. Junker, Lynn P. Carlson, and Mike Carlson. The conveyed real estate included farmland, several buildings, and one residential home. Grantors lived in this residential home until 2006.

The property was conveyed between trusts in order to avoid taxation and Grantors' creditors until it was held by the Aebeskiver Company Trust (the Trust), of which Roger Wells (Trustee) was trustee. In his deposition, Trustee acknowledged

that the property was conveyed to the Trust for the benefit of Grantors' children.

Grantors and two of the three beneficiaries brought suit against (1) Trustee, (2) a buyer of the property, and (3) tenants who had leased a portion of the property. There were two other defendants whom we do not address, because they were dismissed from the suit prior to judgment and are not relevant for the purposes of this appeal. The suit asserted that the defendants had knowingly participated in certain transactions which constituted a breach of Trustee's fiduciary duties. The third beneficiary was later added as a third-party defendant, but his interests aligned with the other trust beneficiaries and he was represented by their counsel at trial. For convenience, we will refer to the Grantors and the three beneficiaries collectively as "Claimants." And we will disregard technical distinctions in pleadings between the trust beneficiaries.

After judgment was entered against Trustee in his separate bankruptcy action, he was dismissed from the suit. After the dismissal of Trustee, the contested issues were limited to (1) whether the transactions constituted a breach of trust and, if so, whether the buyer and tenants knowingly participated in those breaches and (2) whether the buyer and tenants were unjustly enriched.

1. Overview of Transactions

In December 2001, Trustee leased the farmland portion of the trust property to Joel Carlson and Elwyn Carlson (collectively Tenants), with the lease to expire in 2007. While the lease was still in place, Trustee sold the property to SLS Partners (Buyer), a company that provides capital to property owners by buying their property and leasing it back with an option to repurchase. The terms of the sale were such that, in exchange for the property, Buyer paid $200,000, as well as executed a lease and an option agreement. Buyer agreed to lease the property back to the seller for $26,405 per year, and the agreement provided the seller with the option to purchase

the property back in the first 4 years of the lease at a price which increased each year the option was not exercised.

In July 2004, even though the property had been sold to Buyer, Trustee entered into an agreement to amend the original lease with Tenants, extending it from February 2007 to February 2014.

In January 2007, the Trust exercised its option to repurchase the trust property from Buyer for $294,000 and simultaneously sold it to a third party for $515,000. In order to clear the title prior to closing, the Trust negotiated with and paid Tenants $152,000 for the relinquishment of the remainder of the extended lease.

2. District Court Judgment

In their operative complaint, Claimants alleged that Buyer participated in Trustee's breaches of trust and improper exercise of trust powers, resulting in a net damage to the beneficiaries of $133,000. They asserted similar claims against Tenants and alleged that they incurred $152,000 in damages. In their prayer for relief, Claimants requested to have said moneys "held in trust for them."

After a bench trial, the district court dismissed the case, finding that Buyer and Tenants were all entitled to protection under § 30-38,101, which protects third parties dealing in good faith with a trustee. Additional facts and findings from the trial and the judgment, styled as an order, are set forth in our analysis.

Claimants appealed, and we moved the case to our docket.[1]

III. ASSIGNMENTS OF ERROR

Claimants assign, combined and restated, that the district court erred in failing to (1) find that Buyer acted in bad faith when purchasing the trust property, (2) find that Tenants acted in bad faith when they entered into the lease extension with

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

the Trust and when they received $152,000 for the relinquishment of the lease, (3) find that the $152,000 payment made to Tenants constituted unjust enrichment, (4) find that the $152,000 payment to Tenants was made under duress and coercion, and (5) grant judgment in favor of Claimants.

IV. STANDARD OF REVIEW

[1] The parties disagree on whether the asserted claims sounded in law or equity. The discrepancy apparently stems from the parties' attempts to separately categorize the claims for restitution and unjust enrichment as theories of recovery alternative to a constructive trust. However, these "alternative" theories of recovery are grounded in Claimants' action to impose a constructive trust,[2] as evidenced by the prayer for relief that the alleged damages be "held in trust for them." And an action to impose a constructive trust is an equitable action.[3]

[2,3] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[4] And in such an appeal, when credible evidence is in conflict on material issues of fact, the court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[5]

V. ANALYSIS

[4,5] A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property

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[2] See, e.g., *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002) (constructive trust is equitable remedy intended to prevent unjust enrichment).

[3] *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015).

[4] *Estates at Prairie Ridge Homeowners Assn. v. Korth*, 298 Neb. 266, 904 N.W.2d 15 (2017).

[5] *O'Connor v. Kearny Junction*, 295 Neb. 981, 893 N.W.2d 684 (2017).

to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.[6] Regardless of the nature of the property upon which a constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.[7]

We have previously held that a constructive trust may be imposed where (1) a third party acquires trust property from a trustee, (2) the third party had notice that the transfer is in breach of trust, and (3) the beneficiary of the trust can in equity compel the third party to restore the property to the trust.[8] But a third party "who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power."[9]

In this case, it is undisputed that both Buyer and Tenants received interest in trust property from Trustee. However, Buyer and Tenants assert that they had no knowledge Trustee's actions were breaches of trust and that they are protected by § 30-38,101, because they dealt with Trustee in good faith. Therefore, the issues are whether Buyer and Tenants were unjustly enriched and, if so, whether they were nonetheless protected by § 30-38,101.

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[6] *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015).

[7] *Id.*

[8] See *Bend v. Marsh*, 145 Neb. 780, 18 N.W.2d 106 (1945).

[9] § 30-38,101(a).

1. Entitlement to Constructive Trust Against Buyer

In their brief on appeal, Claimants maintain that the sale of the real estate to Buyer and the following lease and option were not executed in good faith and were breaches of trust of which Buyer had actual knowledge. However, the evidence is unclear whether the sale was in fact a breach of trust, let alone whether Buyer had reason to believe that it constituted a breach of trust. In fact, the record is replete with testimony and evidence that Grantors knew of and participated in the sale of the land to Buyer.

Grantors were present when Buyer inspected the land before the sale, and Carol testified that Trustee explained the transaction to them "[j]ust about word for word" the way that Buyer's counsel did in his opening statement at the bench trial. In his opening statement, Buyer's counsel stated:

> [Buyer] buys the property, [Buyer] leases the property back to the seller for a period of years, and during the lease the seller is given an option to repurchase the property with the option price usually escalating on an annual basis.
>
> [Buyer] is in the business to make money. Their objective is to receive or make approximately 18 percent return on their investment. [Buyer] wants to make their investment return. They do not want to own the real estate.

Dale also testified that while Buyer's partners were inspecting the property, they mentioned that they were interested in purchasing it. At that point in time, Dale asked Trustee, "'What is going on?'" and Trustee supposedly responded, "'I'm the trustee. I can do what I want.'" When Dale asked Trustee why the property needed to be sold, Trustee responded, "'Well, I'm just doing it.'" Although Dale testified at trial that he did not agree to sell the land in 2004, he testified in an earlier affidavit that he "'still had strong faith in the trust arrangement and in [Trustee] as trustee through 2005.'" Dale also

admitted that he did not consult an attorney about Trustee's actions until 2007.

One of Buyer's partners testified that both Trustee and Dale had agreed to the terms of the sale before Buyer came to look at the property. The partner reiterated the terms of the agreement in Dale's presence and testified that Dale expressed that he thought it was "'a great deal.'" According to the partner, Dale was "high" and "excited" about making an investment in some sort of medical device, and he wanted the deal to close quickly so that he could get the money for that investment. Dale allegedly asked the partners whether they would be interested in investing too, but they declined.

As the sale proceeded, Buyer relied on counsel, the seller's counsel, and the title companies to facilitate the closing process. Before closing, an agent of the title company called Trustee's counsel to acquire a corrective deed. Three weeks later, Grantors executed a warranty deed, granting the property to the Trust. Then, on the day of closing, Grantors executed an affidavit stating, among other things, that they were the owners and sellers of the trust property and that there were no encumbrances on the land. When confronted with the document at trial, Carol acknowledged that her signature was on the affidavit, but stated that she could not remember signing it.

Finally, the closing statement shows, and Dale testified, that $35,000 of the proceeds from the sale was used to pay an earlier judgment debt of Dale's.

On this evidence, the district court found that Grantors were participants, and not simply unknowing bystanders, to the deal with Buyer. We agree. It would be difficult to find Buyer had notice that Trustee was exceeding or improperly exercising his authority in the sale where Grantors personally prepared documents necessary for closing.

Claimants additionally argued that Buyer should have known that the sale was a breach of trust, because Buyer purchased the land for less than half the market value, leased

the property back for more than the Trust was receiving from Tenants, granted an option to purchase "with a steep escalating option price," and received "an excessive investment return." However, these arguments attack the propriety of the sale, and a party "who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise."[10]

Because Buyer dealt in good faith with Trustee and had no reason to believe they participated in a breach of trust, Buyer was protected under § 30-38,101. The district court did not err in dismissing the claims for a constructive trust against Buyer.

2. Entitlement to Constructive Trust Against Tenants

[6] Claimants assert that Tenants were unjustly enriched when they received the payment of $152,000 for the relinquishment of their lease, because (1) the original lease, which was drafted by one of the Tenants, was unfair and constituted a violation of an attorney or trusted relationship; (2) the lease extension and relinquishment lacked consideration; (3) Tenants had knowledge that the Trust did not own the land when they entered into the agreement to extend the lease; and (4) the relinquishment payment was made under duress and coercion. However, Claimants failed to plead their theory of duress and coercion in the court below. Because appellate courts do not consider arguments and theories raised for the first time on appeal,[11] we decline to consider the theory of duress and coercion.

(a) Original Lease

We first dispose of Claimants' attack upon the original lease with Tenants. Claimants complain that Joel served as Dale's

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[10] § 30-38,101(b).

[11] *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

attorney and abused a trusting relationship when he wrote an unfair lease. In the argument section of their brief, Claimants' sole basis for claiming the lease was unfair was that it contained a provision allowing Tenants to terminate the lease under certain circumstances. However, Tenants never terminated the lease under that provision. Accordingly, even assuming that Joel abused a trusting relationship and that the particular lease provision was unfair, we fail to see how Tenants were unjustly enriched by this provision.

(b) Consideration for Lease Extension and Relinquishment

Claimants next argue that Tenants were unjustly enriched because they were paid $152,000 to relinquish a lease that they paid nothing to obtain. However, this argument lacks merit, because there was adequate consideration for both the extension of the lease and the relinquishment.

When Tenants entered into the amendment that extended the term of the original lease, they agreed to pay rent in exchange for the Trust's leasing the farmland to them for the new duration of the lease. According to Claimants' argument, there must be some extra consideration, apart from the terms contained within the original lease, in order for there to be consideration for the extension. They cite no authority to support that proposition, and we have not found any.

There was also adequate consideration for the relinquishment. Under the original lease and its amendment, Tenants had the right to farm the land until February 2014. In exchange for the relinquishment of that right, the parties negotiated that Tenants would be paid $152,000. Joel testified that this amount was based off the amount of projected earnings from farming the ground. Because the $152,000 payment compensated Tenants for the lost profits resulting from the loss of the right to farm the ground, we conclude that Tenants were not unjustly enriched by retaining that payment.

(c) Validity of Lease Extension

In the remaining argument regarding lease extension, the issue is whether Tenants were aware, at the time of the extension, that the Trust did not own the property and that Trustee no longer had authority to execute the extension. In our de novo review, we conclude that the evidence was insufficient to establish that knowledge.

Tenants testified that at the time of the extension, they believed that the Trust still owned the land and that Trustee had the authority to enter into the lease, because that is what Dale represented to them. They testified that they did not discover that the land had been sold to Buyer until they went to the "ASCS office" to "sign up" the farmland for an incentive program, which was after they had entered into the extension. And, as the district court noted, there was no reason to think that Tenants would knowingly enter into a lease with someone who neither owned the property nor had the legal authority to bind the owner.

Because Claimants failed to prove that Tenants were unjustly enriched, it is unnecessary to consider whether they were also protected by § 30-38,101. The district court did not err in dismissing the claims for a constructive trust against Tenants.

VI. CONCLUSION

For the reasons set forth above, we affirm the district court's judgment dismissing the claims set forth in the operative complaint.

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

Ray Anderson, Inc., a Nebraska corporation, appellee and cross-appellant, v. Buck's, Inc., a Nebraska corporation, appellant and cross-appellee.

915 N.W.2d 36

Filed July 6, 2018. No. S-17-816.

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, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
4. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
5. ____. In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
6. **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.
7. **Contracts.** The meaning of an ambiguous contract is generally a question of fact.
8. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.

9. ____. The court must accord clear terms their plain and ordinary meaning as an ordinary or reasonable person would understand them.
10. ____. The fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
11. ____. A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
12. ____. Extrinsic evidence is not permitted to explain the terms of a contract that is unambiguous.
13. ____. Instruments made in reference to and as part of the same transaction are to be considered and construed together.
14. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Stephen M. Kalhorn, Benjamin W. Hulse, of Blackwell Burke, P.A., and John P. Passarelli, of Kutak Rock, L.L.P., for appellant.

Aaron F. Smeall and Jacob A. Acers, of Smith, Slusky, Pohren & Rogers, L.L.P., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Daugherty, District Judge.

Daugherty, District Judge.

In this declaratory judgment action, the district court for Douglas County determined that a contract between Ray Anderson, Inc. (Anderson), and Buck's, Inc., to supply "BP-branded" motor fuel did not prevent Anderson from contracting with a competitor, Western Oil, Inc., to rebrand fuel sold at some of Anderson's facilities. The court further found that Buck's held a unilateral right to terminate the fuel supply agreement. Upon our de novo review, we reach the same conclusion. Therefore, we affirm.

BACKGROUND

Parties and Governing Contracts

Anderson is a Nebraska corporation operating retail gasoline stations and convenience stores in Omaha, Nebraska. Buck's is a Nebraska corporation which also operates retail gasoline stations in Omaha. In addition, Buck's acts as a "jobber" by purchasing fuel from BP Products North America Inc. (BP) and selling BP-branded fuel to individual gasoline stations, including to some of Anderson's stations.

Before Anderson entered into the BP-branded fuel supply contract with Buck's, Anderson was also a "jobber" and had purchased BP-branded gasoline directly from BP. In 2007, Anderson was unable to meet its gasoline sales commitments to BP and incurred $840,000 in volume fees. Buck's agreed to "bail out" Anderson and assumed Anderson's contractual rights and obligations under its "jobber" agreement with BP.

On July 30, 2007, the parties entered into a series of agreements. The parties executed a "Jobber Purchase and Sale Agreement," in which Buck's agreed to (1) pay Anderson $300,000, (2) assume Anderson's $840,000 liability to BP, and (3) assume Anderson's volume sales commitments to BP. The parties also entered into a fuel supply contract entitled the "Subjobber Supply Agreement" (the Agreement), which incorporated a rider entitled the "Electronic Dealer Delivery Plan" (the EDDP). The parties' rights under the Agreement are at issue in this appeal.

In December 2015, Anderson negotiated terms with Western Oil, a competitor of BP, to sell Shell Oil Company-branded gasoline at four of Anderson's stations. Anderson claims that on January 11, 2016, it informed Buck's of its agreement with Western Oil. Buck's issued cease-and-desist letters to Anderson and Western Oil the following day. The letter Buck's sent to Anderson stated:

> Buck's . . . and . . . Anderson executed [the] Agreement . . . .

> It has been brought to our attention that you may be contemplating the breach of [the] Agreement by entering into a like contract with other suppliers.
>
> . . . .
>
> . . . Paragraph 20(b) of the Agreement imposes upon you an affirmative duty to avoid entering into an agreement with other suppliers, which would breach [the] Agreement.

Anderson filed suit seeking a declaration that it was not prohibited from rebranding under the Agreement, and Buck's counterclaimed, seeking a declaration that the Agreement required Anderson to buy BP-branded fuel and damages for anticipatory repudiation.

District Court Proceedings

Anderson's complaint requested the court to declare, pursuant to Nebraska's Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2016), the rights of the parties under the Agreement; to find that the Agreement does not prohibit Anderson from withdrawing and rebranding some of its facilities; and to determine that if Anderson sought to terminate the Agreement, it could do so upon reasonable notice.

The answer and counterclaim filed by Buck's alleged that the Agreement requires Anderson to buy BP-branded fuel from Buck's for sale at Omaha-area facilities identified in the Agreement. The counterclaim stated, "Read together, Paragraphs 20(b) and 36 [of the Agreement] impose an affirmative duty on [Anderson] to . . . avoid discontinuing . . . the sale of [Buck's]-supplied BP-branded gasoline." It further stated, "[Anderson's] affirmative duty is extremely important to [Buck's]," and "[t]his re-branding will send the message to potential customers that [Anderson] endorses another brand, and no longer stands by BP." Buck's claimed Anderson's agreement with Western Oil constituted a material breach

of the Agreement and requested declaratory relief, injunctive relief, and monetary damages.

Both parties moved for summary judgment on their declaratory judgment claims, and following a hearing, the district court granted Anderson's motion and denied the motion filed by Buck's. In considering the motion filed by Buck's, the court analyzed provisions within the Agreement, including section 19, titled "Grounds for Termination and Nonrenewal"; section 20(b), found under the section titled "Procedures for Termination or Nonrenewal"; and section 36, titled "Franchise Relationship." The court found it was unclear whether these provisions of the Agreement could be construed together to support the position of Buck's, and stated that "the Agreement itself is, at the very least, ambiguous as to whether Anderson rebranding its stations would violate Section 20(b) of the Agreement." Based upon its review of the Agreement alone, the court denied the motion filed by Buck's.

The court continued its analysis and discussed provisions of the EDDP in reviewing Anderson's motion. The court pointed to section 12 of the EDDP, titled "Independent Business," which provides that "[n]othing herein shall obligate [Buck's] to sell or [Anderson] to purchase products, nor preclude [Anderson] from selling competitive-brand products . . . provided there occurs no infringement of [the] Branded Trade Identities" of Buck's. The court determined that section 12 of the EDDP was clear and unambiguous and that the Agreement and the EDDP must be read together as a whole. The court concluded that "nothing within either the Agreement or the EDDP prohibits Anderson from selling competitive-brand products."

The court then found that even if Buck's interpretation of its rights under the Agreement were correct, the EDDP provides that "in the event of a conflict between [the Agreement and the EDDP], the terms of the [EDDP] shall supersede any conflicting provisions elsewhere." The court found Anderson's

right to rebrand under section 12 of the EDDP controlled over any affirmative duty to avoid rebranding imposed by the Agreement.

In a separate order, the court rejected Anderson's argument that it may terminate the Agreement upon reasonable notice. The court determined that the Agreement grants Buck's "an unambiguous and valid unilateral right of termination." The court stated, "Anderson cannot, by invoking [its] contracted for right to rebrand, also circuitously assume the uncontracted for power to terminate the Agreement."

Buck's appealed, Anderson filed a cross-appeal, and we moved the appeals to our docket.

ASSIGNMENTS OF ERROR

Buck's assigns, restated, that the district court erred by (1) interpreting the Agreement in a way to permit Anderson to discontinue buying BP-branded fuel from Buck's and commence buying Shell Oil Company-branded fuel from a third-party suppler, notwithstanding affirmative duties imposed upon Anderson by the Agreement; (2) finding that the EDDP released Anderson of its obligation to buy fuel from Buck's and concluding that the EDDP superseded conflicting provisions in the Agreement; and (3) failing to resolve contractual ambiguities through a trial.

On cross-appeal, Anderson assigns that the district court erred by (1) finding that Anderson has no right to terminate the Agreement and the EDDP and (2) failing to find that Anderson can terminate upon reasonable notice.

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, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3,4] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.[3] The meaning of a contract and whether a contract is ambiguous are questions of law.[4]

ANALYSIS

We first address the appeal filed by Buck's regarding the issue of whether the Agreement and the EDDP prevent Anderson from rebranding fuel sold at some of its stations. We then address Anderson's cross-appeal regarding the issue of whether Anderson has a contractual right to terminate the Agreement. In both appeals, we find the plain language of the Agreement and the EDDP compels affirmance of the district court's decision.

[5-7] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.[5] 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.[6] The meaning of an ambiguous contract is generally a question of fact.[7]

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[1] *Walters v. Colford*, 297 Neb. 302, 900 N.W.2d 183 (2017).

[2] *Id.*

[3] *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004).

[4] *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 868 N.W.2d 67 (2015).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8-12] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[8] The court must accord clear terms their plain and ordinary meaning as an ordinary or reasonable person would understand them.[9] The fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.[10] A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.[11] Extrinsic evidence is not permitted to explain the terms of a contract that is unambiguous.[12]

Buck's Appeal

The issue in the appeal filed by Buck's is whether the Agreement imposes an affirmative duty upon Anderson not to rebrand. We conclude, as a matter of law, that the terms of the Agreement and the EDDP are unambiguous and do not prevent Anderson from rebranding. As a result, the court did not err when it denied the motion for summary judgment filed by Buck's.

Buck's asserts that numerous provisions in the Agreement preclude Anderson from rebranding. Buck's points to sections 6, 19, 20, and 36 of the Agreement and contends that these provisions require Anderson to sell BP-branded fuel purchased from Buck's and thus prohibit rebranding. Anderson, for its

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[8] *Frohberg Elec. Co. v. Grossenburg Implement*, 297 Neb. 356, 900 N.W.2d 32 (2017).

[9] *Kasel v. Union Pacific RR. Co.*, 291 Neb. 226, 865 N.W.2d 734 (2015).

[10] *Id.*; *Sack Bros. v. Tri-Valley Co-op.*, 260 Neb. 312, 616 N.W.2d 786 (2000).

[11] *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011); *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

[12] *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015).

part, makes counterarguments that those same terms of the Agreement do not prohibit it from selling fuel purchased from another source.

[13] Our inquiry as to the parties' agreement concerning rebranding, however, is not limited to the Agreement. The parties also entered into the EDDP on the same day as the Agreement. We consider and construe together instruments made in reference to and as part of the same transaction.[13] It is particularly clear that the Agreement and the EDDP must be construed together, because the agreements are related and are part of one transaction. The parties agreed that they are actually part of the *same agreement*: The first line of the EDDP states that it is "attached to and made a part of [the Agreement] dated [July 30, 2007,] between [Buck's] and [Anderson]."

The EDDP directly speaks to rebranding. Section 12 of the EDDP, titled "Independent Business," provides that "[n]othing herein shall obligate [Buck's] to sell or [Anderson] to purchase products, nor preclude [Anderson] from selling competitive-brand products . . . ." Buck's is forced to concede that section 12 pertains to rebranding, but it contends that the word "herein" limits the scope of that language. According to Buck's, "'herein'" must be understood as meaning "'in this'"[14] and thus section 12 of the EDDP should be understood as governing the EDDP alone. Buck's argues the EDDP merely concerns fuel delivery and does not alter terms within the Agreement which preclude Anderson from selling competitive-brand products. We are not persuaded.

The attempt by Buck's to limit the scope of section 12 via the word "herein" fails because the parties explicitly made the EDDP part of the Agreement. Accordingly, the word "herein" must refer to both the Agreement and the EDDP.

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[13] *McCord & Burns Law Firm v. Piuze*, 276 Neb. 163, 752 N.W.2d 580 (2008).

[14] Brief for appellant at 14.

Because the Agreement and the EDDP together constitute one agreement, it is difficult to see what purpose section 12 of the EDDP would serve under the interpretation provided by Buck's.

Having concluded that section 12 of the EDDP applies to both the Agreement and the EDDP, this case becomes considerably easier to resolve. Section 12 makes clear that there is nothing in the Agreement (or EDDP) that precludes Anderson from rebranding. And while we have not forgotten the various arguments Buck's premised on sections 6, 19, 20, and 36 of the Agreement, those arguments lose all of their force in light of the clear language permitting Anderson to rebrand in section 12 of the EDDP.

The most Buck's could accomplish with its arguments based on the terms of the Agreement would be to show a conflict between the Agreement and the EDDP. But that would not be enough, because section 10 of the EDDP directly speaks to that possibility. It provides that to the extent there is any conflict between the terms of the Agreement and the terms of the EDDP, the EDDP's terms shall control. Accordingly, there is no way Buck's can show that there is contractual ambiguity as to whether Anderson may rebrand, let alone show that the parties' agreements unambiguously prohibit rebranding.

[14] Because the unambiguous terms of the parties' agreements permit rebranding, we find that the district court correctly denied the motion for summary judgment filed by Buck's. Because we find that the terms of the Agreement and the EDDP are unambiguous, we need not address the final assignment of error of Buck's that the court erred by not resolving contractual ambiguities through a trial. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[15]

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[15] *Woodmen of the World v. Nebraska Dept. of Rev.*, 299 Neb. 43, 907 N.W.2d 1 (2018).

Anderson's Cross-Appeal

The issue in Anderson's cross-appeal is whether the Agreement affords Anderson a right of termination. We conclude, as a matter of law, that the terms of the Agreement are unambiguous and afford Anderson no right of termination. As a result, the court did not err when it denied that aspect of Anderson's motion for summary judgment.

Anderson acknowledges the Agreement grants Buck's the sole authority to terminate and is silent regarding any right of termination held by Anderson, and Anderson does not challenge the enforceability of a unilateral right to terminate a contract under Nebraska law. Anderson is concerned, however, that the Agreement is for an indefinite period and may no longer be "commercially reasonable,"[16] especially where the Agreement does not obligate Anderson to buy BP-branded fuel exclusively from Buck's. Anderson argues this court should fill the gap under Nebraska's Uniform Commercial Code, specifically Neb. U.C.C. § 2-309(2) and (3) (Reissue 2001), in order to grant Anderson both an uncontracted-for right of termination and to provide that such right of termination is effective upon reasonable notice. This we will not do.

Sections 19 and 20 of the Agreement contemplate that the power to terminate is held by only Buck's, and there are no similar provisions in the Agreement or the EDDP providing such a right to Anderson. Section 36 provides that even in a situation such as this case, where Anderson has elected to rebrand, Anderson would not have the power to terminate and the Agreement "shall remain in effect."

Section 2-309(2) of the Uniform Commercial Code states, "Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party." Buck's argues that § 2-309(2) does not apply, because the parties "otherwise agreed" that Buck's

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[16] Brief for appellee on cross-appeal at 22.

has the sole power to terminate. The district court found that "[§] 2-309(2) . . . cannot be used to contradict the express provisions of the Agreement." We agree with Buck's and the district court, and we find Buck's has the sole right to terminate the Agreement. We therefore affirm the judgment of the district court.

CONCLUSION

We determine the district court did not err when it determined that the Agreement and the EDDP do not prohibit Anderson from rebranding fuel sold at some of its stations and that Buck's holds the sole right to terminate the Agreement. For the reasons explained above, we affirm.

Affirmed.

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

In re Interest of Paxton H., a child under 18 years of age. Nebraska Department of Health and Human Services, appellant, v. Patrick H. and Penny H., appellees.

915 N.W.2d 45

Filed July 6, 2018. No. S-17-1182.

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: 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. **Juvenile Courts: Costs: Final Orders.** An order in a juvenile case which directs the Department of Health and Human Services to pay for the costs of treatment is a final order for purposes of Neb. Rev. Stat. § 25-1902 (Reissue 2016).
4. **Juvenile Courts.** Juvenile courts have the authority to assent to and dissent from decisions of the Department of Health and Human Services with respect to what care, placement, services, and expenditures are in the best interests of juveniles under its care and custody.
5. **Appeal and Error.** Appellate courts will not consider issues on appeal that were not presented to or passed upon by the trial court.

Appeal from the Separate Juvenile Court of Lancaster County: Toni G. Thorson, Judge. Affirmed.

Douglas J. Peterson, Attorney General, and C.J. Roberts, Special Assistant Attorney General, for appellant.

Lisa Gonzalez, of Johnson & Pekny, L.L.C., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Johnson, District Judge.

Papik, J.

The separate juvenile court of Lancaster County ordered the Nebraska Department of Health and Human Services (DHHS) to arrange and pay for Paxton H., a juvenile in its care and custody, to receive mental health services at a facility in Kansas. DHHS challenges that order. While DHHS acknowledges that Paxton requires certain services, it contends that Paxton can receive those services in Nebraska and that local services would better serve his needs. Following our de novo review of the record, we determine that the juvenile court's order was in Paxton's best interests, and we therefore affirm.

BACKGROUND

In the sections below, we set forth how Paxton came into the custody of DHHS and the circumstances that led to the order at issue in this appeal.

Paxton's Placement in DHHS Custody.

On December 29, 2014, the State of Nebraska filed a petition alleging that Paxton, then 11 years old, was without proper support through no fault of his parents and therefore was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2014). Following a hearing, the juvenile court adjudicated Paxton as a child within the meaning of § 43-247(3)(a).

In its adjudication order, the juvenile court noted Paxton's diagnoses of posttraumatic stress disorder, attention deficit hyperactivity disorder, traumatic brain injury, disruptive mood dysregulation disorder, and reactive attachment disorder. The juvenile court found that Paxton had been placed outside the family home more than once due to assaultive, defiant, and destructive behaviors that his parents could not control. It

further found that Paxton had recently returned to the family home from a residential treatment facility and, upon his return, resumed his assaultive behavior. The juvenile court determined that Paxton's parents could not safely maintain him in their home or provide the treatment and services he needed. The juvenile court ordered DHHS to maintain Paxton in its care and custody, pending placement at a psychiatric residential treatment facility.

Paxton's Placements at KidsTLC in Kansas.

As a result of disruptions at past placements, no residential treatment facility in Nebraska would accept Paxton, but KidsTLC, a residential treatment facility in Olathe, Kansas, would. Paxton was admitted there in January 2015. Although the record does not disclose Paxton's discharge date, it appears that he remained at KidsTLC for about a year.

Just a few months after returning to his parents' home from KidsTLC, Paxton was again removed due to aggressive behaviors. After placements in multiple foster homes and in respite care, Paxton was returned to KidsTLC in July 2016.

July 2017 Review Hearing.

In July 2017, the juvenile court conducted a review hearing. Paxton was still at KidsTLC at this point, but Laura Milburn, Paxton's DHHS caseworker, testified at the hearing that he was having home visits with his parents almost every other week and that these visits were going well. She stated that KidsTLC recommended that Paxton transition to his parents' home in August 2017.

Milburn acknowledged that DHHS accepted the recommendations of a recent psychological evaluation of Paxton. This evaluation recommended that Paxton receive various services and treatment including regular meetings with a physician and psychiatrist to manage his psychotropic medications as well as individual psychotherapy. Milburn also

acknowledged that, if Paxton were discharged to his parents' home, he would need services at school, individual therapy, and weekly bloodwork to monitor his medications, as well as other services. While Milburn had initiated the processes to obtain some of these services, none of them were in place for Paxton at the time of the July 2017 hearing.

In its order following the July 2017 hearing, the juvenile court approved DHHS' case plan, as modified. In particular, the juvenile court ordered Paxton's transition home upon discharge from KidsTLC. The juvenile court ordered DHHS "to ensure that necessary services are available to Paxton . . . immediately upon his discharge to the family home." The juvenile court went on to provide a nonexclusive list of necessary services consistent with the recent psychological evaluation.

Dispute Regarding Paxton's Care.

Paxton was discharged from KidsTLC to his parents' home on September 30, 2017. Shortly thereafter, a dispute arose between Paxton's parents and DHHS regarding his care. Paxton's parents asked DHHS to arrange for Paxton to periodically travel to and participate in a transition program at KidsTLC. Paxton's therapist during his time at KidsTLC believed that Paxton's participation would smooth his transition home and assist him in remaining there. DHHS refused to arrange for participation in the KidsTLC transition program. DHHS personnel concluded that Paxton and his family should utilize services in Nebraska, rather than services multiple hours away in Kansas.

Paxton's parents then filed a motion for an order directing DHHS to arrange and pay for him to participate in the KidsTLC transition program. The juvenile court held a hearing on that motion on October 10, 2017. At the hearing, Milburn acknowledged that DHHS had declined to provide the KidsTLC services requested by Paxton's parents

and recommended by his therapist. She testified that DHHS regarded respite providers in Nebraska to be more suitable for Paxton's transition. Milburn conceded, however, that DHHS had not provided services immediately upon Paxton's discharge, as ordered by the juvenile court. She also admitted that Paxton's Medicaid had not yet been activated and that as a result, Paxton could not see the therapist his parents had identified to work with him, obtain a refill of his medication, or see a psychiatrist concerning his medication. Milburn acknowledged that Paxton had not received any type of therapy in the 11 days since his discharge from KidsTLC.

At the close of the hearing, the juvenile court observed that DHHS had not presented any viable alternative to the KidsTLC transition program. The juvenile court noted that it did not have information as to how long Paxton would need services at KidsTLC, but that it was "in everyone's best interest" that Paxton eventually receive services in Nebraska.

In an order entered on October 11, 2017, the juvenile court found that it was in Paxton's best interests to participate in the KidsTLC transition program and ordered that DHHS immediately arrange and pay for him to do so. It observed that DHHS had not provided an alternative plan and that such a plan was "critical" given previous failed transitions home as a result of a gap in services. While directing Paxton's participation in the KidsTLC transition program, the juvenile court indicated that it would continue to monitor services provided to Paxton and review whether participation in the KidsTLC transition program was necessary. The juvenile court scheduled a review hearing for January 2018 and added that the review hearing could be advanced upon request of the parties. DHHS then filed this appeal.

ASSIGNMENT OF ERROR

DHHS assigns, rephrased, that the juvenile court erred in ordering DHHS to arrange and pay for Paxton to participate in the KidsTLC transition program.

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 Josue G.*, 299 Neb. 784, 910 N.W.2d 159 (2018).

ANALYSIS

Jurisdiction.

[2,3] Before reaching the merits of DHHS' appeal, we pause to confirm our jurisdiction to do so. 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. *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017). 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." We have held that an order directing DHHS to pay for the costs of treatment is a final order for purposes of Neb. Rev. Stat. § 25-1902 (Reissue 2016). See, *In re Interest of J.M.N.*, 237 Neb. 116, 464 N.W.2d 811 (1991); *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989), *citing In re Interest of G.B., M.B., and T.B.*, 227 Neb. 512, 418 N.W.2d 258 (1988). We thus have jurisdiction here.

Merits of DHHS' Appeal.

Turning now to the merits, DHHS argues that the juvenile court erred in ordering DHHS to arrange and pay for Paxton to participate in a transition program at KidsTLC following his discharge. DHHS contends that it is not in Paxton's best interests to participate in a transition program several hours from his parents' home. Instead, DHHS asserts that it would be better for Paxton to receive "respite support" from providers in Nebraska. Brief for appellant at 10.

DHHS does not have the authority to unilaterally determine where Paxton should be placed and how he should be treated.

Neb. Rev. Stat. § 43-285 (Reissue 2016) grants broad authority to juvenile courts to make orders which are in the best interests of juveniles under their jurisdiction. Section 43-285(1) provides, in relevant part:

> When the court awards a juvenile to the care of [DHHS], . . . the juvenile shall, unless otherwise ordered, become a ward and be subject to the legal custody and care of [DHHS]. . . . [DHHS] shall have authority, *by and with the assent of the court*, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it.

(Emphasis supplied.)

[4] Through § 43-285(1), the Legislature removed from DHHS complete control of minors whose care was given to DHHS under the juvenile code. See *In re Interest of Veronica H.*, 272 Neb. 370, 721 N.W.2d 651 (2006). Pursuant to § 43-285, the juvenile court has the authority to assent to and dissent from decisions of DHHS with respect to what care, placement, services, and expenditures are in the best interests of juveniles under its care and custody. *In re Interest of Veronica H., supra.* We agree with the juvenile court's exercise of that authority here.

Paxton has previously struggled with transitions from residential treatment facilities to his parents' home. In light of this history and the recommendations of a psychologist, the juvenile court, after its July 2017 review hearing, ordered DHHS to provide Paxton with various support and mental health services *immediately* upon his discharge from KidsTLC. DHHS personnel were aware of the specific services and the urgency required. Yet as of the date of the hearing at issue, 11 days after Paxton's discharge from KidsTLC, DHHS had not arranged for these services to be provided to Paxton. By contrast, the KidsTLC transition program was identified as ready and available to assist Paxton in transitioning home. Given Paxton's undisputed need for immediate services and

the fact that KidsTLC was the only identifiable provider of such services at the time of the hearing, we agree that it was in Paxton's best interests to participate immediately in the KidsTLC transition program.

DHHS' argument that Paxton would be better served by respite care provided locally does not alter our conclusion. This argument hinges on the faulty premise that local respite care was an available alternative as of the hearing on this matter. But the juvenile court was not presented with a choice between the transition program at KidsTLC and ideal or even functioning local respite care. Its options were to direct that Paxton immediately receive transition services, which all agree he urgently required, at KidsTLC, or to allow him to continue to go without services until DHHS could arrange for them to be provided locally. Faced with those alternatives and aware of Paxton's history, we do not hesitate to find that the juvenile court acted in Paxton's best interests.

[5] Neither are we moved by DHHS' contention that, in the long term, Paxton would be better served by local care than care provided at KidsTLC. On this point, there actually appears to be some agreement among everyone involved that, at some time, it would be best for Paxton to leave the KidsTLC program and receive any necessary care locally. But the question of Paxton's long-term participation in the KidsTLC program was not presented to or decided by the juvenile court in the order under appeal. Appellate courts will not consider issues on appeal that were not presented to or passed upon by the trial court. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

The juvenile court's statement that it was in "everyone's best interest" that Paxton eventually receive local services, as well as its stated willingness to continue to monitor whether services at KidsTLC are necessary, strongly suggests that the juvenile court is open to considering, presumably with the aid of new evidence, whether it remains in Paxton's best interests to receive services at KidsTLC. This court, however, is not the

place for that decision to be made in the first instance. We are limited to reviewing the decision of the juvenile court based on the record available to us. Having performed that review, we find no basis to disagree with the juvenile court.

CONCLUSION

Upon our de novo review of the record, we conclude that the juvenile court did not err in ordering DHHS to arrange and pay for Paxton to receive services at KidsTLC. Accordingly, we affirm.

Affirmed.

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

In re Henry B. Wilson, Jr., Revocable Trust Dated June 27, 2002. Lou Ann Goding, appellant, v. Roger A. Wilson and Roseann M. Wilson, Cotrustees of the Henry B. Wilson, Jr., Revocable Trust Dated June 27, 2002, appellees.

915 N.W.2d 50

Filed July 13, 2018. No. S-15-1014.

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. **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: Trusts: Equity: Appeal and Error.** The removal of a trustee is a question of equity, and therefore an appellate court reviews de novo the question of whether a trustee was properly removed.
4. **Pleadings.** The issues in a given case will generally be limited to those which are pled.
5. **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.
6. **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, Moore, Chief Judge, and Riedmann and Bishop, Judges, on appeal

thereto from the County Court for Sherman County, Tami K. Schendt, Judge. Judgment of Court of Appeals affirmed.

Nicole Seckman Jilek, Robert M. Schartz, and Thomas J. Malicki, of Abrahams, Kaslow & Cassman, L.L.P., and, on brief, Jeffrey J. Blumel, for appellant.

Larry W. Beucke, of Parker, Grossart, Bahensky, Beucke, Bowman & Symington, L.L.P., and Sheila A. Bentzen and Anthony M. Aerts, of Rembolt Ludtke, L.L.P., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Vaughan, District Judge.

Funke, J.

This matter concerns the administration of the "Henry B. Wilson, Jr., Revocable Trust Dated June 27, 2002" (Henry's Trust or Trust), and the related issue of the administration of three subtrusts created by Henry's Trust upon his death. Henry B. Wilson, Jr.'s daughter, Lou Ann Goding (Lou Ann), filed suit, asserting the mismanagement of Henry's Trust, and following a trial, the county court for Sherman County removed the cotrustees of Henry's Trust. Lou Ann appealed, asserting several errors, including that the county court failed to remove the cotrustees of her subtrust.

In a memorandum opinion, the Nebraska Court of Appeals interpreted the county court's order to have removed the cotrustees of Lou Ann's subtrust and concluded that there was no error in need of correction.[1] Upon further review, we determine the Court of Appeals erred in interpreting the county court's order to have removed the cotrustees of the subtrusts. However, our ultimate conclusion on the judgment is the same. Therefore, although our reasoning differs from that of the Court of Appeals, we affirm.

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[1] See *In re Henry B. Wilson, Jr., Revocable Trust*, Nos. A-15-1014, A-15-1015, 2017 WL 5608085 (Neb. App. Nov. 21, 2017) (selected for posting to court website).

BACKGROUND

Henry died on December 23, 2010. He was preceded in death by his wife, Eleanor Wilson, and was survived by three adult children, Lou Ann, Roseann Wilson, and Roger Wilson. During their lifetimes, Henry and Eleanor created an estate plan which included revocable trusts and pour-over wills. After Henry's death, Roseann and Roger were named successor cotrustees of Henry's Trust and copersonal representatives of Henry's estate.

The documents for Henry's Trust and Eleanor's trust provided that upon the death of the last surviving spouse, real property interests within each trust were to be distributed to three separate and unequal subtrusts in the name of each of their children: the "Lou Ann Goding Trust," the "Roger A. Wilson Trust," and the "Roseann M. Wilson Trust." Henry's Trust and Eleanor's trust also distributed the residue of their respective trusts in equal shares to their three children. The three separate and unequal subtrusts had identical language regarding trust management. In relevant part, the instructions for the Lou Ann Goding Trust directed the trustee of the subtrust, "Until the death of my said daughter, LOUANN [sic] GODING, the trustee shall pay the net income from the trust in convenient installments (at least annually) to my said daughter so long as my said daughter shall live."

At the time of Henry's death, Henry's Trust owned approximately 4,200 acres of land. In accordance with the Trust's language, in December 2011, the successor trustees transferred real estate previously owned by Henry's Trust and Eleanor's trust to the three subtrusts. However, no other steps were taken to administer the three subtrusts, such as opening separate bank accounts, obtaining federal tax identification numbers, or filing tax returns. The cotrustees continued to operate Henry's Trust for convenience as opposed to separately operating the subtrusts.

An estate proceeding was opened in county court to address assets that were not identified in Henry's Trust, did not have

a beneficiary, or were not payable on death to the Trust. An estate inventory was filed on December 28, 2011, and an inheritance tax worksheet and receipt were all signed "right at the end of December." According to the attorney who prepared Henry's estate plan and drafted Henry's will and Henry's Trust, the estate was ready to close at that point, but it had not been closed because of the pending litigation.

In separate cases, Lou Ann filed petitions for the removal of Roseann and Roger as copersonal representatives of Henry's estate and cotrustees of Henry's Trust, and the matters were consolidated for trial.

County Court

In the trust case, the county court concluded that Roseann and Roger had breached their fiduciary duties as cotrustees of Henry's Trust, under Neb. Rev. Stat. § 30-3875 (Reissue 2016), by failing to keep accurate records, commingling assets, and not keeping the cotrustees' property separate from Henry's Trust property. The court also found the cotrustees breached their fiduciary duties under Neb. Rev. Stat. § 30-3878 (Reissue 2016) by failing to keep beneficiaries of the Trust reasonably informed about the administration of the Trust and of the material facts necessary for them to protect their interests. Finally, the county court determined the cotrustees breached their fiduciary duties by using the Trust assets to pay for personal expenses, failing to maintain the subtrusts created by Henry's Trust as separate trusts, and failing to pay the income from the Trust to Lou Ann.

The county court found the foregoing breaches qualified as serious breaches under Neb. Rev. Stat. § 30-3862 (Reissue 2016) and that it was in the best interests of the administration of the Trust to remove Roseann and Roger as cotrustees of Henry's Trust. The county court removed the cotrustees (except for their duty to provide an accounting), ordered an accounting, surcharged the cotrustees $73,675.88 for payments made from the assets of the Trust for personal expenses and

expenses that were not the responsibility of the Trust, and awarded attorney fees in the amount of $20,000 in favor of Lou Ann and against the cotrustees, jointly and severally. The court also appointed an attorney as a successor trustee.

In the estate case, the county court found that under the terms of Henry's will, any residue of Henry's estate poured over into the Trust and that the Trust was the only beneficiary of the estate. As a result, the court found that all of Lou Ann's claims for unaccounted property and for damages were claims for the Trust administration and not the estate proceeding.

Accordingly, the county court dismissed Lou Ann's petition for the termination of appointment and the removal of the copersonal representatives, appointment of a successor personal representative, an accounting, and a surcharge. The court also overruled Lou Ann's objection to the inventory. The court ordered the copersonal representatives to file a final accounting, a schedule of distribution, and a formal petition for complete settlement of the estate within 30 days.

Court of Appeals

Lou Ann assigned 14 errors to the county court's order, consolidated and restated as follows: As to the Trust case, Lou Ann assigned that the court erred in (l) failing to surcharge Roseann and Roger for various amounts paid from the Trust, (2) making a mathematical error in the total surcharge amount ordered, (3) failing to remove Roseann and Roger as cotrustees of her subtrust, (4) failing to award amounts due to Lou Ann under the Trust, (5) excluding certain testimony and exhibits, (6) making an insufficient award of attorney fees and costs, and (7) ordering beneficiaries of the Trust to pay the successor trustee's fee if there are insufficient assets in the Trust. As to the estate case, Lou Ann assigned that the court erred in (1) failing to remove Roseann and Roger as copersonal representatives of the estate, (2) not assessing a surcharge, and (3) overruling Lou Ann's objection to the estate's inventory.

Upon considering each of Lou Ann's assignments of error, the Court of Appeals modestly increased the surcharge to the cotrustees for amounts paid from the Trust, but affirmed the county court's order in all other respects. The court further determined that the county court's removal of Roseann and Roger as cotrustees and appointment of a successor trustee applied to Henry's Trust and Lou Ann's separate subtrust and that therefore, no correction was needed.

In doing so, the Court of Appeals relied on language from the trial court's order which stated that the cotrustees breached their fiduciary duties by "failing to maintain the sub trusts created by the Trust as separate trusts and by failing to pay the income from the Trust to Lou Ann." The Court of Appeals determined that "[a]lthough the county court was unwilling to consider evidence specific to the administration of the subtrusts, its conclusion that the cotrustees should be removed as cotrustees stemmed from breaches of their fiduciary duties to Henry's Trust and their responsibilities to the subtrusts."[2]

The Court of Appeals further noted that the plain language of Henry's Trust did not distinguish between the trustee of the Trust and the subtrusts and that when referencing the subtrusts, the document states that "'[t]he trustee shall hold, administer, and distribute all of the trustee's right, title, and interest in and to the following described real property.'"[3] In addition, the court noted that there were no separate appointment procedures or processes related to the subtrusts.

Consequently, the Court of Appeals determined that the county court's removal of Roseann and Roger as cotrustees and appointment of a successor trustee applied to Henry's Trust and to Lou Ann's separate subtrust.

ASSIGNMENTS OF ERROR

Roseann and Roger petitioned for further review of the trust case only. They assign, restated, that the Court of Appeals

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[2] *Id.* at *9.

[3] *Id.* at *10.

erred (1) in interpreting the county court's order to mean that the removal of Roseann and Roger as cotrustees and appointment of a successor trustee applied to Henry's Trust and Lou Ann's separate subtrust; (2) by exceeding its authority, because the issue of removing the cotrustees of Lou Ann's subtrust was not before or considered by the county court; and (3) in considering Lou Ann's assignment of error that the county court failed to remove Roseann and Roger as cotrustees of her subtrust, because that issue was raised for the first time on appeal.

STANDARD OF REVIEW

[1-3] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.[4] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[5] The removal of a trustee is a question of equity, and therefore an appellate court reviews de novo the question of whether a trustee was properly removed.[6]

ANALYSIS

Roseann and Roger argue the Court of Appeals' reading of the county court's order with respect to Lou Ann's subtrust is incorrect. They contend that the county court's order provided a clear statement that "[t]he administration of the sub trusts [is] not an issue properly before this Court" and that Lou Ann's petition concerned only Henry's Trust and did not

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[4] *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018); *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017); *In re Estate of Robb*, 21 Neb. App. 429, 839 N.W.2d 368 (2013).

[5] *In re Estate of Hasterlik*, 299 Neb. 630, 909 N.W.2d 641 (2018); *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010).

[6] See *In re Estate of Robb, supra* note 4.

include any allegations about the subtrusts or request that the cotrustees be removed from the subtrusts.

Lou Ann argues that Roseann and Roger are the cotrustees of all of the trusts and that "the Court of Appeals did not misinterpret the trial court order as removing Roseann and Roger as cotrustees of the subtrusts."[7] Lou Ann contends that the cotrustees had notice that the administration of the subtrusts was at issue, because a single document created Henry's Trust and the subtrusts and because Lou Ann attached the document to her petition. She argues the evidence showed that the cotrustees commingled the affairs of Henry's Trust and the subtrusts and treated them as one trust. Lou Ann claims the Court of Appeals merely affirmed the county court's order and "made no change to the trial court order" and "did not modify the county court's order in any manner."[8]

We are mindful that, with respect to this narrow issue, Lou Ann took a contrary position in her appeal from the county court. In her appellate brief, Lou Ann argued that "the trial court failed to remove the Co-Trustees as trustees from the Lou Ann Trust"[9] and assigned as error that "[t]he trial court erred in failing to remove the Co-Trustees as trustees of the Lou Ann Trust sub-trust . . . ." It is thus apparent that prior to the Court of Appeals' opinion, Lou Ann believed that the county court did not remove the cotrustees of her subtrust, and thus, she requested the Court of Appeals to grant her relief that the county court did not grant.

We agree with Roseann and Roger that the Court of Appeals' interpretation that the county court's order removed the cotrustees of Lou Ann's subtrust was incorrect. The petition filed by Lou Ann identifies Roseann and Roger as the cotrustees of Henry's Trust. Further, the petition seeks the removal of Roseann and Roger as cotrustees. However, the pleadings

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[7] Brief for appellant in response to petition for further review at 4.

[8] *Id.* at 2 and 3.

[9] Brief for appellant at 41-42.

make no reference to the subtrusts created by Henry's Trust or to the removal of the cotrustees of the subtrusts.

[4] The issues in a given case will generally be limited to those which are pled.[10] Lou Ann did not amend her petition prior to trial or during trial to raise the claim of the removal of the cotrustees of her subtrust, and the county court made the following specific finding:

> Roseann . . . and Roger . . . are the Co-Trustees of the . . . Trust . . . . The Co-Trustees have administered the Trust and sub-trusts created by the Trust since Henry['s] Death on December 23, 2010. The real estate that [Henry] had transferred to the Trust prior to his death was deeded by the Co-Trustees to the sub trusts on December 23, 2011. The administration of the sub trusts are not an issue properly before this Court.

In addition, throughout the trial, the court excluded evidence regarding the administration of the subtrusts as going beyond the petition. For example, the court sustained objections to testimony on issues such as how the cotrustees might have damaged Lou Ann's subtrust and the extent of such damage. In one instance, Lou Ann sought to introduce evidence of the reasonable rental rates for a piece of land that was deeded to Lou Ann's subtrust. The court sustained Roseann and Roger's objection and limited the questioning to the time period when Henry's Trust owned the land. The court agreed that Henry's Trust did not own the land after the transfer in 2011 and excluded evidence of income generated in 2012 through 2014.

The county court's order further stated that "the Co-Trustees Roseann . . . and Roger . . . are removed as trustees of the . . . Trust." Thus, the county court determined that Lou Ann had not sufficiently pled the issue of removing the cotrustees of Lou Ann's subtrust prior to trial. On appeal, Lou Ann requested

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[10] See *In re Conservatorship of Abbott*, 295 Neb. 510, 890 N.W.2d 469 (2017).

that the Court of Appeals remove the cotrustees of her subtrust de novo, but the Court of Appeals did not do so. The Court of Appeals found no error in need of correction, and Lou Ann did not file a cross-petition for further review.

We also find persuasive Roseann and Roger's argument that the Court of Appeals' interpretation creates an ambiguity which leaves in limbo the status of the cotrustees of their own respective subtrusts.

Lou Ann now argues the Court of Appeals limited its decision to only remove the cotrustees from Henry's Trust and her subtrust. In support of this contention, she references the Court of Appeals' statement that the "county court's removal of Roseann and Roger as cotrustees and appointment of a successor trustee applied to Henry's Trust and *Lou Ann's separate subtrust*."[11] However, the Court of Appeals also stated that "the court's removal of the cotrustees necessarily applied to Roseann and Roger as cotrustees of the Trust and the *subtrusts*."[12]

As noted, in response to Roseann and Roger's petition for further review of the trust case, Lou Ann took the position that the trial court order removed Roseann and Roger as cotrustees of all of the subtrusts. Moreover, Lou Ann filed a supplemental brief pursuant to Neb. Ct. R. App. P. § 2-102(H) (rev. 2015) which stated that the "Court of Appeals did not misinterpret the county court's order with respect to the removal of the cotrustees of the *subtrusts*."[13] Therefore, the Court of Appeals' opinion does indeed create an ambiguity with respect to Roseann's and Roger's subtrusts, and it granted Lou Ann relief beyond what she had elected.

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[11] *In re Henry B. Wilson, Jr., Revocable Trust, supra* note 1, 2017 WL 5608085 at *10 (emphasis supplied).

[12] *Id.* at *9 (emphasis supplied).

[13] Supplemental brief for appellant in response to petition for further review at 3 (emphasis supplied) (see § 2-102(H)).

[5] Upon further review, we find the county court did not remove Roseann and Roger as cotrustees of the subtrusts. Therefore, the Court of Appeals' interpretation of the county court's order on this narrow issue was made in error. Because we find merit to Roseann and Roger's first assignment of error, we need not address their remaining assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[14]

[6] While our reasoning differs from that employed by the Court of Appeals, our ultimate conclusion that the county court did not err is the same. Upon further review from a judgment of the Court of Appeals, this court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.[15]

CONCLUSION

The county court's determination that the administration of the subtrusts was not an issue properly before the county court was not in error. The Court of Appeals erred in its decision in the trust case when it concluded that the county court removed Roseann and Roger as cotrustees of Lou Ann's subtrust and appointed a successor trustee.

Affirmed.

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[14] *Nesbitt v. Frakes, ante* p. 1, 911 N.W.2d 598 (2018).

[15] *State v. Ratumaimuri*, 299 Neb. 887, 911 N.W.2d 270 (2018).

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

Millard Gutter Company, a corporation doing business as Millard Roofing and Gutter, appellant, v. American Family Insurance Company, appellee.

915 N.W.2d 58

Filed July 13, 2018. No. S-17-485.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **Costs: Appeal and Error.** The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.
3. **Judgments: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Dismissal and Nonsuit.** Generally speaking, under Neb. Rev. Stat. §§ 25-601 and 25-602 (Reissue 2016), a plaintiff has the right to dismiss an action without prejudice any time before final submission of the case, so long as no counterclaim or setoff has been filed by an opposing party.
6. ____. The statutory right to voluntary dismissal under Neb. Rev. Stat. §§ 25-601 and 25-602 (Reissue 2016) is not a matter of judicial grace or discretion, but neither is it absolute or without limitation.
7. ____. Under certain circumstances, a district court has the authority to deny a voluntary dismissal pursuant to Neb. Rev. Stat. §§ 25-601 and 25-602 (Reissue 2016) and may attach conditions to the dismissal where justice and equitable principles so require.
8. **Summary Judgment: Dismissal and Nonsuit.** A motion for summary judgment can be a final submission that will prevent voluntary dismissal under Neb. Rev. Stat. § 25-601 (Reissue 2016).

9. **Dismissal and Nonsuit: Costs.** Neb. Rev. Stat. § 25-602 (Reissue 2016) gives plaintiffs in district court the right to dismiss their action without prejudice, upon payment of costs, when no counterclaim or setoff has been filed by the opposing party.
10. **Costs.** Litigation expenses are not recoverable unless provided for by statute or a uniform course of procedure.
11. **Costs: Legislature.** It is within the province of the Legislature to designate specific items of litigation expense which may be taxed as costs.
12. **Trial: Evidence: Costs.** The electronic presentation of evidence is not a taxable cost.
13. **Juries: Costs.** Under Neb. Rev. Stat. § 33-138(3) (Reissue 2016), the payment of jurors for service in the district and county courts shall be made by the county.

Appeal from the District Court for Douglas County: Horacio J. Wheelock, Judge. Affirmed in part, and in part reversed.

Theodore R. Boecker, Jr., of Boecker Law Office, P.C., L.L.O., for appellant.

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

Donald W. Kleine, Douglas County Attorney, and Cortney M. Wiresinger for amicus curiae Douglas County, Nebraska.

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

Stacy, J.

Millard Gutter Company, a corporation doing business as Millard Roofing and Gutter (Millard Gutter), filed this civil action against American Family Insurance Company (American Family) in the Douglas County District Court. Just prior to jury selection, Millard Gutter filed a voluntary dismissal without prejudice. The district court held a hearing, after which it entered a judgment of dismissal and taxed costs to Millard Gutter, including expenses incurred by American Family in setting up courtroom technology and expenses incurred by Douglas County in compensating prospective

jurors. Millard Gutter appeals, arguing that once it filed a voluntary dismissal, the district court lacked authority to make any further rulings. Alternatively, Millard Gutter argues the district court erred in taxing technology expenses and jury expenses as costs.

We conclude, on the facts of this case, that Millard Gutter's voluntary dismissal had no effect on the district court's authority to make further rulings. But we find the court erred in taxing technology expenses and jury expenses as costs. We therefore reverse that portion of the judgment, and in all other respects we affirm.

I. BACKGROUND

After a 2013 hailstorm, Millard Gutter performed roof repairs for approximately 48 homeowners in the Omaha area, all of whom were insured with American Family. In connection with those repairs, Millard Gutter took assignments of any right the homeowners had to insurance proceeds due under their homeowners' policies. The validity of the assignments is not at issue in this appeal.

In 2015, Millard Gutter filed suit, as assignee of the homeowners, against American Family. Millard Gutter's complaint alleged claims for (1) breach of contract, (2) bad faith, (3) violations of the Unfair Insurance Trade Practices Act,[1] and (4) violations of the Unfair Insurance Claims Settlement Practices Act.[2]

American Family's answer admitted that it issued insurance policies to the Omaha homeowners and had an obligation to pay for covered losses caused by the hailstorm, but denied that Millard Gutter had valid assignments. American Family raised several affirmative defenses, including that it was entitled to a credit or setoff for payments previously made to the homeowners under the insurance policies. American Family's

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[1] Neb. Rev. Stat. §§ 44-1521 to 44-1535 (Reissue 2010).

[2] Neb. Rev. Stat. §§ 44-1536 to 44-1544 (Reissue 2010 & Cum. Supp. 2016).

answer also alleged that Millard Gutter's claims were frivolous and requested an award of costs and attorney fees under Neb. Rev. Stat. § 25-824 (Reissue 2016).

1. American Family Moves for Partial Summary Judgment

American Family moved for partial summary judgment on three of Millard Gutter's four claims for relief. The court granted the motion and entered summary judgment in favor of American Family on the claims alleging (1) bad faith, (2) violations of the Unfair Insurance Trade Practices Act, and (3) violations of the Unfair Insurance Claims Settlement Practices Act. Neither party asked the court to direct the entry of a final judgment under Neb. Rev. Stat. § 25-1315 (Reissue 2016), and the court did not do so.

The only claims to survive summary judgment were Millard Gutter's claims for breach of contract, which were set for trial on January 23, 2017. The parties were given a special jury setting to minimize the risk that trial would need to be continued to accommodate other cases on the court's docket. Trial was expected to last 5 days.

2. Millard Gutter Files Voluntary Dismissal

During its final trial preparations, Millard Gutter discovered "underbilling issues" on some of the roof repairs, and decided to dismiss its breach of contract claims without prejudice rather than proceed to trial; it planned to refile the action later and seek additional damages. Thus, on the morning of January 23, 2017, just minutes before trial was set to begin, Millard Gutter filed a voluntary dismissal without prejudice pursuant to Neb. Rev. Stat. § 25-601 (Reissue 2016).

3. Court Holds Hearing on Voluntary Dismissal and Costs

Immediately after learning Millard Gutter had filed a voluntary dismissal, the district court held a hearing on the record

to discuss the effect of the filing and to address taxable costs. When asked what effect the voluntary dismissal should have on the claims previously resolved on summary judgment, Millard Gutter replied, "Our position is all we're voluntarily dismissing without prejudice are the claims that have not already been dismissed, so the remaining claims are what we are dismissing."

When addressing costs, the hearing focused on the expenses incurred by American Family in setting up courtroom technology for use during the scheduled trial and the expenses incurred by Douglas County to bring in prospective jurors.

(a) Courtroom Technology Expenses

American Family hired a court reporting firm to equip the courtroom with electronics and display screens for use during the 5-day trial. It was undisputed that the firm spent several hours over 2 days setting up the technology at a cost of $1,650. American Family asked that this expense be taxed to Millard Gutter. Millard Gutter stipulated to the reasonableness of the charges, but took the position that courtroom technology expenses were not properly taxable as costs. American Family made no request for other costs or attorney fees and did not ask for a determination of frivolousness under § 25-824.

(b) Jury Expenses

With the parties' knowledge, the court summoned 40 prospective jurors, rather than the usual 25, out of concern that potential juror conflicts might exist with American Family. These prospective jurors were called exclusively for this case and were waiting at the courthouse when the voluntary dismissal was filed.

During the hearing on costs, the court remarked, "It cost the taxpayers approximately $2,000 to have 40 jurors ready to go this morning, and that includes the . . . $35 fee for each juror and then approximately $15 in mileage for each juror . . . ." The court suggested an evidentiary hearing be held later in the

day to permit the clerk of the Douglas County District Court to testify and "get it down to the penny." Millard Gutter declined an evidentiary hearing on the issue and stipulated that juror fees and mileage totaled $2,000, but argued such expenses were not properly taxable as costs.

4. Order of Dismissal and Taxation of Costs

The court announced its ruling from the bench. It held the prior summary judgments in favor of American Family would "remain in place" on the claims of bad faith, violations of the Unfair Insurance Trade Practices Act, and violations of the Unfair Insurance Claims Settlement Practices Act. It further held it would dismiss "the remaining breach of contract" claims without prejudice, pursuant to the voluntary dismissal. The court taxed costs to Millard Gutter, including $1,650 for technology expenses incurred by American Family and $2,000 "to be paid to the Douglas County District Court clerk's office for the 40 jurors that were specifically assigned to this case."

Subsequently, the court entered a judgment of dismissal, styled as an order, consistent with its ruling from the bench. In addition to taxing technology costs and jury costs, the judgment taxed "all court costs" to Millard Gutter. The judgment also imposed certain procedural conditions in the event Millard Gutter refiled the action against American Family, but because neither party has assigned error to such conditions, we do not address them further.

5. Millard Gutter's Motion to Alter or Amend

Millard Gutter filed a timely motion to alter or amend. It argued the district court had no authority to rule on any issue after the voluntary dismissal was filed. In the alternative, Millard Gutter argued that neither jury expenses nor technology expenses were properly taxable as costs. The district court overruled the motion to alter or amend in all respects. Millard

Gutter timely appealed, and we moved the appeal to our docket on our own motion.[3]

II. ASSIGNMENTS OF ERROR

Millard Gutter assigns, restated and consolidated, that the district court erred in (1) making any rulings after the voluntary dismissal was filed, (2) determining technology expenses and jury expenses were taxable costs, and (3) overruling the motion to alter or amend.

III. STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.[4]

[2,3] The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.[5] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[6]

[4] 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.[7]

IV. ANALYSIS

1. Voluntary Dismissal

Millard Gutter argues that once the voluntary dismissal without prejudice was filed, it had the effect of withdrawing

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

[4] *Klingelhoefer v. Monif*, 286 Neb. 675, 839 N.W.2d 247 (2013); *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002).

[5] *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 903 N.W.2d 432 (2017).

[6] *Id.*

[7] *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018).

the entire case from the court's consideration. According to Millard Gutter, the voluntary dismissal "automatically terminated the jurisdiction" of the district court[8] and the court thereafter lacked authority to make any further rulings regarding the case. We disagree.

The ability of a plaintiff to voluntarily dismiss his or her claim without prejudice is codified in § 25-601 and Neb. Rev. Stat. § 25-602 (Reissue 2016).[9] Section 25-601 provides that "[a]n action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court . . . ." A related statute, § 25-602, applies to cases pending before a district court or appellate court. At the time Millard Gutter filed its voluntary dismissal, § 25-602 provided:

> The plaintiff, in any case pending in the district or Supreme Court of the state, shall, when no counterclaim or setoff has been filed by the opposite party, have the right in the vacation of any of said courts to dismiss his said action without prejudice, upon payment of costs, which dismissal shall be, by the clerk of any of said courts, entered upon the journal and take effect from and after the date thereof.

We note that the Legislature recently amended § 25-602 primarily to update terminology,[10] but those amendments do not affect our analysis in this case.

[5,6] Generally speaking, under §§ 25-601 and 25-602, a plaintiff has the right to dismiss an action without prejudice any time before final submission of the case, so long as no counterclaim or setoff has been filed by an opposing

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[8] Brief for appellant at 6.

[9] See *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

[10] See 2018 Neb. Laws, L.B. 193, § 9.

party.[11] We have stated that the statutory right to voluntary dismissal under §§ 25-601 and 25-602 is not a matter of judicial grace or discretion,[12] but neither is it absolute or without limitation.[13]

[7] Under certain circumstances,[14] a district court has the authority to deny a voluntary dismissal pursuant to §§ 25-601 and 25-602 and may attach conditions to the dismissal where justice and equitable principles so require.[15] And we have repeatedly stated that despite a plaintiff's statutory right to voluntary dismissal, trial courts have discretion to protect the "'"rights which have accrued to [a] defendant"'" in the action "'"such as the preservation of a counterclaim, the restitution of property of which he has been deprived, the recovery of his costs, and the like."'"[16]

Here, we apply the plain language of §§ 25-601 and 25-602 and conclude that at the time Millard Gutter filed its voluntary dismissal, it had no such right under either statute. As

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[11] *Kansas Bankers Surety Co., supra* note 4. See, also, Neb. Rev. Stat. § 25-603 (Reissue 2016) (defendant in "any case" has right to proceed to trial on counterclaim or setoff "although the plaintiff may have dismissed the action or failed to appear").

[12] *Holste, supra* note 9; *Schroeder v. Schroeder*, 223 Neb. 684, 392 N.W.2d 787 (1986); *Dawson v. Papio Nat. Resources Dist.*, 210 Neb. 100, 313 N.W.2d 242 (1981), *modified on denial of rehearing* 210 Neb. 612, 316 N.W.2d 311 (1982).

[13] See, *Holste, supra* note 9; *Horton v. State*, 63 Neb. 34, 88 N.W. 146 (1901).

[14] See *Holste, supra* note 9 (court can deny party's voluntary dismissal where party is necessary party to another claim in same action). See, also, *Vose v. Müller*, 48 Neb. 602, 67 N.W. 598 (1896) (explaining court can deny plaintiff's voluntary dismissal in replevin action if plaintiff obtained possession of property through prejudgment order of delivery).

[15] See, *Holste, supra* note 9; *Schroeder, supra* note 12; *Dawson, supra* note 12; *Feight v. Mathers*, 153 Neb. 839, 46 N.W.2d 492 (1951); *Blue River Power Co. v. Hronik*, 116 Neb. 405, 217 N.W. 604 (1928).

[16] *Kansas Bankers Surety Co., supra* note 4, 263 Neb. at 978, 644 N.W.2d at 870, quoting *Feight, supra* note 15. Accord *Dawson, supra* note 12.

we explain below, there was a final submission that precluded voluntary dismissal under § 25-601, and a setoff had been filed that precluded voluntary dismissal under § 25-602.

(a) Final Submission Under § 25-601

Section 25-601 provides that a plaintiff may dismiss an action without prejudice any time before final submission to the jury or the court. Millard Gutter claims that its voluntary dismissal was filed before final submission for purposes of § 25-601, because the breach of contract claim had not yet been submitted to the jury. But Millard Gutter's argument ignores the fact that at the time it filed its dismissal, summary judgment had been entered on three of its four claims.

We have not squarely addressed whether a summary judgment motion can constitute a final submission for purposes of § 25-601. But our case law demonstrates that a final submission can occur on a motion.

In a bench trial, we have treated a motion for directed verdict at the close of the plaintiff's case as a final submission preventing voluntary dismissal under § 25-601.[17] And in a jury trial, we have treated a defendant's motion for directed verdict as a final submission under § 25-601 once the parties argued their positions on the motion.[18] In doing so, we reasoned that a motion for directed verdict is a final submission that limits the right of voluntary dismissal, because "the court is called upon to determine as a matter of law whether there are any issues arising from the facts submitted which present a jury question."[19] This same rationale applies to motions for summary judgment. We have also explained that if the court overrules the motion for directed verdict, there is no longer a final submission and the plaintiff

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[17] See *Gydesen v. Gydesen*, 188 Neb. 538, 198 N.W.2d 67 (1972).

[18] See, *Collection Specialists v. Veseley*, 238 Neb. 181, 469 N.W.2d 549 (1991); *Miller v. Harris*, 195 Neb. 75, 236 N.W.2d 828 (1975); *Fronk v. Evans City Steam Laundry Co.*, 70 Neb. 75, 96 N.W. 1053 (1903).

[19] *Miller, supra* note 18, 195 Neb. at 78, 236 N.W.2d at 830.

regains the right to dismiss the action if he or she chooses, because at that point, "fact issues remain to be determined by the jury, and those issues have not yet been submitted to the jury."[20]

To date, our only case addressing summary judgment and § 25-601 is *Kansas Bankers Surety Co. v. Halford*.[21] In that case, the defendant filed a motion for summary judgment and submitted a brief to the court in support. On the day the plaintiff's brief was due, the plaintiff instead filed a dismissal without prejudice, which the court granted that same day. On those facts, we concluded the plaintiff retained the statutory right to voluntary dismissal without prejudice, because the defendant "had not filed a setoff or counterclaim" and "[t]here was no relief requested by [the plaintiff] that was pending at the time of [the] dismissal other than [the defendant's] motion for summary judgment . . . ."[22]

Our statement regarding summary judgment could have been more precise, but we take this opportunity to clarify that we were not suggesting such a motion could not be a final submission under § 25-601. Rather, we were emphasizing that a final submission does not occur until argument is complete or has been waived; and where argument is allowed by brief, final submission will not occur until the briefing is complete or until the time for submitting briefs has expired.[23] Because the voluntary dismissal in *Kansas Bankers Surety Co.* was filed before the time for briefing had expired, the summary judgment motion was not a final submission for purposes of § 25-601.

[8] We now hold, as we have with motions for directed verdict, that a motion for summary judgment can be a final

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[20] *Id.*

[21] *Kansas Bankers Surety Co., supra* note 4.

[22] *Id.* at 979, 644 N.W.2d at 871.

[23] See *Plattsmouth Loan & Bldg. Ass'n v. Sedlak*, 128 Neb. 509, 259 N.W. 367 (1935).

submission that will prevent voluntary dismissal under § 25-601. In this case, the district court granted summary judgment on three of Millard Gutter's four claims; thus, there was a final submission regarding some, but not all, of Millard Gutter's claims. In this respect, we emphasize that a final submission should not be confused with a final judgment.

Here, the district court did not direct the entry of final judgment pursuant to § 25-1315(1), so its ruling on the summary judgment motions was the product of a final submission, but was not a final judgment for purposes of appeal.[24] Consequently, the district court was free to revise or vacate the summary judgments at any time prior to entry of judgment adjudicating all of the claims and rights of the parties.[25]

Had the court here revised or set aside the summary judgments, it may have affected our final submission determination under § 25-601. But the court's judgment in this case did neither. To the contrary, the district court's judgment not only incorporated by express reference its prior summary judgment rulings in favor of American Family, but also excepted those prior rulings from the dismissal without prejudice.

Because the summary judgments in favor of American Family were the product of final submissions that were not revised or set aside before Millard Gutter's voluntary dismissal was filed, Millard Gutter had no statutory right under § 25-601 to voluntarily dismiss these claims without prejudice.[26]

(b) Setoff Under § 25-602

[9] Millard Gutter's right to voluntary dismissal of its remaining breach of contract claims was affected by § 25-602. As previously stated, that statute gives plaintiffs in district court the right to dismiss their action without prejudice, upon

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[24] See, John P. Lenich, *There's No Escape: The Plaintiff's Right to Dismiss After the Submission of a Motion for Summary Judgment or a Motion to Dismiss in Nebraska*, 1 Neb. L. Rev. Bull. 31 (2009).

[25] See § 25-1315(1).

[26] Accord Lenich, *supra* note 24.

payment of costs, when no counterclaim or setoff has been filed by the opposing party.

In this case, the answer filed by American Family included allegations that it was entitled to a setoff for payments previously made to the homeowners in the event it was determined that additional sums were owed under the insurance contracts. Consequently, to the extent Millard Gutter sought voluntary dismissal of its remaining breach of contract claims, it had no right to do so under § 25-602, because a setoff related to those claims was filed by American Family and American Family was ready to proceed to trial on the setoffs.[27] Of course, in response to Millard Gutter's filing, the court had discretion to grant a dismissal without prejudice,[28] which it ultimately did as to the breach of contract claims but not as to the claims on which summary judgment had been granted as a matter of law.

Given the procedural posture of this case at the time Millard Gutter filed its dismissal, it had no statutory right to voluntary dismissal under either § 25-601 or § 25-602. Consequently, the district court's authority to make further rulings in the case was unaffected by the filing, and Millard Gutter's first assignment of error is without merit.

2. Taxable Costs

The district court's judgment taxed "all court costs" to Millard Gutter and, in addition, ordered it to pay $1,650 for technology expenses incurred by American Family and $2,000 to "reimburse the tax payers of Douglas County" for the expenses associated with bringing in 40 jurors for trial. On appeal, Millard Gutter argues that neither the technology expenses nor the expenses of securing jurors are properly taxed as costs.

[10,11] Since as early as 1922, this court has recognized that litigation expenses are not recoverable costs unless provided

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[27] See § 25-603.

[28] See, e.g., *Tuttle v. Wyman*, 149 Neb. 769, 32 N.W.2d 742 (1948).

for by statute or a uniform course of procedure.[29] And while our cases have not always been consistent in their treatment of taxable costs, we recently recommitted to the basic principle that "it is within the province of the Legislature to designate specific items of litigation expense which may be taxed as costs."[30] To that end, we have expressly disapproved of our prior cases which permitted the recovery of litigation expenses without an explicit basis in statute or uniform procedure.[31]

In an action for the recovery of money, taxable costs upon final judgment are governed by Neb. Rev. Stat. §§ 25-1708 and 25-1710 (Reissue 2016). Section 25-1708 governs costs upon judgment in favor of a plaintiff, and § 25-1710 governs costs upon judgment in favor of a defendant. Both statutes allow for the recovery of "costs," but neither specifies which costs are recoverable. Under such circumstances, we have held a party may recover "the costs of the filing of the action, and any other expenses that are specifically delineated as taxable costs by statute."[32]

Here, American Family obtained a judgment in its favor on three of the four claims asserted by Millard Gutter. To the extent the judgment here directed Millard Gutter to pay "all court costs," Millard Gutter assigns no error. Our analysis is limited to whether a statute or uniform course of procedure authorized the district court to tax as costs the expenses associated with courtroom technology or securing jurors. We find no such authorization.

(a) Technology Expenses

American Family hired a company to equip the courtroom with electronics and display screens for use during the

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[29] See, *McGill v. Lion Place Condo. Assn.*, 291 Neb. 70, 864 N.W.2d 642 (2015), citing *Toop v. Palmer*, 108 Neb. 850, 189 N.W. 394 (1922).

[30] *City of Falls City v. Nebraska Mun. Power Pool*, 281 Neb. 230, 235, 795 N.W.2d 256, 260 (2011).

[31] *McGill, supra* note 29.

[32] *Id.* at 95, 864 N.W.2d at 661.

scheduled trial. The expense for this service was stipulated to be $1,650. There is no dispute that the charges were fair and reasonable, and no claim that the presentation of evidence would not have been enhanced by the use of such technology. The question presented is whether litigation expenses associated with courtroom technology are properly taxable as costs.

[12] In *City of Falls City v. Nebraska Mun. Power Pool*,[33] this court specifically held that the electronic presentation of evidence is not a taxable cost, noting that no Nebraska statute or uniform course of procedure authorizes it as such. We are aware that federal courts have allowed taxation of costs associated with the electronic display of trial exhibits as a form of "exemplification" under 28 U.S.C. § 1920 (2012),[34] but Nebraska has no corollary to this federal statute. Therefore, we must find the district court abused its discretion in taxing these technology expenses as costs.

(b) Jury Expenses

The parties stipulated that the cost of bringing in 40 prospective jurors for the trial in this case was $2,000. The district court found that "under the circumstances it is fair, just, and equitable to order [Millard Gutter] to pay such costs and reimburse the tax payers of Douglas County, Nebraska." Accordingly, as part of the judgment, Millard Gutter was directed to pay $2,000 to the clerk of the Douglas County District Court.

[13] Under Nebraska law, the "[p]ayment of jurors for service in the district and county courts shall be made by the county."[35] Each juror is statutorily entitled to receive $35 for each day "employed in the discharge of his or her duties," plus mileage at the statutory rate "for each mile necessarily

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[33] *City of Falls City, supra* note 30.

[34] See *id*. See, also, e.g., *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748 (8th Cir. 2006).

[35] Neb. Rev. Stat. § 33-138(3) (Reissue 2016).

traveled."[36] The statute also permits jurors to voluntarily waive such payment.[37]

Millard Gutter argues that the expense of bringing in jurors is a governmental cost and not a cost properly taxable to the parties. Millard Gutter notes that in criminal cases, we have expressly held it is error to tax such costs[38] and further argues there is no statute or uniform procedure that permits a court to tax jury expenses as costs in a civil case.

American Family counters that juror compensation may properly be taxed as costs, and relies on our reasoning in *Frazer v. Myers*[39] as support for this proposition. In *Frazer*, the jury returned a verdict for the plaintiff in a breach of contract case. The court's judgment directed each party to pay their own costs, but, in addition, taxed to the defendant a $5 "jury fee" and a $1 "trial fee."[40] The defendant asked that these costs be "retaxed" against the plaintiff, and the trial court refused.[41] On appeal, we found this was error, reasoning:

> Plaintiff voluntarily went into court and demanded a trial and judgment upon his cause of action. Defendant by the process of the court was compelled to appear. Plaintiff could not obtain his judgment without a trial. He could not have a trial without a jury, unless the intervention of a jury was waived, not only by himself, but by the defendant. No cases in point are cited, and we have

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[36] § 33-138(1).

[37] § 33-138(4).

[38] See, *State ex rel. City of St. Paul v. Rutten*, 177 Neb. 633, 130 N.W.2d 558 (1964) (error to tax convicted defendant with payment of juror compensation, meals, and mileage); *State v. Jungclaus*, 176 Neb. 641, 126 N.W.2d 858 (1964) (error to tax convicted defendant with paying for juror meals, lodging, and mileage because no statute authorized taxing such items as costs).

[39] *Frazer v. Myers*, 95 Neb. 194, 145 N.W. 357 (1914).

[40] *Id.* at 197, 145 N.W. at 358.

[41] *Id.*

> neither the time nor inclination to look for them, but as a case of first impression it appears to us quite clear that these two items were costs made by plaintiff, and, under the judgment of the court, that each party should pay his own costs, they should have been taxed against the plaintiff.[42]

The reasoning in *Frazer* is not compelling support for the proposition that jury expenses are properly taxable as costs. More importantly, *Frazer* is contrary to our recent reaffirmation of the principle that "it is within the province of the Legislature to designate specific items of litigation expense which may be taxed as costs"[43] and our express disapproval of prior cases that permitted recovery of litigation expenses without an explicit basis in statute or uniform procedure.[44]

Douglas County filed an amicus curiae brief, directing our attention to Neb. Rev. Stat. § 25-1711 (Reissue 2016). That statute applies in equity actions, and permits an appellate court, in its discretion, to "tax as costs the actual fees and expenses necessitated by such jury [where a jury is demanded in the district court] if the court finds that the appeal was taken or the original filing was made for a frivolous or capricious reason."[45] Douglas County concedes this statute does not apply to the present case, but suggests the statute shows that the Legislature has, under certain circumstances, defined taxable costs to include jury expenses.

Section 25-1711 illustrates that when the Legislature wants to make jury fees and expenses a taxable cost, it knows how to do so. To date, it has authorized only appellate courts to tax jury fees and expenses, and then only in very limited

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[42] *Id*.

[43] *City of Falls City, supra* note 30, 281 Neb. at 235, 795 N.W.2d at 260.

[44] See *McGill, supra* note 29.

[45] See *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983) (reiterating § 25-1711 applies to equitable actions—not those involving recovery of money).

circumstances. Because § 25-1711 does not apply—either factually or procedurally—to this case, it provides no authority for taxing Millard Gutter with jury fees and mileage.

Finally, we are urged by American Family and Douglas County to conclude that even if no other statute authorizes a district court to tax jury expenses as costs, it is permissible to assess jury costs against a party who brings or defends a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith under § 25-824. We express no opinion on whether jury costs can be assessed under § 25-824, because there was no finding of frivolousness in this case that would bring this action within the purview of that statute. We also express no opinion on whether there are any circumstances under which a district court, as a court of general jurisdiction having the inherent power to do all things necessary for the proper administration of justice and equity within the scope of its jurisdiction,[46] might impose upon a party the expense incurred by a county to provide a jury panel in a civil case. Although on appeal American Family alludes to this inherent authority, the district court based its decision on its authority to tax costs and not upon its inherent power.

Nebraska law mandates that jurors shall be paid "by the county"[47] for their service in district court. The parties direct us to no other statute that authorizes a trial court to tax, as costs in a civil action, the sums paid to pay jurors for their service and mileage. We share the trial court's frustration that Millard Gutter waited until 40 prospective jurors were present at the courthouse to dismiss its remaining claims, and we do not condone the needless waste of taxpayer resources that resulted from this tactic. But we are also mindful that shifting the expense of juror fees and mileage from the government to the parties under certain circumstances could have a chilling effect

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[46] See *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983).

[47] § 33-138(3).

on exercising the constitutional right to a jury trial.[48] Questions of whether, or under what circumstances, the governmental expense of juror fees and mileage should be taxed as costs in a civil action are matters of public policy in the province of the Legislature.[49] In the absence of a statute or uniform course of procedure that authorized the district court to tax jury expenses as costs, we must find the district court abused its discretion in awarding these costs.

3. Motion to Alter or Amend Judgment

Millard Gutter assigns the trial court erred in denying its motion to alter or amend the order taxing costs. Given our resolution of this appeal, it is unnecessary to address this assignment.[50]

V. CONCLUSION

At the time Millard Gutter filed its dismissal, it had no statutory right to voluntary dismissal under either § 25-601 or § 25-602. For that reason, the district court's authority to make further rulings in the case was unaffected by that filing. However, because there is no statute or uniform course of procedure authorizing the district court to tax as costs the expenses associated with courtroom technology or juror fees and mileage, we must find the district court abused its discretion in taxing such expenses as costs. We therefore reverse the judgment of the district court to the extent it taxed such costs, and in all other respects, we affirm.

Affirmed in part, and in part reversed.

Wright and Kelch, JJ., not participating.

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[48] See Neb. Const. art. I, § 6.

[49] See *City of Falls City, supra* note 30.

[50] *In re Interest of Josue G.*, 299 Neb. 784, 910 N.W.2d 159 (2018) (appellate court not obligated to engage in analysis unnecessary to adjudicate case and controversy before it).

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

Elizabeth Mays, and all others similarly situated, appellee, v. Midnite Dreams, Inc., doing business as Shaker's, and Daniel Robinson, appellants.

915 N.W.2d 71

Filed July 13, 2018. No. S-17-674.

1. **Contracts: Statutes: Appeal and Error.** The construction of a contract and the meaning of a statute are questions of law which an appellate court reviews de novo.
2. **Contracts: Public Policy.** The determination of whether a contract violates public policy presents a question of law.
3. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Employer and Employee: Independent Contractor: Master and Servant.** Ordinarily, a party's status as an employee or an independent contractor is a question of fact. However, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law.
5. **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.
6. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
7. **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.

8. **Contracts: Wages.** The policy statement in Neb. Rev. Stat. § 48-1201 (Reissue 2010) precludes parties from avoiding the protections of the Wage and Hour Act, Neb. Rev. Stat. § 48-1201 et seq. (Reissue 2010 & Cum. Supp. 2016), by contractual agreement.
9. **Statutes: Legislature: Public Policy.** It is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state.
10. **Contracts: Public Policy.** A contract which is clearly contrary to public policy is void.
11. **Constitutional Law: Rules of the Supreme Court: Notice: Statutes: Appeal and Error.** Strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) is required in order for an appellate court to consider a challenge to the constitutionality of a statute.
12. **Estoppel.** The doctrine of equitable estoppel is based upon the principle that one who has previously taken a position with reference to a transaction and thereby obtained a benefit from the other party cannot thereafter take an inconsistent position which would result in prejudice to the party who relied on the original position.
13. **Appeal and Error.** On appeal, an appellate court will consider only arguments that were both specifically assigned and specifically argued in the appellate brief.
14. **Employer and Employee: Independent Contractor.** No single test exists for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the type of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.
15. ____: ____. The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor.
16. **Federal Acts: Employer and Employee: Wages.** The Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (2012 & Supp. IV 2016), requires employers subject to its provisions to pay each employee engaged

in commerce or in the production of goods for commerce, or who is employed in an enterprise which is engaged in commerce or in the production of goods for commerce, specified wages for all hours worked, certain of which are to be compensated at overtime rates.

17. **Federal Acts: Employer and Employee: Words and Phrases.** Commerce as used in the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (2012 & Supp. IV 2016), means interstate commerce.
18. **Federal Acts: Employer and Employee: Proof.** One of the basic elements necessary to showing an entitlement to relief under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (2012 & Supp. IV 2016), is that the work involved interstate activity.
19. ____: ____: ____. Under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (2012 & Supp. IV 2016), the burden is on the employee to prove a sufficient nexus to interstate commerce as an essential element of the claim.
20. ____: ____: ____. Without at least some minimal showing as to the parties' relationship to interstate commerce, the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (2012 & Supp. IV 2016), cannot be said to apply as a matter of law.
21. **Federal Acts: Employer and Employee.** The question whether an employee is engaged in commerce within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (2012 & Supp. IV 2016), is determined by practical considerations, not by technical conceptions. The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity.
22. ____: ____. Work that is purely local in nature does not meet the requirements of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (2012 & Supp. IV 2016), but any regular contact with commerce, no matter how small, will result in coverage.
23. ____: ____. For an employee to be "engaged in commerce" under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (2012 & Supp. IV 2016), the employee must be directly participating in the actual movement of persons or things in interstate commerce by (1) working for an instrumentality of interstate commerce, e.g., transportation or communication industry employees, or (2) by regularly using the instrumentalities of interstate commerce in his or her work, e.g., regular and recurrent use of interstate telephone, telegraph, mails, or travel.
24. **Federal Acts: Employer and Employee: Sales: Proof.** To succeed on a Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (2012 & Supp. IV 2016), claim alleging enterprise coverage, an employee must elicit

evidence to prove that his or her employer's sales were high enough to trigger coverage under the act.

25. **Employer and Employee: Wages.** Under Neb. Rev. Stat. § 48-1203(2) (Cum. Supp. 2016), an employee is considered to be a tipped employee if the employer proves the employee received tips sufficient to compensate the employee at a rate greater than or equal to the minimum wage.
26. **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.
27. **Actions: Employer and Employee: Wages.** The Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue 2010 & Cum. Supp. 2016), does not grant a cause of action to an employee in a case where no regular payday has been established and he or she has never received payment from his or her employer.
28. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed in part, and in part reversed and remanded with direction.

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

Kathleen M. Neary, of Powers Law, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Daugherty, District Judge.

Funke, J.

This appeal concerns an order from the Lancaster County District Court which found that Elizabeth Mays, an exotic dancer with Midnite Dreams, Inc., doing business as Shaker's, was an employee entitled to compensation under the federal Fair Labor Standards Act[1] (FLSA) and the Wage and Hour

[1] 29 U.S.C. § 201 et seq. (2012 & Supp. IV 2016).

Act[2] (WHA). The district court then awarded damages and attorney fees and costs under the FLSA and the Nebraska Wage Payment and Collection Act[3] (NWPCA). While the court's ruling that Mays was an employee under the WHA was not clearly erroneous, the court erred in granting Mays relief under the FLSA and the NWPCA. Therefore, we affirm in part, and in part reverse and remand with direction to award damages and attorney fees and costs, calculated consistently with the WHA.

I. BACKGROUND

Shaker's, a juice bar featuring all-nude dancers, is owned by Midnite Dreams and located near Waverly, Nebraska. Shaker's operates as a "leased" club, meaning it contracts with dancers to lease them the use of its facilities and the dancers receive compensation only from customer tips. Shaker's also directly employs a doorman, wait staff, a bartender, and a disk jockey. Daniel Robinson, one of the appellants, manages Shaker's and is the principal owner and sole corporate officer of Midnite Dreams.

From 2012 to 2014, Mays danced at Shaker's, under two 1-year "Independent Artist Lease Agreements" with Midnite Dreams. Under the agreements, Mays paid a flat nightly fee for the use of Shaker's stage and dressing room, with additional fees for each use of the "VIP" or private rooms. The agreements did not provide that Shaker's would compensate Mays for any service and did not contain any schedule or minimum work requirements. The appellants never provided any compensation to Mays.

While dancing at Shaker's, Mays was informed of over 50 additional "house rules," posted at the facility and orally communicated to the dancers, concerning the dancers' conduct and the use of Shaker's facility. Robinson provided inconsistent

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[2] Neb. Rev. Stat. § 48-1201 et seq. (Reissue 2010 & Cum. Supp. 2016).

[3] Neb. Rev. Stat. § 48-1228 et seq. (Reissue 2010 & Cum. Supp. 2016).

testimony as to whether these rules were mandatory or merely "suggestions." However, Mays testified that the house rules were enforced by Robinson and his employees and that failure to follow the house rules would result in discipline through belligerent reprimands, impositions of fines, and threats to terminate the agreements, which were terminable at will.

The "house rules" concerned the dancers' shift arrival times; hair, makeup, lotion, and dress requirements for the dancers; the number and order of sets the dancers performed during a shift; the method of payment the dancers could accept from customers; cleaning duties; the price the dancers could charge for private and "VIP" room dances; off-stage dancer conduct; and conduct during onstage performances, specifying clothing items the dancers were expected to remove during certain sets.

Mays prepared a spreadsheet of the dates and hours she performed at Shaker's from various documents and recollections. She also calculated her average compensation from customer tips, after lease fees, while working at Shaker's as $44 per hour.

Mays filed a complaint and an amended complaint against the appellants seeking unpaid wages, liquidated damages, and attorney fees and costs under the FLSA and Nebraska law. Though Mays' amended complaint alleged that the appellants violated the FLSA and Nebraska law, it contained no allegations concerning whether Mays had engaged in commerce or whether Midnite Dreams was an enterprise engaged in commerce.

The court determined Mays was an "employee" entitled to minimum wage compensation under the FLSA and Nebraska law, applying the "ABC test" under § 48-1229(1)(a) through (c) and the 10-factor test under § 48-1202(3). The court concluded that by instituting and enforcing the house rules, the appellants transformed Mays into an employee and themselves into employers. The court also ruled Mays was not estopped from claiming she was an employee.

The court determined Mays was entitled to a full minimum wage rate because, unlike Nebraska Law, the FLSA required specific notice requirements to count a "tip credit" against minimum wage requirements. Further, it ruled the FLSA entitled Mays to overtime compensation and liquidated damages. The court ruled the appellants were jointly and severally liable for $7,586.78 in damages for unpaid wages, $27,945 in attorney fees, and $504.70 in costs. The appellants filed a motion for new trial, which was denied.

The appellants perfected a timely appeal. We moved 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.[4]

II. ASSIGNMENTS OF ERROR

The appellants assign, restated and reordered, error to the court for (1) concluding that a written lease agreement between the parties created an employment relationship, (2) applying the FLSA and the WHA policy statements to change the parties' contractual relationship, (3) failing to find Mays was estopped from arguing she was an employee, (4) finding Mays was an employee of the appellants, (5) finding Mays was entitled to minimum wage compensation, (6) failing to conclude Mays was a tipped employee, and (7) awarding excessive and unreasonable attorney fees.

III. STANDARD OF REVIEW

[1-3] The construction of a contract and the meaning of a statute are questions of law which an appellate court reviews de novo.[5] The determination of whether a contract violates public policy presents a question of law.[6] An appellate

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

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

[6] *Johnson v. Nelson*, 290 Neb. 703, 861 N.W.2d 705 (2015).

court independently reviews questions of law decided by a lower court.[7]

[4] Ordinarily, a party's status as an employee or an independent contractor is a question of fact. However, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law.[8]

[5,6] 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.[9] In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[10]

[7] 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.[11] An appellate court may, at its option, notice plain error.[12]

IV. ANALYSIS

The appellants' arguments on appeal can be consolidated into the following four issues: (1) Did the court err as a matter

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[7] *Donut Holdings v. Risberg*, 294 Neb. 861, 885 N.W.2d 670 (2016).

[8] *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003).

[9] *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018).

[10] *Elting v. Elting*, 288 Neb. 404, 849 N.W.2d 444 (2014).

[11] *Houser v. American Paving Asphalt*, 299 Neb. 1, 907 N.W.2d 16 (2018).

[12] *In re Robert L. McDowell Revocable Trust*, 296 Neb. 565, 894 N.W.2d 810 (2017).

of law in considering whether Mays was an "employee" when the agreements stated the parties had a lessee/lessor relationship? (2) Did the court err in ruling Mays was an "employee"? (3) Did the court err in ruling Mays was entitled to full minimum wage compensation? (4) Was the amount of attorney fees awarded to Mays excessive and unreasonable?

1. Mays Was Employee Entitled to Compensation

(a) Agreements Neither Waived Protections Afforded to Mays by WHA nor Estopped Mays From Asserting Rights Under WHA

The appellants contend that because of the agreements entered into by the parties, as a matter of law, Mays cannot be considered an employee. They argue that the parties' constitutional right to contract supersedes the policy statement in § 48-1201. This argument, however, relies on a presumption that the WHA permits an employee to forfeit the protections afforded to him or her by the WHA through contract. The appellants fail to cite any authority for their argument that the protections of the WHA may be waived, and we find no basis for such in the WHA.

Section 48-1201 provides:

> It is declared to be the policy of this state (1) to establish a minimum wage for all workers at levels consistent with their health, efficiency and general well-being, and (2) to safeguard existing minimum wage compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hours standards which do not provide adequate standards of living.

[8-10] The policy statement in § 48-1201 is precisely why parties may not contract away the protections afforded by the WHA. It is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy

of this state.[13] And a contract which is contrary to public policy is void.[14] Accordingly, the agreements are void to the extent they defined the parties' employment relationship, under § 48-1202(3).

[11] To the extent the appellants challenge the constitutionality of the WHA, we do not reach this argument. Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) requires that a party challenging a statute's constitutionality file and serve notice with the Supreme Court clerk at the time of filing the party's brief. Strict compliance with § 2-109(E) is required in order for an appellate court to consider a challenge to the constitutionality of a statute.[15] A review of the record shows the appellants did not file a notice of a constitutional question with the clerk.

[12] The appellants also contend that because Mays profited from the agreements, she is estopped from claiming relief as an employee. The doctrine of equitable estoppel is based upon the principle that one who has previously taken a position with reference to a transaction and thereby obtained a benefit from the other party cannot thereafter take an inconsistent position which would result in prejudice to the party who relied on the original position.[16] The necessary elements of equitable estoppel are as follows:

> "As to party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of

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[13] *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010).

[14] *Id.*

[15] *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015).

[16] *Williams v. Williams*, 206 Neb. 630, 294 N.W.2d 357 (1980).

> knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice."[17]

However, Mays could not have made a false representation or concealment of material facts by entering into the agreements the appellants imposed upon her. In addition, the appellants could not have relied, in good faith, upon the conduct or statements of Mays, because the agreements cannot define the relationship between the parties for the purposes of § 48-1202(3). As a result, Mays cannot be estopped from exercising the rights afforded to her under the WHA.

(b) Court's Determination Mays Was "Employee" Under § 48-1202(3) Was Not Clearly Erroneous

[13] While the appellants assigned error to the district court's determination that Mays was an "employee," the court made the determination under the three separate acts consisting of the FLSA, the WHA, and the NWPCA. Because the appellants reference only the 10-factor employee test that the court applied to the WHA, we confine our analysis to that determination. On appeal, we will consider only arguments that were both specifically assigned and specifically argued in the appellate brief.[18]

[14] No single test exists for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered:

> (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct

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[17] *Id.* at 637, 294 N.W.2d at 362.

[18] *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

> occupation or business; (3) the type of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.[19]

The appellants argue 3 of the 10 factors support a finding that Mays would be an independent contractor. Those three factors, which include the method of payment, the parties' belief that they were not creating an agency relationship, and the extent of control they had over the details of the work, each favor a determination Mays was an independent contractor.

While the court did not specifically address the method of payment or the parties understanding of their relationship, both support an independent contractor finding. Nevertheless, these were merely two factors considered in conjunction with the other eight factors.

Ordinarily, a party's status as an employee or an independent contractor is a question of fact.[20] In this matter, there is a factual question regarding what the "house rules" were and whether they were mandatory or were merely suggestions. As a result, we review the court's determination that Mays was an employee as a question of fact. In reviewing the court's factual determinations, we do not reweigh the evidence but consider it in the light most favorable to Mays.

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[19] *Allstate Indemnity Co., supra* note 8, 266 Neb. at 801, 669 N.W.2d at 461-62.

[20] *Id.*; *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997).

[15] The court's decision strongly relied on a finding that the "house rules" imposed on Mays controlled almost every aspect of her employment. The court correctly noted that the "right of control is the chief factor distinguishing an employment relationship from that of an independent contractor."[21]

As the district court also noted, the appellants were in the business of operating a club which offered fully nude, live entertainment. Mays' work was a vital part of that regular business. In addition, the appellants instituted the "house rules," which significantly controlled the manner in which the dancers performed their work, including the dancers' movement on stage and inside the club, the type of dress worn by the dancers, the dancers' cleaning duties, their schedule of performing, their contact with customers, the rates they charged, the method of payment, their cell phone usage, the types of lotions they used, the music they danced to, and their attendance at mandatory meetings. Further, the appellants meted out penalties for violations of the "house rules," which included monetary fines, relegation to less desirable time slots, and verbal reprimands.

The appellants' argument that they did not control the means and methods of the dancers' performances is not supported by the record, does little to undercut the well-reasoned analysis of the court, and fails to address the existence of the "house rules." In addition, the appellants have provided no basis for finding the court's determination that Mays was an "employee" entitled to a minimum wage, under the WHA, clearly erroneous. Therefore, we find these assignments of error to be without merit.

(c) Appellants Failed to Properly Raise Issue of Robinson's Personal Liability

The appellants argue in their brief that the evidence clearly shows Midnite Dreams, and not Robinson, was Mays' employer

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[21] See *Kime, supra* note 20, 252 Neb. at 414, 562 N.W.2d at 711.

and that the court improperly pierced the corporate veil without legal basis to make Robinson personally liable. They provide no support for their implication that an owner of a company may be liable under employment laws for wages only if the corporate veil may be pierced, which the court explicitly rejected in its order on the motion for rehearing. Further, the appellants failed to assign error to the court's determination that Robinson was one of Mays' employers and, therefore, was jointly liable for her wages.

As mentioned above, we will consider only arguments that were both specifically assigned and specifically argued in the appellate brief. The trial court ruled Robinson was an employer based on his direct role at Shaker's, not merely through his role as the owner of Midnite Dreams. Therefore, we do not consider this argument.

2. Mays Failed to Prove FLSA Applied

[16] The FLSA requires employers subject to its provisions to pay each employee engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise which is engaged in commerce or in the production of goods for commerce, specified wages for all hours worked, certain of which are to be compensated at overtime rates.[22] Any employer who violates these requirements is liable to each employee in the amount of his or her unpaid minimum and overtime wages, an additional equal amount as liquidated damages and reasonable attorney fees and costs.[23]

The trial court found that under the FLSA, the appellants were liable to Mays for minimum wage, without any tip credit; overtime wage compensation; liquidated damages; and attorney fees and costs. The appellants argue the court erred in certain determinations of its liability under the FLSA.

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[22] *Banks v. Mercy Villa Care Center*, 225 Neb. 751, 407 N.W.2d 793 (1987). See 29 U.S.C. §§ 206 and 207.

[23] See 29 U.S.C. § 216(b).

[17] Nevertheless,

> [t]o recover for minimum-wage or overtime violations under the FLSA, a plaintiff-employee must demonstrate that either (1) his employer is an "enterprise engaged in commerce or in the production of goods for commerce" or (2) the plaintiff himself has "engaged in commerce or in the production of goods for commerce" in his capacity as an employee.[24]

The FLSA defines commerce as meaning "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."[25] In short, commerce, as used in the FLSA, means interstate commerce.[26]

[18-20] Accordingly, "[o]ne of the 'basic elements' necessary to showing an entitlement to relief under the FLSA is that 'the work involved interstate activity.'"[27] "The burden is on the employee to prove a sufficient nexus to interstate commerce as an essential element of the claim."[28] Similarly, we have held that "[w]ithout at least some minimal showing as to the [parties'] relationship to interstate commerce, the [FLSA] cannot be said to apply" as a matter of law.[29]

Neither the parties nor the court addressed this element of Mays' FLSA claims. Therefore, before addressing the merits of the award of unpaid minimum and overtime wages, liquidated damages, and reasonable attorney fees and costs, we consider

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[24] *Helfand v. W.P.I.P., Inc.*, 165 F. Supp. 3d 392, 396 (D. Md. 2016), citing 29 U.S.C. §§ 206(a) and 207(a)(1). Accord *Martinez v. Petrenko*, 792 F.3d 173 (1st Cir. 2015).

[25] 29 U.S.C. § 203(b).

[26] See *Banks, supra* note 22.

[27] *Martinez, supra* note 24, 792 F.3d at 179.

[28] *Id.* at 175. See, also, e.g., *Sobrinio v. Medical Center Visitor's Lodge, Inc.*, 474 F.3d 828 (5th Cir. 2007), citing *Warren-Bradshaw Co. v. Hall*, 317 U.S. 88, 63 S. Ct. 125, 87 L. Ed. 83 (1942).

[29] *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 469, 428 N.W.2d 141, 151 (1988), citing *Banks, supra* note 22.

whether Mays made a sufficient showing to entitle her the protections of the FLSA as a matter of law.

As a dancer, Mays was not engaged in the production of goods in commerce. Instead, we limit our consideration to whether Mays engaged in commerce or whether Midnite Dreams was an enterprise engaged in commerce. The facts capable of establishing coverage under both of these theories are different. "To establish individual coverage, the employee must present facts showing his own activities. To establish enterprise coverage, the employee instead must present facts showing the activities of other employees, and the employer's sales."[30]

(a) Evidence Does Not Show Mays Was Engaged in Commerce

[21,22] "The question whether an employee is engaged 'in commerce' within the meaning of the [FLSA] is determined by practical considerations, not by technical conceptions."[31] "'The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.'"[32] "The [U.S.] Supreme Court has articulated that it is the intent of Congress to regulate only activities constituting interstate commerce, not activities merely affecting commerce."[33] "Work that is purely local

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[30] *Martinez, supra* note 24, 792 F.3d at 175.

[31] *Mitchell v. Vollmer & Co.*, 349 U.S. 427, 429, 75 S. Ct. 860, 99 L. Ed. 1196 (1955). See, also, e.g., *Wirtz v. Modern Trashmoval, Inc.*, 323 F.2d 451 (4th Cir. 1963).

[32] *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 324, 80 S. Ct. 739, 4 L. Ed. 2d 753 (1960). See, also, e.g., *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292 (11th Cir. 2011); *Williams v. Henagan*, 595 F.3d 610 (5th Cir. 2010); *Wirtz, supra* note 31.

[33] *Thorne v. All Restoration Services, Inc.*, 448 F.3d 1264, 1266 (11th Cir. 2006), citing *McLeod v. Threlkeld*, 319 U.S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538 (1943).

in nature does not meet the FLSA's requirements, but '[a]ny regular contact with commerce, no matter how small, will result in coverage.'"[34]

[23] The 11th Circuit Court of Appeals has espoused the following test to determine if an employee is engaged in commerce:

> [F]or an employee to be 'engaged in commerce' under the FLSA, he must be directly participating in the actual movement of persons or things in interstate commerce by (i) working for an instrumentality of interstate commerce, *e.g.,* transportation or communication industry employees, or (ii) by regularly using the instrumentalities of interstate commerce in his work, *e.g.,* regular and recurrent use of interstate telephone, telegraph, mails, or travel.[35]

Regarding the first type of interstate employees, courts have further expounded on the actions that qualify as engaging in commerce to include an employee that "either crosses state lines in connection with his employment, handles goods directly moving in the channels of interstate commerce, or directly contributes to the repair or extension of facilities of interstate commerce."[36]

There is also substantial case law considering the limits of this type of interstate employment. The U.S. Supreme Court has stated that "handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not."[37] Based on this principle, courts have rejected claims that an employee operating a vehicle and purchasing

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[34] *Henagan, supra* note 32, 595 F.3d at 621. See, also, 29 C.F.R. § 779.109 (2017).

[35] *Thorne, supra* note 33, 448 F.3d at 1266, citing 29 C.F.R. §§ 776.23(d)(2) and 776.24 (2005). See, also, 29 C.F.R. § 779.103 (2017).

[36] *Wirtz, supra* note 31, 323 F.2d at 457, citing *Vollmer & Co., supra* note 31.

[37] *McLeod, supra* note 33, 319 U.S. at 494.

gasoline, both of which were produced out-of-state, was in the stream of commerce.[38]

In *Sobrinio v. Medical Center Visitor's Lodge, Inc.*,[39] an employee of a motel, connected to a large local medical center, worked in roles as a janitor, security guard, and driver for guests. He drove guests on errands to local stores and the medical center, but never drove them to the airport or other transportation centers. While he served many out-of-state guests, the court held he was not engaged in commerce under the FLSA, because his duties were purely local in nature.[40] It distinguished his transportation duties from those of other employees that "engaged in commerce when 'their work was entwined with a *continuous* stream of [interstate] travel.'"[41]

Regarding the second type of interstate employees, there is less agreement among courts on what activities constitute engagement in commerce.

In *Jian Long Li v. Li Qin Zhao*,[42] the U.S. District Court for the Eastern District of New York rejected an argument that using a cell phone "'connecting to phone towers across the United States'" amounted to engaging in commerce. In *Jian Long Li*, the plaintiff used a cell phone to contact customers in the course of making local deliveries for a New York City restaurant. The court ruled "the use of a cellular phone by [the plaintiff], but *not* for communication between states, is strictly an intrastate activity, notwithstanding the fact that it utilizes interstate technology."[43] It reasoned that while using

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[38] *Jian Long Li v. Li Qin Zhao*, 35 F. Supp. 3d 300 (E.D.N.Y. 2014), citing *Josendis, supra* note 32, and *Thorne, supra* note 33.

[39] *Sobrinio, supra* note 28.

[40] *Id.*

[41] *Id.* at 829-30 (emphasis in original).

[42] *Jian Long Li, supra* note 38, 35 F. Supp. 3d at 308.

[43] *Id.* at 309, citing *Junkin v. Emerald Lawn Maint. & Landscaping, Inc.*, No. 04-CV-1537, 2005 WL 2862079 (M.D. Fla. Nov. 1, 2005). See, also, 29 C.F.R. § 779.103.

a cell phone, as well as other intrastate activities, may affect or indirectly relate to interstate commerce, it would be untenable to conclude that such local activities would lead to FLSA coverage without evidence of the communication crossing state lines, because it would be "difficult to imagine anyone, in this modern day and age, who [would not then qualify for FLSA coverage]."[44]

Two unpublished U.S. District Court opinions have addressed what activities of dancers constitute engaging in commerce, *Miller v. Centerfold Entertainment Club, Inc.*[45] and *Foster v. Gold & Silver Private Club, Inc.*[46] In *Miller*, the court rejected arguments that a dancer was engaged in commerce by dancing for out-of-state customers and serving beverages produced in another state, but ruled the dancer's use of music streamed over the Internet, text messages to clients, and self-publication on social media constituted engagement in commerce. In *Foster*, the court ruled broadcasting dances over the Internet was engagement in commerce.

At oral arguments, Mays argued that Robinson's contracting with dancers from outside Nebraska and scheduling them to come to Nebraska and the fact that Mays commuted to Nebraska to dance constituted engagement in interstate commerce. However, the record is devoid of evidence that Robinson communicated with the dancers across state lines by using cell phones or the Internet. In addition, as mentioned above, only Mays' personal activities are relevant to analyzing whether she was an employee engaged in commerce. The U.S. Department of Labor regulations explicitly distinguish an employee's personal actions of commuting to and from the work place, which do not constitute engaging in

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[44] *Jian Long Li, supra* note 38, 35 F. Supp. 3d at 309.

[45] *Miller v. Centerfold Entertainment Club, Inc.*, No. 6:14-CV-6074, 2017 WL 3425887 (W.D. Ark. Aug. 9, 2017) (unpublished decision).

[46] *Foster v. Gold & Silver Private Club, Inc.*, No. 7:14CV00698, 2015 WL 8489998 (W.D. Va. Dec. 9, 2015) (unpublished decision).

commerce, from an employee's traveling across state lines in the performance of his or her duties, who must do so consistently to be considered engaged in commerce.[47] Further, it has been held that an employer's action of hiring an employee in another state and paying for his travel to the state where his employment activities were located did not amount to that employee's engaging in commerce, because the relocation was unrelated to the employee's actual duties.[48] We decline to expand the scope of the FLSA to cover employees based on actions performed in their personal capacity with no relation to the performance of their employment.

Here, even considering the most liberal standards, the evidence fails to show that Mays engaged in interstate commerce. Even the activities the court in *Jian Long Li* was concerned would bring all employees in the modern era under FLSA coverage are not present.

While Robinson testified dancers were free to accept payment by credit card, Mays stated dancers were strictly forbidden from doing so and there was no evidence Mays had ever accepted credit card payment. The evidence shows out-of-state customers did attend Shaker's but, as stated in *Sobrinio*, purely local interactions with out-of-state individuals is not an interstate activity.[49]

Unlike *Miller*, there was no evidence Mays ever communicated with customers in Nebraska or elsewhere by telephone or promoted herself on social media. Also, while the dancers could request music, Robinson and the disk jockey exclusively handled playing music and it was not established that such music was streamed via the Internet. Therefore, we must

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[47] 29 C.F.R. § 776.12 (2017). See, also, 1 Les A. Schneider & J. Larry Stine, Wage and Hour Law § 4:3 (2018).

[48] *Oliphant v. Kaser et al., d.b.a. Kaser Construction Co.*, 10 Lab. Cas. (CCH) ¶ 62,928 (Dallas Cty. Dist. Ct., Iowa, No. 16470, Nov. 13, 1945).

[49] See *Sobrinio, supra* note 28.

conclude that as a matter of law, Mays failed to make even a minimal showing she engaged in commerce.

(b) Evidence Does Not Show Midnite Dreams Was Enterprise Engaged in Commerce

The FLSA defines an "'[e]nterprise engaged in commerce or in the production of goods for commerce'" as, in relevant part, an enterprise that

> (A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and
>
> (ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated).[50]

[24] FLSA coverage through enterprise coverage is particularly expansive compared to individual coverage based on the broad definition of how an employee may engage in commerce in § 203(s)(1)(A)(i).[51] Congress, however, curbed this potentially limitless definition by including the revenue threshold in § 203(s)(1)(A)(i).[52] To succeed on a FLSA claim alleging enterprise coverage, an employee must elicit "evidence to prove that his employer's sales were high enough to trigger coverage under the [FLSA]."[53]

We need not consider the scope of activities constituting enterprise coverage here, because there was no evidence

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[50] 29 U.S.C. § 203(s)(1).

[51] *Helfand, supra* note 24; *Ethelberth v. Choice Sec. Co.*, 91 F. Supp. 3d 339 (E.D.N.Y. 2015).

[52] *Helfand, supra* note 24.

[53] *Martinez, supra* note 24, 792 F.3d at 175.

adduced or even an allegation concerning the annual gross volume of sales made or business done by Midnite Dreams. Therefore, we must conclude that as a matter of law, Mays failed to make even a minimal showing Midnite Dreams was an enterprise engaged in commerce.

The court's ruling in favor of Mays on her FLSA claims, despite Mays' failure to prove all of the elements of her claims, affected a substantial right of the appellants, and to leave this error uncorrected would amount to a miscarriage of justice. Therefore, we find plain error in the court's ruling that Mays was entitled to compensation, overtime compensation, no tip credit, liquidated damages, and attorney fees and costs under the FLSA.

3. Mays Was Tipped Employee

[25] The court did not explicitly rule whether Mays was a tipped employee under Nebraska law. However, unlike the FLSA, § 48-1203(2) does not require any prior notification for an employee to be a tipped employee. Instead, an employer must merely prove the employee received tips sufficient to compensate the employee at a rate greater than or equal to the minimum wage.

Mays' evidence that she was compensated by way of gratuities at an average rate of $44 per hour clearly satisfies this requirement. Therefore, under § 48-1203(2), Mays was entitled to a wage of only $2.13 per hour.

4. Mays Was Not Entitled to Relief Under NWPCA

The NWPCA requires that absent an exception, "each employer shall pay all wages due its employees on regular days designated by the employer or agreed upon by the employer and employee."[54] Under the NWPCA, "[a]n employee having a claim for wages which are not paid within thirty days of the

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[54] § 48-1230(1).

regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court."[55] We have summarized this cause of action as "essentially permit[ing] an employee to sue his or her employer if the employer fails to pay the employee's wages as they become due."[56]

"Wages" are defined as "compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis."[57] Accordingly, we have stated that "'unpaid wages' means 'wages which are not paid within thirty days of the regular pay day designated or agreed upon.'"[58]

[26] 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.[59]

[27] As expressed by the preceding provisions, the plain language of the NWPCA indicates that the act only applies to a situation where a regular payday has been established by an employer unilaterally or with the consent of an employee. An employee is not granted a cause of action in the case where no regular payday has been established and he or she has never received payment from his or her employer. Instead, an employee denied minimum wage compensation for employment that has no regular payday may only proceed to recover under the WHA.[60] Further, "wages," under the NWPCA, is

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[55] § 48-1231(1).

[56] *Pick v. Norfolk Anesthesia*, 276 Neb. 511, 516, 755 N.W.2d 382, 386 (2008).

[57] § 48-1229(6).

[58] *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 670, 407 N.W.2d 751, 757 (1987).

[59] *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018).

[60] § 48-1206(5).

expressly limited to a situation where the parties have agreed the employer will compensate the employee for performing work under the terms of the agreement.

In this case, the evidence shows Mays never received any compensation from the appellants. Further, the agreements do not contain any provision stating Mays will be paid for performing services as a dancer or cleaner. There is also no evidence the appellants had established a regular payday or that Mays had agreed on a certain date for such payment. While the court determined that the house rules were a condition of employment, that is not sufficient to bring the agreements within the scope of the NWPCA.

Therefore, Mays was not entitled to relief under § 48-1231 of the NWPCA.

While Mays is still entitled to recover minimum wage benefits under the WHA, the court's decision to grant relief under § 48-1231 affected a substantial right of the appellants by making them liable for attorney fees from this appeal and requiring them to defend against the possibility of liability for liquidated damages under § 48-1232. Thus, we find the court's ruling that Mays was entitled to minimum wage compensation and attorney fees and costs under § 48-1231 constitutes plain error.

5. Attorney Fees

[28] Because we determine the court erred in awarding attorney fees under the FLSA and the NWPCA, we do not consider the appellants' assignment of error regarding whether the amount of attorney fees the court awarded to Mays was excessive and unreasonable. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[61]

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[61] *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018).

V. CONCLUSION

We conclude the trial court's determination that Mays was an employee entitled to a minimum wage under the WHA was not clearly erroneous, but Mays was entitled to only the minimum wage amount for tipped employees. The WHA may also entitle Mays to attorney fees and costs. Nevertheless, the court erred in ruling Mays was entitled to relief under the FLSA and the NWPCA. Therefore, we affirm in part, and in part reverse and remand with direction to award damages and attorney fees and costs, calculated consistently with the WHA.

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

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

In re Interest of J.K., a child under 18 years of age. State of Nebraska, appellant, v. J.K., appellee.

915 N.W.2d 91

Filed July 13, 2018. No. S-17-982.

1. **Judges: Recusal: Appeal and Error.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
2. **Appeal and Error.** Appellate review of a 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. **Judges: Recusal: Waiver.** A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.
5. **Judges: Recusal: Appeal and Error.** Once a case has been litigated, an appellate court will not disturb the denial of a motion to disqualify a judge and give litigants a second bite at the apple.
6. **Judges: Recusal: Time.** The issue of judicial disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered.
7. **Judges: Recusal.** Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned.
8. ____: ____. Under the Nebraska Revised Code of Judicial Conduct, such instances in which the judge's impartiality might reasonably be

questioned specifically include where the judge has a personal bias or prejudice concerning a party or a party's lawyer.

9. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
10. **Judges: Recusal.** In evaluating a trial judge's alleged bias, the question is whether a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
11. **Judges: Recusal: Judgments.** Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion directed to a trial judge.
12. **Judges: Recusal.** Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.
13. **Judges: Witnesses: Evidence.** Comments by the judge presiding over a matter are clearly not evidence, because a judge may not assume the role of a witness.
14. **Trial: Judges: Witnesses: Rules of Evidence.** Neb. Rev. Stat. § 27-605 (Reissue 2016) was drafted as a broad rule of incompetency designed to prevent a judge presiding at a trial from testifying as a witness in that trial on any matter whatsoever.
15. **Trial: Judges: Witnesses.** A judge's taking the role of a witness in a trial before him or her is manifestly inconsistent with the judge's customary role of impartiality.

Appeal from the County Court for Washington County: C. Matthew Samuelson, Judge. Exception overruled.

M. Scott Vander Schaaf, Washington County Attorney, and, on brief, Emily A. Beamis for appellant.

Nicholas E. Wurth, of Law Offices of Nicholas E. Wurth, P.C., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Dobrovolny, District Judge.

Funke, J.

In a delinquency proceeding brought under the Nebraska Juvenile Code,[1] the county court for Washington County, sitting as a juvenile court, found the State of Nebraska failed to prove the allegations against the appellee, J.K., and dismissed the proceedings. The State filed this exception proceeding challenging the court's rulings on a motion to recuse and a motion to join the case with that of another minor. Because we find the State's assignments of error to be without merit, we overrule its exception.

I. BACKGROUND

In August 2015, J.K. and J.G., both male minors, were arrested by the Blair Police Department. The State filed criminal complaints against J.K. and J.G. under separate Washington County Court dockets. While J.K. and J.G. made their initial appearances together, J.K. had an individual preliminary hearing before the county court judge.

At J.K.'s preliminary hearing, the State called as a witness a Blair Police Department detective. The detective testified that Y.C., a female minor, reported being sexually assaulted by J.K. and J.G. on August 15, 2015. The detective stated that Y.C. had reported voluntarily going to the parking lot of her apartment building to spend time with J.K. and J.G., declining numerous sexual advances by J.K. and J.G. outside of the apartment building, J.K. and J.G. forcibly exposing and making contact with her breasts outside the apartment building, J.K. and J.G. taking her belongings into the apartment complex's laundry room; J.K. forcing her into the apartment complex's laundry room, J.K. and J.G. both digitally penetrating her vagina, and J.G. forcing her to have vaginal intercourse with him.

On cross-examination, the detective stated that while Y.C. had initially only told officers that she went home to her

[1] See Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2008 & Cum. Supp. 2014).

apartment after the assault, Y.C. subsequently reported voluntarily going to J.K.'s apartment shortly after she went home, to recover the cell phone case he had stolen from her. The detective also provided additional testimony about the events of the night, suggesting Y.C. had an existing relationship with J.K. and J.G.

After presenting the evidence, the parties made arguments regarding whether the State met its burden of establishing probable cause for the alleged crimes. The judge, on the record, engaged in discussion with J.K.'s counsel regarding his argument, Y.C.'s credibility, and whether Y.C.'s allegation alone amounted to probable cause. During this discussion, the court made the following statement:

> One of the concerns — the biggest concern I have so far is why would an alleged victim go to the alleged perpetrator's residence within an hour, or two, or five minutes, or whatever the case may be, within a short period of time, knock on his door, even if it's to try to get my [sic] cell phone case. I find that a little unusual.

Nevertheless, the county court ruled there was probable cause to proceed with the felony counts against J.K. and bound the matter over to the district court for Washington County. In May 2016, the district court sustained J.K.'s motion to suppress J.K.'s statement to law enforcement made on August 17, 2015, and then ordered the matter transferred to juvenile court.

The State then filed a petition against J.K. in juvenile court, alleging first degree sexual assault and false imprisonment, under § 43-247(2). The same county judge who heard the preliminary hearing was assigned to sit as the judge for the juvenile court proceedings.

During a preadjudication hearing, J.K.'s attorney requested a continuance to file a motion to suppress statements made and evidence collected from J.K. on August 17, 2015. On November 3, 2016, the scheduled hearing on the motion to suppress was continued at the State's request to allow the State to file a motion to recuse the judge.

Before considering the motion to recuse, the court requested briefs from the parties and heard arguments on the issue of whether or not the juvenile court was bound by the district court's order to suppress statements J.K. had made on August 17, 2015. The court ultimately concluded it was not bound by the district court's order to suppress, and the matter proceeded to a hearing on the State's motion to recuse.

The motion to recuse asserted that the judge should be recused for bias or prejudice, under Neb. Rev. Code of Judicial Conduct § 5-302.11. The State submitted an affidavit, authored by the county attorney, describing the alleged biased or partial statements made by the judge during an off-the-record conversation with both parties' counsel before the November 3, 2016, hearing, including that the judge had read the district court's order to suppress; absent "new" evidence, the court would make the exact same finding as the district court; and, in response to the State's inquiry regarding the court's ability to make its ruling without evidence, the judge stated that he "knew the law and would follow it." The State also cited the above-quoted statement by the judge from the preliminary hearing about Y.C.'s credibility, which had been published in a local newspaper.

At the hearing on the motion to recuse, the State rested on its affidavit. The judge then called J.K.'s counsel as a witness, who testified that the statements the county attorney attributed to the judge were not a verbatim account of the judge's statements. The judge then, while issuing his ruling on the motion, stated from the bench, regarding the off-the-record conversation, "[T]here's several of the paragraphs in your affidavit that the Court strongly disagrees with as to the accuracy" and "I don't recall saying things that you attribute to me" and, regarding the statement at the preliminary hearing, "It was certainly something that I heard during the course of the preliminary hearing." Ultimately, the court overruled the motion for recusal.

In March 2017, the court entered an order overruling J.K.'s motion to suppress and set the matter for adjudication in June 2017. In April 2017, the State filed a motion for joinder regarding the petitions against J.K. and J.G. and an unrelated motion for continuance of J.K.'s adjudication.

The matters of joinder and continuation of the adjudication for J.K. came before the court, at which time J.K. and J.G. resisted the motion for joinder. The court denied the motion for joinder, finding that the cases were at differing procedural postures, and continued J.K.'s adjudication to July 2017.

After the adjudication hearing, the court ruled the State failed to prove its case beyond a reasonable doubt and dismissed the petition against J.K. The State appealed. 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]

II. ASSIGNMENTS OF ERROR

The State assigns, restated, that the juvenile court erred when (1) the presiding judge failed to recuse himself after evidence was presented showing bias and partiality and (2) it failed to join J.K.'s and J.G.'s cases.

III. STANDARD OF REVIEW

[1] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.[3] An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.[4]

[2,3] Appellate review of a court's use of inherent power is for an abuse of discretion.[5] An abuse of discretion occurs

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

[3] *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

[4] *Id.*

[5] *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[6]

IV. ANALYSIS

1. Court's Denial of Motion for Recusal Was Not Error

The State argues the juvenile judge abused his discretion in failing to recuse himself, under Neb. Rev. Code of Judicial Conduct § 5-302.10(A), as well as § 5-302.11. Section 5-302.10(A) states that "[a] judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." Section 5-302.11(A) states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."

In support of its argument, the State identifies three separate actions of the judge that it argues violated these rules. First, the State asserts that the judge's on-the-record statement about Y.C.'s credibility at a preliminary hearing violated § 5-302.10(A) as an improper public comment and violated § 5-302.11 by showing bias and partiality. Second, the State asserts that the judge's off-the-record comments about the way it would rule on J.K.'s motion to suppress violated § 5-302.10(A) as an improper nonpublic comment and violated § 5-302.11 by showing bias and partiality. Finally, the State argues that the judge's conduct at the motion for recusal hearing violated § 5-302.11 by showing bias and partiality.

J.K. contends that the State waived its argument that the judge acted with bias and partiality during the motion for recusal hearing because it never raised the issue to the trial court. J.K. also contends that the on-the-record statement during the preliminary proceeding was based on the evidence

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[6] *Id.*

presented and was, therefore, a judicial, not prejudicial, statement. Finally, J.K. argues that no matter what the judge may have stated in the off-the-record conversation, the judge clearly stated that he would follow the law.

(a) State Failed to Present Certain Basis for Disqualification to Juvenile Court

The State never alleged, either in its motion to recuse or at the hearing on its motion, that the judge violated § 5-302.10(A). Instead, the only basis for recusal presented was the alleged violation of § 5-302.11. Further, despite reasserting its motion for recusal after the hearing, the State did not add the court's conduct during the hearing on the motion for recusal as an additional basis for disqualification. Accordingly, the State failed to present either of these issues to the juvenile court for consideration.

[4-6] A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.[7] Once a case has been litigated, an appellate court will not disturb the denial of a motion to disqualify a judge and give litigants a second bite at the apple.[8] The issue of judicial disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered.[9]

Because the State failed to timely submit these issue to the juvenile court, it waived its ability to obtain disqualification on either basis.

(b) Principles of Law Regarding § 5-302.11

[7-9] Under § 5-302.11 of the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from

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[7] *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017).

[8] *Id.*

[9] *Id.*

a case if the judge's impartiality might reasonably be questioned. Such instances in which the judge's impartiality might reasonably be questioned specifically include where the judge has a personal bias or prejudice concerning a party or a party's lawyer.[10] A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[11]

[10,11] Under the standard we have articulated for evaluating a trial judge's alleged bias, the question is whether a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.[12] Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion directed to a trial judge.[13]

(c) Judge's Statement at Preliminary Hearing Did Not Warrant Disqualification

We begin by noting that the State timely submitted this argument for the judge's disqualification. While this incident occurred over a year before the motion to recuse, the matter had only recently been assigned to the judge sitting as a juvenile judge, and it was made before the judge decided any substantial issues in the juvenile proceedings.

As mentioned above, judicial rulings almost never constitute a valid basis for a partiality motion. As the U.S. Supreme Court stated in *Liteky v. United States*[14]:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the

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[10] *Id.*; § 5-302.11.

[11] *Buttercase, supra* note 7.

[12] *Id.* See, also, *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

[13] *Buttercase, supra* note 7. Accord *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

[14] *Liteky, supra* note 13, 510 U.S. at 550-51.

> defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. . . . ". . . If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."

[12] Therefore, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings,"[15] do not "constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."[16]

The record shows that the judge's comment, regarding a determination of Y.C.'s credibility, was based solely on the evidence presented during the hearing, which expressed neither favoritism nor antagonism for either side. As a result, the judge's impartiality could not be questioned by a reasonable person under an objective standard of reasonableness based on this comment.

(d) Evidence of Judge's Off-the-Record Comment Did Not Warrant Disqualification

The only evidence presented by the State regarding the judge's off-the-record comments was an affidavit from the county attorney. However, J.K.'s counsel testified that the affidavit did not state the judge's comments verbatim. The State could have called J.K's counsel to testify or request to cross-examine J.K.'s counsel to present further evidence of the comments but did not do so.

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[15] *Id.*, 510 U.S. at 555.

[16] *Id.*

[13] We note that the judge made statements from the bench during the hearing regarding the content of his off-the-record comments. Though we do not comment on the procedure used by the judge, we do note that comments by a judge presiding over a matter are clearly not evidence, because a judge may not assume the role of a witness.[17]

[14,15] Neb. Rev. Stat. § 27-605 (Reissue 2016) provides: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." This rule was drafted as a broad rule of incompetency designed to prevent a judge presiding at a trial from testifying as a witness in that trial on any matter whatsoever.[18] This prohibition applies not only to formal testimony but also to whenever the judge assumes the role of a witness.[19] A judge's taking the role of a witness in a trial before him or her is manifestly inconsistent with the judge's customary role of impartiality.[20] Therefore, we do not consider statements made by the court in such capacity.[21]

Nevertheless, the context of the judge's alleged comment about the way the court would rule on J.K.'s motion to suppress does not support a finding of prejudice by the judge. First, the judge requested that the parties brief and argue the issue of whether he was bound by the district court's order to suppress. This indicates that the judge's alleged statement may have related to a belief that collateral estoppel required him to enter an identical order, rather than providing an indication of prejudicial reliance on extraneous material. Second, the judge's alleged comment that he would follow the law in making his order rebuts any allegation that he intended to rule on the basis of bias or partiality. Further, the State has not identified

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[17] *State v. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000).

[18] *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

[19] *Baird, supra* note 17.

[20] *Id.*

[21] *Id.*

anything in the judge's ruling on the motion to suppress that would indicate that the judge in fact relied on any evidence that was not presented to the court.[22]

Noting the strong presumption of impartiality, we conclude that a reasonable person who knew the circumstances of the case would not question the judge's impartiality under an objective standard of reasonableness. Therefore, this assignment of error is without merit.

2. Court Did Not Abuse Its Discretion in Denying Motion for Joinder

The State argues that J.K.'s and J.G.'s proceedings were joinable under Neb. Rev. Stat. § 29-2002(2) (Reissue 2016) and that the court abused its discretion in denying its motion without engaging in the statutory analysis for joinder. J.K. contends that joinder is not permissible in juvenile proceedings because the juvenile code does not provide for such and the rules of criminal procedure are not applicable in juvenile proceedings, which are civil in nature. J.K. also argues that if joinder is permissible in juvenile proceedings, the motion was properly denied because of the differing procedural postures of the cases and the State's long delay in requesting joinder.

At the time of the State's motion for joinder, J.K.'s proceedings had been pending in the juvenile court for over a year and the adjudicatory hearing had been scheduled, absent a later motion to continue by the State. The State had not raised the issue of joinder, though without filing such a motion, until the hearing where the date for the adjudicatory hearing was initially set. Conversely, J.G.'s proceedings still had a pending motion to suppress J.G.'s statements before it could reach the adjudicatory stage.

The court determined that ordering the cases joined at that point in J.K.'s and J.G.'s proceedings would have caused excessive and unnecessary delay in adjudicating J.K. We need

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[22] *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

not decide whether J.K. correctly argues that the court lacked authority to join matters for adjudication, because here, the court denied the State's motion for joinder. Even if the court had such authority, its denial of joinder under these circumstances would not have been an abuse of discretion.

V. CONCLUSION

For the preceding reasons, we overrule the State's exception.

Exception overruled.

Heavican, C.J., concurring.

I concur with the decision of the court, but write separately to caution that a trial court should refrain as much as possible from calling and questioning witnesses on its own motion, particularly where that witness is one of the attorneys in the underlying litigation and especially where the trial court then subjected counsel to a leading question.

Both Nebraska and federal law allow a trial court to call a witness on its own motion,[1] the usual purpose of such interrogation being "to develop the truth."[2] But this right of examination should be "'"'sparingly exercised.'"'"[3] In this instance, I observe that although the State objected to the trial court's examination of counsel, it did not assign that action as error on appeal. As such, I join the opinion of the court.

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[1] Neb. Rev. Stat. § 27-614 (Reissue 2016); Fed. R. Evid. 614.

[2] *State v. Fix*, 219 Neb. 674, 677, 365 N.W.2d 471, 473 (1985).

[3] *State v. Brehmer*, 211 Neb. 29, 44, 317 N.W.2d 885, 894 (1982), *disapproved on other grounds, State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

Cassel, J., concurring.

I join the court's opinion and write separately only to suggest that the purported absence of any statutory basis for joinder of adjudication proceedings in juvenile law violation cases deserves the attention of the Legislature.

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

Richard K. Jordan, appellant, v. LSF8 Master Participation Trust and Kelly R. Jordan, now known as Kelly R. Fairchild, appellees.

915 N.W.2d 399

Filed July 13, 2018. No. S-17-995.

1. **Issue Preclusion: Appeal and Error.** The applicability of issue preclusion is a question of law on which an appellate court reaches a conclusion independent of the court below.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Motions for New Trial: Time: Appeal and Error.** A motion for new trial following the entry of summary judgment is not a proper motion and does not terminate the 30-day period to file a notice of appeal under Neb. Rev. Stat. § 25-1912 (Reissue 2016).
5. **Pleadings: Judgments: Time: Appeal and Error.** A timely motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Reissue 2016) terminates the 30-day period to file a notice of appeal under Neb. Rev. Stat. § 25-1912 (Reissue 2016).
6. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought by the motion, not on its title.
7. **Trial: Parties.** The right to consolidate is dependent upon application by the defendant.
8. **Trial: Courts.** The trial court has the inherent power to consolidate for purposes of trial in order to expedite the reception of evidence and eliminate the multiplicity of hearings and trials.

9. **Statutes.** A statute should not be construed to restrict or remove a common-law right unless the plain words of the statute compel it.
10. **Homesteads: Issue Preclusion: Estoppel.** Issue preclusion and judicial estoppel may supply the statutory requirements set forth in Neb. Rev. Stat. § 40-104 (Reissue 2016) for encumbrances of a homestead.
11. **Evidence: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
12. **Rules of Evidence.** Statements in trial briefs should be treated under the evidence rules the same as unsworn statements made anywhere else.
13. ____. There is no per se bar against the admission of briefs from prior proceedings.
14. **Rules of Evidence: Hearsay: Appeal and Error.** A court's decision to admit a statement as a nonhearsay statement against interest under Neb. Rev. Stat. § 27-801(4)(b) (Reissue 2016) is reviewed for an abuse of discretion.
15. **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.
16. **Issue Preclusion: Summary Judgment.** Issue preclusion is a question of law that may properly be raised on a motion for summary judgment.
17. **Issue Preclusion: Judgments: Final Orders: Parties.** Under issue preclusion, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.
18. **Issue Preclusion.** Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
19. **Issue Preclusion: Judgments.** The first step in determining whether issue preclusion applies is to decide whether there is an identity of issues in the successive proceedings.
20. **Issue Preclusion: Proof.** The party relying on issue preclusion in a present proceeding has the burden to show that a particular issue was involved and necessarily determined in a prior proceeding.
21. **Actions: Judgments: Verdicts.** In determining whether issues in a prior and subsequent action are identical, the former verdict and judgment are conclusive only as to the facts directly in issue and do not extend to

facts which may be in controversy but which rest on evidence and are merely collateral.

22. **Issue Preclusion: Judgments: Evidence: Proof.** The issue preclusion test as to whether the former judgment is a bar generally is whether the same evidence will sustain both the present and the former action; where different proof is required, a judgment in the former action is no bar to the subsequent action.
23. **Issue Preclusion: Words and Phrases.** For purposes of applying the doctrine of issue preclusion, an issue is considered to be the identical issue in the absence of a significant factual change.
24. **Issue Preclusion: Parties: Proof.** Issue preclusion does not apply to a party who had a higher standard of proof in the first action than the standard of proof in a later proceeding.
25. **Issue Preclusion: Due Process.** Due process requires that the rule of issue preclusion operate only against persons who have had their day in court either as a party to a prior suit or as a privy; and, where not so, that at least the presently asserted interest was adequately represented in the prior trial.
26. **Issue Preclusion.** A party cannot circumvent the doctrine of issue preclusion simply by cherrypicking which facts and theories to raise at the prior proceeding and which to reserve for later.

Appeal from the District Court for Buffalo County: William T. Wright, Judge. Affirmed as modified.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellant.

John D. Stalnaker and Robert J. Becker, of Stalnaker, Becker & Buresh, P.C., for appellee LSF8 Master Participation Trust.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Schreiner, District Judge.

Heavican, C.J.

I. NATURE OF CASE

The plaintiff appeals from an order of summary judgment in a quiet title action seeking to invalidate a mortgage lien on the ground that it was an improper encumbrance of the homestead under Neb. Rev. Stat. § 40-104 (Reissue 2016), because his

signatures on the deed of trust were forged. In a prior order of dissolution and property division, the court allocated to the plaintiff the marital home and its accompanying refinancing mortgage debt, after concluding that it was "unlikely [the plaintiff] was unfamiliar" with the debt. The plaintiff's attorney asserted in trial briefs to the dissolution court that even if the signatures on pertinent documents were forgeries, the "propriety" of the mortgage lien would not be in question.

The court in the quiet title action determined as a matter of law that the plaintiff was barred from challenging the validity of the mortgage lien by the doctrines of issue preclusion and judicial estoppel. The plaintiff argues on appeal that such equitable doctrines do not apply to encumbrances that are invalid under § 40-104 and that in any event, the court erred in concluding there was no genuine issue that all the elements of those doctrines were satisfied. The plaintiff also asserts that the trial court erred in admitting into evidence the trial briefs from the dissolution proceedings and in failing to join the action with another quiet title action he had filed against his ex-wife regarding the same property. We affirm.

II. BACKGROUND

Richard K. Jordan and Kelly R. Jordan, now Kelly R. Fairchild, were married in 1985. They purchased real property in 1995, which included land and a new manufactured home where they lived during their marriage (the real estate). The parties do not dispute that this was their homestead as defined by Nebraska statutes, at least up to the $60,000 value and land limitations described in Neb. Rev. Stat. § 40-101 (Reissue 2016).

Richard and Kelly purchased the manufactured home for approximately $100,000 by way of an installment contract and security agreement, giving the lender a security interest in the home until all payments had been made. Richard and Kelly made payments on the installment contract until Kelly entered into a fixed-rate refinancing loan with Ameriquest Mortgage Company in the amount of $68,250.

The proceeds of that loan were used to satisfy the outstanding debt of Richard and Kelly on the installment contract in the amount of $50,875.55. The remainder of the loan was used to pay off other debts owed by Richard and Kelly.

The refinancing mortgage was secured with a deed of trust dated February 11, 2004, in favor of Ameriquest Mortgage Company. The deed was recorded in the office of the register of deeds on April 26.

Kelly was designated in the deed as the only borrower, and she was the only party to initial the various pages and sign the original signature page. Attached to the deed of trust was an acknowledgment signed by Kelly before a notary public in Council Bluffs, Pottawatomie County, Iowa, on February 11, 2004.

But both Richard's and Kelly's apparent signatures appear on another signature page attached to Kelly's acknowledgment. In fact, Richard's apparent signature appears twice. Next to one of Richard's apparent signatures is the notation, "original signature," which notation appears to be made by the registrar of deeds.

The following page of the trust deed contains a notarized statement by Rhonda Nichols, a notary in Buffalo County, that Richard had acknowledged the trust deed instrument before her in Buffalo County on February 29, 2004. Nichols signed and stamped the acknowledgment again on March 19.

On the first page of the deed of trust is a registrar's note stating, "Borrower does not show Richard Jordan but a signature [illegible] notarized/requested to record as presented." The deed of trust was assigned in 2014 to LSF8 Master Participation Trust (LSF8).

1. Dissolution

The marriage of Richard and Kelly was dissolved in 2013. A trial had been held to determine the division of property and debts. In its dissolution decree, the court found that Richard and Kelly had more debts than assets, in part due to income

tax liability for unfiled tax returns and a judgment against them in a lawsuit.

The decree set forth that the real estate was encumbered by a mortgage deed of trust in the amount of $65,300. The court recognized that only Kelly's name was on the debt and mortgage instruments and that a quitclaim deed, dated February 29, 2004, "purportedly from Richard to Kelly . . . allowed Kelly to obtain this apparent refinancing." The court acknowledged that Richard denied that this quitclaim deed contained his real signature.

The court did not specifically discuss in the decree whether Richard denied that his purported signatures on the debt and mortgage instruments were his. Instead, the court concluded: "The debt however was incurred in February 2004, was recorded in 2004, and it's highly unlikely that Richard was unfamiliar with it."

The court found that the mortgage lien, a judgment lien, and an Internal Revenue Service lien consumed all the equity in the real estate. But the court awarded the real estate to Richard because vehicles and equipment previously used in Richard's trucking business were stored on the land; therefore, Richard would have more use for the property. The court stated that awarding the real estate to Richard "is more realistic as long as it's accompanied by all associated debt."

The court thus awarded the real estate to Richard, explicitly subject to the mortgage lien, the judgment lien, and any tax lien present or future. The court also quieted title of the real estate in Richard and terminated any right, title, or interest Kelly might have in the real estate. Ultimately, the court's allocation of debt resulted in a mere $1,477.84 difference between the parties, and the court found that an equalizing judgment would not be appropriate.

2. Quiet Title Action

After the time for appealing the dissolution decree had passed without an appeal by either party, Richard brought, in the same court, a quiet title action against LSF8 and Kelly.

Richard described the action as one in which he sought "to quiet title to real estate . . . by setting aside a deed of trust." Specifically, Richard asked the court to quiet title in his name without any encumbrances by LSF8.

Richard alleged that Kelly was the former owner of the property. At the same time, he alleged that his apparent signature on a quitclaim deed filed April 26, 2004, and purporting to transfer title from Richard to Kelly was forged.

Regarding LSF8, Richard alleged that his apparent signature on a deed of trust filed April 26, 2004, was a forgery. Richard recognized that this signature was "allegedly notarized by [the notary] on February 29, 2004." He did not specifically allege in his complaint that he had not, in fact, acknowledged the trust deed in front of the notary on February 29. Richard did not make any reference in his complaint to the Nebraska homestead statutes, Neb. Rev. Stat. §§ 40-101 to 40-116 (Reissue 2016).

LSF8 denied Richard's allegation that his signature was a forgery. LSF8 alleged affirmative defenses of waiver, estoppel, unclean hands, laches, unjust enrichment, acquiescence and acceptance, and ratification.

LSF8 brought a counterclaim for declaratory judgment that the LSF8 deed of trust constitutes a valid, first, and prior lien against the property. In the alternative, LSF8 counterclaimed for equitable subrogation or an equitable lien, giving it priority over any other encumbrance on the property.

(a) No Joinder

The record indicates that there was a separate, pending quiet title action by Richard against Kelly. In that action, Richard asserted that Kelly was claiming title to the property, adversely to Richard, by virtue of an alleged quiet title deed containing Richard's forged signature. However, the record does not contain the complaint in the other action.

At a status hearing for both actions, the court stated that it was considering whether to try the two actions together, but noted concern as to whether the two actions involved

different standards of proof. In its order on status hearing, the court acknowledged that the parties advised that both actions involved the same real estate and common parties and could be tried together. But the record does not contain a motion by either party to join the actions, or an order joining the actions.

(b) Motion for Summary Judgment

On May 9, 2017, LSF8 moved for summary judgment against Richard in his quiet title action and in favor of LSF8 in its counterclaim that its deed of trust is a first and priority encumbrance upon the real estate or, in the alternative, that LSF8 was entitled to a similar equitable lien on the real estate.

At the time of the summary judgment hearing, it was clear that Richard was claiming his forged signature and lack of proper acknowledgments rendered the deed of trust void under the homestead statutes. LSF8 responded that the court need not determine the disputed factual questions of whether the deed of trust contained valid signatures and acknowledgments because the undisputed facts demonstrated that under several equitable doctrines, Richard was estopped from asserting such invalidity.

(i) Trial Briefs From Dissolution Proceedings

At the summary judgment hearing, LSF8 offered into evidence certified copies of Richard's trial brief and rebuttal brief filed in the dissolution proceedings. The attorney who wrote the briefs was the same attorney representing Richard in the quiet title action.

Richard's attorney objected on the grounds of foundation, relevancy, and hearsay. The foundation objection went to the fact that there were handwritten, extraneous markings on the exhibits. The court allowed the exhibits into evidence, with the caveat that the court would ignore any extraneous markings.

The court found the statements in the briefs to be nonhearsay under Neb. Rev. Stat. § 27-801(4)(b) (Reissue 2016) and relevant to LSF8's arguments of issue preclusion, collateral estoppel, and ratification.

The trial brief reflects that in the proposed equitable division of marital debt, Richard's counsel suggested allocating to Richard the real estate, including the mortgage thereon in the amount of $65,300. The mortgage lien that corresponded to the trust deed was also listed in a detailed property division analysis attached to the brief, and it supported Richard's argument that Kelly would owe him an equalization payment.

Under the heading "Status of the Mortgage," Richard's counsel wrote:

> This author is somewhat confused as to why the validity of the current mortgage is an issue unless the evidence as to the validity of [Richard's] signature on the Quit Claim Deed is in doubt. Even if [Richard's] signature is a forgery it would not affect the propriety of the lien.

In the rebuttal trial brief, Richard's counsel argued that awarding the real estate to Kelly was "unrealistic" because liens against the real estate, including the mortgage, consumed its entire equity.

(ii) Richard's Deposition

In support of its motion for summary judgment, LSF8 also entered into evidence Richard's deposition. During the deposition, Richard was not specifically asked whether he had signed the trust deed or acknowledged it before a notary. Richard indicated, however, that he was not in Buffalo County on February 29, 2004, when he purportedly acknowledged the trust deed before Nichols.

(iii) Kelly's Affidavit

Lastly, LSF8 entered into evidence Kelly's affidavit outlining the undisputed factual background regarding the original financing for the manufactured home. Attached to the affidavit

was the fixed rate note memorializing the refinancing loan on February 11, 2004. That note contained only Kelly's signature and initials.

(c) Motion for Continuance Denied

Richard asked for a continuance of the summary judgment hearing in order to take a second deposition of Kelly. Richard's counsel explained that Kelly had testified in her deposition for the companion quiet title action that she had never appeared before a notary public in Pottawatomie County, Iowa. LSF8 was not present during that deposition because it was not a party, and it refused to waive its right to be present. Therefore, Richard asked to depose Kelly again, with LSF8 present, in an effort to obtain the same testimony. After observing that the issue of the validity of Kelly's acknowledgment of the trust deed had not been raised by the pleadings, the court denied the motion but noted that it would postpone pretrial in the event summary judgment were not granted.

(d) Order Granting Summary Judgment

On July 7, 2017, the court granted summary judgment against Richard and in favor of LSF8 on its counterclaim, finding that LSF8's deed of trust was a valid first and prior lien on the real estate as "against . . . all other claims." The court found that Richard's quiet title action was barred by issue preclusion and judicial estoppel. The court also discussed equitable estoppel and ratification, but ultimately appeared not to base its decision on those doctrines.

(e) Motion for New Trial

On July 14, 2017, Richard filed a "Motion for New Trial," challenging the court's order of summary judgment. In the motion, Richard asked for a new trial on the grounds of surprise, newly discovered evidence, errors of law, and insufficient

evidence. Richard requested in the alternative that the court amend or alter its order of summary judgment because the deed of trust was neither executed nor acknowledged by Richard or Kelly and was therefore void and unenforceable under § 40-104.

(i) Attorney Affidavit

In a supporting affidavit attached to the motion for new trial and entered into evidence at the hearing on the motion, Richard's counsel averred Kelly testified in a deposition that the signature and initials of the deed of trust were hers, but that the deed was "executed and signed in Kearney, Nebraska, on February 11, 2004," and that she was not "physically in Council Bluffs, Iowa on February 11, 2004." Counsel averred that he intended to ask the court to submit the deposition as additional evidence for purposes of LSF8's summary judgment motion, but when staff requested a hearing date for the motion, they were informed that the court had already signed the order ruling on summary judgment.

(ii) Kelly's Deposition

Kelly's deposition was entered into evidence for purposes of the motion for new trial. Kelly testified in her deposition that in 2004, she and Richard had agreed to obtain a refinancing loan to pay off their installment contract and other debts. They settled on Ameriquest Mortgage Company, which sent the paperwork through the mail. Kelly signed some of the paperwork in Kearney.

At a later date, Richard and Kelly went to "Rhonda's house," where Richard signed a quitclaim deed and Richard and Kelly signed signature pages. Kelly had no recollection of seeing her acknowledgment page, which was attached to the deed of trust. Further, Kelly had no recollection of appearing before a notary in Iowa. Attached to the deposition is a quitclaim deed conveying the homestead from Richard to Kelly, purportedly signed by Richard and notarized by Nichols on February 29, 2004.

(iii) Order Denying Motion for New Trial

The court denied Richard's motion for new trial on August 21, 2017. The court explained that the alleged newly discovered evidence did not affect its determination that Richard's action attempting to invalidate the deed of trust was barred by issue preclusion and judicial estoppel.

Richard filed his notice of appeal on September 20, 2017.

III. ASSIGNMENTS OF ERROR

Richard assigns, summarized and restated, that the district court erred in (1) failing to try the current quiet title action together with his quiet title action against Kelly, (2) entering into evidence his trial briefs from the dissolution action, (3) granting summary judgment in favor of LSF8, and (4) denying his motion for new trial regarding the same.

IV. STANDARD OF REVIEW

[1] The applicability of issue preclusion is a question of law on which an appellate court reaches a conclusion independent of the court below.[1]

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

V. ANALYSIS

Richard argues that the district court should have joined this action with a companion case against Kelly, that the court

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[1] See *Strode v. City of Ashland*, 295 Neb. 44, 886 N.W.2d 293 (2016).

[2] *Id.*

[3] *Id.*

erred in considering trial briefs from the dissolution action, and that summary judgment was improper because there was a genuine issue of material fact regarding whether the deed of trust was "executed and acknowledged by both spouses," as required by § 40-104.

1. Motion for New Trial

[4] We first dispose of a preliminary jurisdictional matter. Although neither party has alleged a jurisdictional defect, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] The question of our appellate jurisdiction arises in this case because Richard purported to file, following entry of summary judgment, a motion for new trial as a terminating motion for the time for taking an appeal. A motion for new trial following the entry of summary judgment is not a proper motion and does not terminate the 30-day period to file a notice of appeal under Neb. Rev. Stat. § 25-1912 (Reissue 2016).[5]

[5,6] A timely motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Reissue 2016), however, also terminates the 30-day period to file a notice of appeal under § 25-1912.[6] And a postjudgment motion must be reviewed based on the relief sought by the motion, not on its title.[7] Because Richard's motion presented newly discovered evidence[8] and sought a substantive alteration of the judgment based on claimed errors of law,[9] his motion is properly considered a motion to alter or amend the judgment. Richard timely

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[4] *First Tennessee Bank Nat. Assn. v. Newham*, 290 Neb. 273, 859 N.W.2d 569 (2015).

[5] *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[6] See § 25-1912(3)(b).

[7] See, *Clarke v. First Nat. Bank of Omaha, supra* note 5; *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[8] *Woodhouse Ford v. Laflan, supra* note 7.

[9] *Clarke v. First Nat. Bank of Omaha, supra* note 5.

filed his notice of appeal after the terminating motion was overruled. Thus, we have jurisdiction over this appeal.

2. Failure to Join Actions

Turning to the merits, we begin by concluding that the district court did not abuse its discretion in failing to join, sua sponte, this action with a companion quiet title action that Richard brought against Kelly. An order allowing or denying consolidation will be affirmed absent an abuse of discretion.[10]

Richard argues that the court failed to "follow its own order" to consolidate the quiet title action against LSF8 with the other action against Kelly.[11] Richard further argues that he was prejudiced because had the court consolidated the actions, the court would have had the evidence in Kelly's deposition that the trust deed was not acknowledged by either party before a notary public.

[7] The right of consolidation of two or more actions pending in the same court is described in Neb. Rev. Stat. § 25-703 (Reissue 2016) as a motion that may be brought by the defendant. We have said that the right to consolidate is thus dependent upon application by the defendant.[12] Here, neither Kelly nor LSF8 asked for consolidation.

[8] The trial court also has the inherent power to consolidate for purposes of trial in order to expedite the reception of evidence and eliminate the multiplicity of hearings and trials.[13] But while there was some discussion of the possibility of future joinder, the court never issued an order to join the cases.

Furthermore, Richard was not prejudiced by the failure to join the actions. Kelly's deposition testimony was irrelevant

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[10] See, *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005); *Butler v. Secrist*, 84 Neb. 85, 120 N.W. 1109 (1909).

[11] Brief for appellant at 12.

[12] See *Bruno v. Kramer*, 176 Neb. 597, 126 N.W.2d 885 (1964).

[13] See *id.*

to the equitable defenses upon which the court's order of summary judgment was based. The court's order depended not upon whether the deed of trust was properly signed and acknowledged, but upon the court's conclusion that Richard was estopped from relying on any improper signature or acknowledgment in his attempt to invalidate LSF8's lien.

Finding no error in the failure to join this action with the companion quiet title action filed only against Kelly, we now examine the court's conclusion that issue preclusion and judicial estoppel barred Richard's claim.

3. Applicability of Estoppel to Homestead Claims

Richard argues as a threshold matter that issue preclusion and judicial estoppel are inapplicable to encumbrances that fail to satisfy the requirements of the homestead statutes. We find no merit to this argument.

Richard relies on case law wherein we have held that "estoppel" will not supply the statutory requirements set forth in § 40-104 for encumbrances of a homestead.[14] Section 40-104 provides:

> Except as otherwise provided in this section, the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both spouses. . . . Any claim of invalidity of a deed of conveyance of homestead property because of failure to comply with the provisions of this section must be asserted within the time provided in sections 76-288 to 76-298.
>
> A purchase agreement or contract for sale of homestead property signed by both spouses does not require acknowledgment to be enforceable.

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[14] See, *Christensen v. Arant*, 218 Neb. 625, 358 N.W.2d 200 (1984); *O'Neill Production Credit Assn. v. Mitchell*, 209 Neb. 206, 307 N.W.2d 115 (1981); *McIntosh v. Borchers*, 201 Neb. 35, 266 N.W.2d 200 (1978); *Bacon v. Western Securities Co.*, 125 Neb. 812, 252 N.W. 317 (1934).

We generically refer to "estoppel" in the cases Richard relies on. However, an examination of the facts of those cases makes clear that we were referring to equitable estoppel.[15] Equitable estoppel or "'"estoppel by misrepresentation"'"[16] is a bar frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he or she has acquiesced or of which he or she has accepted any benefit.[17] The cases under the homestead statutes that Richard presents are consistent with other cases where we have refused under the circumstances to apply equitable estoppel to agreements that are contrary to public policy, fail to satisfy statutory requirements, or are otherwise invalid for reasons not implicating a tribunal's jurisdiction.[18]

In contrast, we have held with little inconsistency that judicial estoppel and issue preclusion can apply to bar similar claims of invalidity.[19] Equitable estoppel is meaningfully

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[15] See *id.*

[16] *Wenzel v. Wenzel*, 174 Neb. 61, 65, 115 N.W.2d 788, 792 (1962).

[17] See, *In re Estate of Fuchs*, 297 Neb. 667, 900 N.W.2d 896 (2017); *Securities Acceptance Corp. v. Brown*, 171 Neb. 406, 106 N.W.2d 456 (1960), *clarified on denial of rehearing* 171 Neb. 701, 107 N.W.2d 540 (1961).

[18] See, *State on behalf of Kayla T. v. Risinger*, 273 Neb. 694, 731 N.W.2d 892 (2007); *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007); *Coe v. Covert*, 214 Neb. 140, 332 N.W.2d 699 (1983); *Turner v. City of North Platte*, 203 Neb. 706, 279 N.W.2d 868 (1979); *Vap v. City of McCook*, 178 Neb. 844, 136 N.W.2d 220 (1965). But see, e.g., *James v. Rainchief Constr. Co.*, 197 Neb. 818, 251 N.W.2d 367 (1977); *Zweygardt v. Farmers Mut. Ins. Co.*, 195 Neb. 811, 241 N.W.2d 323 (1976); *Murphy Finance Co. v. Fredericks*, 177 Neb. 1, 127 N.W.2d 924 (1964); *Koch v. Koch*, 175 Neb. 737, 123 N.W.2d 642 (1963); *Securities Acceptance Corp. v. Brown, supra* note 17.

[19] See, *TFF, Inc. v. SID No. 59,* 280 Neb. 767, 790 N.W.2d 427 (2010); *Stewart v. Bennett, supra* note 18; *Lammers Land & Cattle Co. v. Hans*, 213 Neb. 243, 328 N.W.2d 759 (1983); *State v. Solomon*, 16 Neb. App. 368, 744 N.W.2d 475 (2008). But see *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999).

different from the doctrines of judicial estoppel and issue preclusion. Issue preclusion and judicial estoppel concern not just the equities between individuals which warrant equitable estoppel,[20] but also the integrity of the judicial process.[21] Judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.[22] Issue preclusion promotes judicial economy by preventing needless litigation.[23]

[9,10] For purposes of the application of judicial estoppel or issue preclusion, there is no reason to treat claims of invalidity under § 40-104 differently from other claims of invalidity that we have found subject to judicial estoppel or issue preclusion. The homestead statutes do not address judicial estoppel or issue preclusion, which have long been part of our common law.[24] A statute should not be construed to restrict or remove a common-law right unless the plain words of the statute compel it.[25] Despite the importance of the homestead protections, they do not require greater emphasis than the sound judicial policy underlying judicial estoppel and issue preclusion.[26] We hold that issue preclusion and judicial

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

[21] See, e.g., *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.*, 291 Neb. 278, 865 N.W.2d 105 (2015); *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009); *State v. Bruckner*, 287 Neb. 280, 842 N.W.2d 597 (2014); 50 C.J.S. *Judgments* § 1031 (2009).

[22] *Hike v. State*, 297 Neb. 212, 899 N.W.2d 614 (2017).

[23] *McGill v. Lion Place Condo. Assn.*, 291 Neb. 70, 864 N.W.2d 642 (2015).

[24] See, e.g., *State v. Marrs*, 295 Neb. 399, 888 N.W.2d 721 (2016); *Finnern v. Bruner*, 167 Neb. 281, 92 N.W.2d 785 (1958); *Chamberlain v. Woolsey*, 66 Neb. 141, 92 N.W. 181 (1902); 31 C.J.S. *Estoppel and Waiver* § 186 (2008).

[25] See *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018).

[26] Compare, e.g., *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

estoppel may supply the statutory requirements set forth in § 40-104 for encumbrances of a homestead.

4. Admission of Trial Briefs

Before deciding whether the district court was correct in finding no genuine dispute that the elements of the estoppel doctrines at issue were satisfied, we address whether the district court erred in admitting the trial briefs into evidence at the summary judgment hearing. We conclude that it did not.

Richard objected below on the ground of hearsay. The district court found the statements to be nonhearsay under § 27-801(4)(b). Section 27-801(4)(b) provides in relevant part that a statement is not hearsay if it

> is offered against a party and is (i) his own statement, in either his individual or a representative capacity, or (ii) a statement of which he has manifested his adoption or belief in its truth, or (iii) a statement by a person authorized by him to make a statement concerning the subject, or (iv) a statement by his agent or servant within the scope of his agency or employment . . . .

Richard does not argue on appeal that the attorney's statements in the trial briefs of the prior action are hearsay. In other words, Richard does not argue that LSF8 offered the briefs into evidence to prove the truth of the matters asserted therein.[27] Richard does not explain how his attorney's statements in the trial briefs fail to satisfy the elements of § 27-801(4)(b). Richard also does not argue on appeal that the statements were irrelevant.

[11] Instead, Richard argues that statements in trial briefs cannot be considered judicial admissions. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged

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[27] See § 27-801(3).

by the opponent is true.[28] Although the district court cited to a case in which the court allowed statements by an attorney into evidence as judicial admissions, the district court explained that it was not allowing Richard's trial briefs into evidence as judicial admissions. Rather, the case was cited merely as support for the district court's conclusion that briefs from a prior action may be admissible against a party as nonhearsay statements. Thus, Richard's argument regarding whether statements in briefs can be considered judicial admissions is not relevant to the question before us.

[12,13] We hold that statements in trial briefs from prior proceedings should be treated under the evidence rules the same as unsworn statements made anywhere else. As the district court noted, other courts have found trial briefs from other actions to be admissible as evidence or capable of being judicially noticed.[29] There is no per se bar against the admission of briefs from prior proceedings.[30]

[14,15] A court's decision to admit a statement as a nonhearsay statement against interest under § 27-801(4)(b) is reviewed for abuse of discretion.[31] 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.[32] The district court did not abuse its discretion in admitting Richard's trial briefs.

We turn now to the court's decision that issue preclusion barred Richard's claim that the deed of trust and LSF8's lien were invalid.

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[28] *Reicheneker v. Reicheneker*, 264 Neb. 682, 651 N.W.2d 224 (2002).

[29] See, *Williams v. Union Carbide Corp.*, 790 F.2d 552 (6th Cir. 1986); *Thyssen Elevator Co. v. Drayton-Bryan Co.*, 106 F. Supp. 2d 1355 (2000). See, also, *F.D.I.C. v. Houde*, 90 F.3d 600 (1st Cir. 1996).

[30] *Thyssen Elevator Co. v. Drayton-Bryan Co., supra* note 29.

[31] See, *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986); *Gerken v. Hy-Vee, Inc.*, 11 Neb. App. 778, 660 N.W.2d 893 (2003).

[32] *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

5. Issue Preclusion

[16,17] Issue preclusion is a question of law that may properly be raised on a motion for summary judgment.[33] Unlike in judicial estoppel where bad faith must be demonstrated,[34] a party's state of mind is irrelevant to issue preclusion. Under issue preclusion, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.[35]

[18] Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[36]

The parties do not dispute that the dissolution decree was a prior final judgment on the merits, that Richard was a party to the dissolution proceedings, and that Richard is the party against whom the doctrine was applied. The question is whether the issue presented by Richard in his quiet title action against LSF8 was identical to an issue decided in the dissolution proceedings and, if so, whether there was an opportunity to fully and fairly litigate it.

[19,20] The first step in determining whether issue preclusion applies is to decide whether there is an identity of issues in the successive proceedings.[37] The party relying on issue preclusion in a present proceeding has the burden to show that

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[33] See *Cunningham v. Prime Mover, Inc.*, 252 Neb. 899, 567 N.W.2d 178 (1997).

[34] See, *Hike v. State, supra* note 22; *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co., supra* note 21.

[35] *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994).

[36] *In re Interest of Noah B. et al., supra* note 26.

[37] *Stewart v. Hechtman*, 254 Neb. 992, 581 N.W.2d 416 (1998).

a particular issue was involved and necessarily determined in a prior proceeding.[38]

[21,22] In determining whether issues in a prior and subsequent action are identical, the former verdict and judgment are conclusive only as to the facts directly in issue and do not extend to facts which may be in controversy but which rest on evidence and are merely collateral.[39] The test as to whether the former judgment is a bar is generally whether the same evidence will sustain both the present and the former action; where different proof is required, a judgment in the former action is no bar to the subsequent action.[40]

[23,24] Thus, for purposes of applying the doctrine of issue preclusion, an issue is considered to be the identical issue in the absence of a significant factual change.[41] And issue preclusion does not apply to a party who had a higher standard of proof in the first action than the standard of proof in a later proceeding.[42]

Apposite to the case at bar is *Woodward v. Andersen*.[43] *Woodward* was an action for an accounting and breach of fiduciary duties in which we held that issue preclusion barred certain claims based on issues determined in a prior dissolution proceeding. We explained that as a necessary determination in the dissolution court's equitable distribution of the property, the court decided the value of a corporation that was marital property subject to distribution.[44] This determination, in turn, necessarily included any claim of the husband or the corporation at the time of the dissolution against the wife

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[38] See *Stevenson v. Wright*, 273 Neb. 789, 733 N.W.2d 559 (2007).

[39] *Eicher v. Mid America Fin. Invest. Corp., supra* note 10.

[40] *Id.*

[41] See *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

[42] *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014).

[43] *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

[44] See *id.*

with respect to the wife's alleged improper withdrawals from the corporation.[45]

As part of the factual background, we observed that the husband made claims in the dissolution proceeding that the wife was wrongfully withdrawing money.[46] Moreover, the parties entered into a settlement agreement that was made a part of the dissolution decree in which the parties agreed that the wife was not indebted to the corporation and that the corporation did not have any claims against the wife.[47]

We held in *Woodward* that the husband was foreclosed by issue preclusion from raising, either individually or on behalf of the corporation, a claim of excessive withdrawals during the time period before the dissolution.[48]

Richard argues that the validity of the lien now held by LSF8 was not at issue in the prior dissolution proceeding and that the dissolution decree did not expressly state that the lien was valid and enforceable against Richard. Therefore, he argues, issue preclusion does not apply. This argument lacks merit.

The validity and enforceability of the lien against Richard were directly and necessarily at issue in the dissolution proceeding when the court was deciding to whom the lien should be allocated. Not only was this fact reflected in the trial briefs, but the lien's validity was a necessary determination in the court's ultimate allocation of the lien to Richard as part of the equitable division of the marital debt.

The same proof is required to establish that a lien is invalid under § 40-104 in a dissolution proceeding as in a quiet title action. We apply the same preponderance of the evidence standard in both dissolution proceedings and quiet title

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[45] See *id.*

[46] See *id.*

[47] See *id.*

[48] See *id.*

actions.[49] The facts upon which Richard challenges the validity of the lien have not changed since the dissolution proceedings. Therefore, we agree with the district court that the identical issue upon which Richard based his quiet title action was decided in the dissolution proceeding.

[25] We must last determine whether the district court was correct in finding that Richard had an opportunity to fully and fairly litigate the validity of the lien in the dissolution proceedings. This is essentially a due process analysis.[50] Due process requires that the rule of issue preclusion operate only against persons who have had their day in court either as a party to a prior suit or as a privy; and, where not so, that at least the presently asserted interest was adequately represented in the prior trial.[51]

[26] For this element to be satisfied, there is no requirement that the party actually took advantage of that opportunity to fully and fairly litigate the issue.[52] A party cannot circumvent the doctrine of issue preclusion by cherrypicking which facts and theories to raise at the prior proceeding and which to reserve for later.[53] Thus, in *Woodward*, we held that there was an opportunity to fully and fairly litigate the issue of improper withdrawals, despite the husband's failure to obtain full discovery in the prior dissolution proceedings.[54] We explained that it was the husband's choice to enter into a settlement

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[49] See, *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002); *Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998); *Goodman v. Goodman*, 180 Neb. 83, 141 N.W.2d 445 (1966). See, also, *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

[50] 4 Christine P. Costanakos, Nebraska Practice, Juvenile Court Law and Practice § 12:8 (2017).

[51] *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990).

[52] See *Simmons v. O'Brien*, 77 F.3d 1093 (8th Cir. 1996).

[53] See *Basurto v. Imperial Irr. Dist.*, 211 Cal. App. 4th 866, 150 Cal. Rptr. 3d 145 (2012).

[54] See *Woodward v. Andersen, supra* note 43.

agreement rather than move to compel or attempt to pursue additional discovery.[55]

While there is no evidence that Richard presented to the dissolution court the precise theory of invalidity under the homestead statutes that he has argued in this quiet title action, he had the opportunity to do so. Richard seems to suggest that he did not have the opportunity to fully and fairly litigate the validity of the lien because the lienholder at the time of the dissolution proceeding was not a party thereto. Specifically, Richard argues that if the lien had been found in the dissolution proceedings to be invalid, "[o]ne can be assured that LSF8 would claim that they were not a party in the dissolution case and therefore neither claim or issue preclusion would apply to them."[56] This conclusion is axiomatic since issue preclusion only applies against a party or person in privity with a party to the prior action. But this does not lead us to the conclusion that Richard lacked an opportunity in the dissolution proceeding to fully and fairly litigate the validity of the lien as against him.

We agree with the district court that Richard had the opportunity to fully and fairly litigate in the dissolution proceeding the question of the lien's validity under the homestead statutes.

In conclusion, the district court did not err in finding as a matter of law that Richard's attempt to invalidate LSF8's lien was barred by issue preclusion. We affirm the court's order of summary judgment in favor of LSF8 for this reason.

6. Ratification and Judicial Estoppel

Because we affirm the order of summary judgment on the grounds of issue preclusion, we need not reach the issue of whether the court was correct in ordering summary judgment for the alternative reason of judicial estoppel.

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[55] See *id.*

[56] Brief for appellant at 18.

7. Motion to Alter or Amend

The district court did not err in denying Richard's motion to alter or amend, as Kelly's deposition testimony was irrelevant to issue preclusion.

8. Plain Error

As acknowledged by LSF8 at oral arguments, we note a point of plain error[57] in the wording of the district court's order. In granting summary judgment, the district court declared the deed of trust to be a "valid first and prior lien on the real estate as against . . . all other claims." The district court lacked the authority to declare the lien as first and prior against claims by persons or entities not parties to the present action.[58] We therefore modify the language of the order to state that the deed of trust is a valid first and prior lien on the real estate as against Richard and Kelly, the defendants in Richard's quiet title action.

VI. CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court as modified.

Affirmed as modified.

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[57] See *State v. Lane*, 299 Neb. 170, 907 N.W.2d 737 (2018).

[58] See *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017).

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

Keith T. Dragon, appellant, v. The Cheesecake Factory and its workers' compensation insurer, Indemnity Insurance Company of North America, appellees.

915 N.W.2d 418

Filed July 20, 2018. No. S-17-891.

1. **Workers' Compensation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
2. **Workers' Compensation: Appeal and Error.** Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. **Legislature: Statutes: Time.** Generally, legislation that is passed takes effect 3 calendar months after the Legislature adjourns unless the Legislature evidences otherwise.
4. **Statutes: Time.** Statutes covering substantive matters in effect at the time of the transaction or event govern, not later enacted statutes. But where there has been an amendment to a statute which was a procedural change and not a substantive change, upon the effective date of the amendment, it is binding upon a tribunal.
5. ____: ____. Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.
6. **Statutes: Words and Phrases.** A substantive amendment is one that creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. A procedural amendment, on the other hand, simply changes the method by which an already existing right is exercised.
7. **Limitations of Actions: Statutes.** Laws prescribing the time within which particular rights may be enforced generally relate to remedies only and not substantive rights.

8. **Workers' Compensation: Statutes.** 2018 Neb. Laws, L.B. 953, is a procedural amendment to Neb. Rev. Stat. § 48-139(4) (Cum. Supp. 2016).
9. **Workers' Compensation: Time.** The reasonable controversy doctrine has long been applied to excuse waiting-time penalties for delayed benefit payments under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2016).
10. ____: ____. The reasonable controversy doctrine has no application to late-payment penalties under Neb. Rev. Stat. § 48-139(4) (Cum. Supp. 2016).
11. **Attorney Fees.** If an attorney seeks a fee for his or her client, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made.

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Order vacated in part and in part reversed, and cause remanded with directions.

Brynne E. Holsten Puhl, of Atwood, Holsten, Brown, Deaver & Spier Law Firm, P.C., L.L.O., for appellant.

Marc N. Middleton, of Adelson, Testan, Brundo, Novell & Jimenez, and David A. Castello for appellees.

Danny C. Leavitt for amicus curiae Nebraska Association of Trial Attorneys.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Strong, District Judge.

Stacy, J.

In this workers' compensation case, the parties reached a lump-sum settlement and filed a verified release with the court using the process set out in Neb. Rev. Stat. § 48-139(3) and (4) (Cum. Supp. 2016). The employer did not pay the amounts owed under the settlement within 30 days after the release was filed, and the employee moved for late payment penalties under § 48-139(4). The Workers' Compensation Court overruled the motion and dismissed the employee's petition with prejudice. The employee appealed.

While the case was pending on appeal, the Legislature amended the process for finalizing lump-sum settlements under

§ 48-139(4). Because we conclude this recent amendment is procedural in nature, we apply it to this pending matter.[1] Doing so, we find the employee is entitled to a late payment penalty, and to that extent only we vacate the order of dismissal with prejudice, reverse the decision of the Workers' Compensation Court, and remand the cause with directions. In all other respects, we affirm.

BACKGROUND

Keith T. Dragon worked as a dishwasher for The Cheesecake Factory in Omaha, Nebraska. On February 9, 2017, Dragon filed a petition for workers' compensation benefits, alleging he was injured in the course and scope of his employment. The parties agreed to settle Dragon's claim for a lump-sum payment of $5,000. Both parties were represented by counsel, and they agreed to use the verified release procedure under § 48-139(3) rather than seek court approval of their settlement.[2]

On May 1, 2017, the employer filed with the Workers' Compensation Court a verified release containing the language required by § 48-139(3), thus triggering the 30-day payment period under § 48-139(4).[3] On June 8, the employer mailed Dragon the settlement check. Thereafter, Dragon filed a motion in the Workers' Compensation Court seeking a late payment penalty of $2,500 under § 48-139(4) and an award of attorney fees under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2016).

At the hearing on the motion for late payment penalties, the employer conceded the lump-sum settlement was paid more

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[1] See *Smith v. Mark Chrisman Trucking*, 285 Neb. 826, 829 N.W.2d 717 (2013).

[2] Compare § 48-139(2) (detailing general process for court approval of lump-sum settlement), with § 48-139(3) (detailing alternative process for filing verified release to finalize lump-sum settlement).

[3] § 48-139(4) ("[a]mounts to be paid by the employer to the employee pursuant to such release shall be paid within thirty days of filing the release with the compensation court").

than 30 days after the release was filed, but it opposed the imposition of a late payment penalty on two grounds.

First, the employer argued the "reasonable controversy" doctrine[4] should preclude an award of late payment penalties, because the payment delay was the result of a reasonable dispute over child support liens. Second, the employer argued Dragon had waived any claim for a late payment penalty under § 48-139(4). This argument was based on the version of § 48-139(4) in effect at that time, which provided: "Upon making payment owed by the employer as set forth in the release, such release shall be a full and complete discharge from further liability for the employer on account of the injury . . . ." Given this statutory language, the employer argued that even though the settlement payment was made more than 30 days after the release was filed, the release sprung into effect as soon as payment was made and extinguished all claims Dragon had under the Nebraska Workers' Compensation Act, including a claim for late payment penalties or attorney fees.

The Workers' Compensation Court agreed with the employer's interpretation of § 48-139(4) and entered an order overruling Dragon's motion for a late payment penalty. In doing so, the court relied on this court's analysis in *Holdsworth v. Greenwood Farmers Co-op*.[5]

In *Holdsworth*, the lump-sum settlement payment was made 42 days after the verified release was filed and the employee moved for a 50-percent waiting-time penalty and attorney fees. When *Holdsworth* was decided, § 48-139 did not have its own late payment penalty provision, so the employee sought penalties under § 48-125 (Reissue 2010). That statute generally authorized a waiting-time penalty for "all delinquent

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[4] See, e.g., *Armstrong v. State*, 290 Neb. 205, 209, 859 N.W.2d 541, 547 (2015).

[5] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

payments after thirty days' notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the compensation court."[6] Section 48-125(2) authorized an employee who received a waiting-time penalty, and who also received an award, to recover reasonable attorney fees.

In *Holdsworth*, the Workers' Compensation Court awarded the employee waiting-time penalties under § 48-125 and the employer appealed. This court reversed, finding that once the verified release was filed with the compensation court pursuant to § 48-139(3), the employee effectively waived "'all rights under the Nebraska Workers' Compensation Act,'" including any rights to late payment penalties and fees the employee may have had under § 48-125.[7] A key part of this court's analysis in *Holdsworth* was the broad language required to be included in the verified release under § 48-139(3). We reasoned this broad release language was unambiguous and resulted in "a full waiver of any and all rights given to workers in the Nebraska Workers' Compensation Act," including the right to waiting-time penalties and attorney fees.[8]

After our decision in *Holdsworth*, the Legislature amended § 48-139 to specifically include a penalty provision for late payments of lump-sum settlements.[9] Thus, in 2017, when the parties in this case reached their lump-sum settlement, § 48-139(4) provided:

> A release filed with the compensation court in accordance with subsection (3) of this section shall be final and conclusive as to all rights waived in the release unless procured by fraud. Amounts to be paid by the

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[6] § 48-125(1)(b).

[7] *Holdsworth, supra* note 5, 286 Neb. at 56, 835 N.W.2d at 36.

[8] *Id.*

[9] See 2014 Neb. Laws, L.B. 961, § 11.

> employer to the employee pursuant to such release shall be paid within thirty days of filing the release with the compensation court. Fifty percent shall be added for payments owed to the employee if made after thirty days after the date the release is filed with the compensation court. Upon making payment owed by the employer as set forth in the release, such release shall be a full and complete discharge from further liability for the employer on account of the injury, including future medical, surgical, or hospital expenses, unless such expenses are specifically excluded from the release, and the court shall enter an order of dismissal with prejudice as to all rights waived in the release.

The Workers' Compensation Court analyzed this statutory language and concluded it did "not cure the problem illuminated by Holdsworth." The court reasoned that under *Holdsworth*, once the broad statutory release language becomes effective, it results in a full and complete discharge from all liability under the act, including a claim for late payment penalties and attorney fees. The Workers' Compensation Court observed that because amendments to § 48-139(4) made the release effective "'[u]pon making payment . . . as set forth in the release . . . ,'" the release in this case became effective once the employer paid Dragon. Thus, even though the settlement payment was late, it served to discharge the employer from all liability, including liability for late payment penalties and attorney fees.

The Workers' Compensation Court thus overruled Dragon's motion for penalties and attorney fees and dismissed his petition with prejudice. Dragon timely appealed, and we moved the case to our docket on our own motion[10] to address the impact of the 2014 amendment to § 48-139(4).

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

ASSIGNMENT OF ERROR

Dragon assigns the Workers' Compensation Court erred in ruling he was not entitled to a late payment penalty under the 2014 version of § 48-139(4) and attorney fees under § 48-125.

STANDARD OF REVIEW

[1] The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[11]

[2] Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.[12]

ANALYSIS

We moved this case to our docket to address the impact of the 2014 amendments to § 48-139(4), but we begin our analysis by addressing a more recent amendment to that section.

L.B. 953

While this appeal was pending, the Legislature again amended § 48-139(4). Specifically, 2018 Neb. Laws, L.B. 953, made the following additions/changes to § 48-139(4):

> Upon the entry of an order of dismissal with prejudice, a ~~A~~ release filed with the compensation court in accordance with subsection (3) of this section shall be final and conclusive as to all rights waived in the release unless procured by fraud. Amounts to be paid by the employer to the employee pursuant to such release shall be paid within thirty days of filing the release with the compensation court. Fifty percent shall be added for

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[11] *Interiano-Lopez v. Tyson Fresh Meats*, 294 Neb. 586, 883 N.W.2d 676 (2016).

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

> payments owed to the employee if made after thirty days after the date the release is filed with the compensation court. Upon making payment owed by the employer as set forth in the release and upon the entry of an order of dismissal with prejudice, as to all rights waived in the release, such release shall be a full and complete discharge from further liability for the employer on account of the injury, including future medical, surgical, or hospital expenses, unless such expenses are specifically excluded from the release~~, and the court shall enter an order of dismissal with prejudice as to all rights waived in the release~~.

In explaining the reason for the amendment, the introducer of L.B. 953 stated:

> LB 953 also addresses a recent Workers' Compensation Court's decision regarding the enforceability of late payment penalties. Currently, Neb. Rev. Stat. § 48-139(4) permits a fifty percent penalty for late payments to the employee, but the Workers' Compensation Court has found that the employee has already waived his or her rights to enforce this. LB 953 corrects this issue by making the entry of an order of dismissal a prerequisite to the discharge of a defendant from liability.[13]

As applicable to the issues before us in this appeal, L.B. 953 changed the point at which a verified release becomes effective under § 48-139(4). Before passage of L.B. 953, a verified release was effective upon payment of sums owed under the release. After L.B. 953, a verified release becomes effective once payment is made and the court enters an order of dismissal with prejudice.

[3] Generally, legislation that is passed takes effect 3 calendar months after the Legislature adjourns unless the

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[13] Introducer's Statement of Intent, L.B. 953, 105th Leg., 2d Sess. (Feb. 5, 2018).

Legislature evidences otherwise.[14] The Legislature's 2018 session adjourned on April 18, 2018, so L.B. 953 has taken effect and we must decide, as a threshold matter, whether the provisions of L.B. 953 apply to this case. The necessary inquiry is whether the changes made by L.B. 953 to § 48-139(4) were procedural or substantive in nature.[15]

[4,5] It is a well-established principle that statutes covering substantive matters in effect at the time of the transaction or event govern, not later enacted statutes.[16] But where there has been an amendment to a statute which was a procedural change and not a substantive change, upon the effective date of the amendment, it is binding upon a tribunal.[17] Thus, procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.[18]

[6] We have explained that a substantive amendment is one that creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover.[19] A procedural amendment, on the other hand, simply changes the method by which an already existing right is exercised.[20]

In *Jackson v. Branick Indus.*,[21] we applied these principles to determine whether an amendment to a workers' compensation subrogation statute[22] was substantive or procedural in nature.

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[14] *Smith, supra* note 1, citing Neb. Const. art. III, § 27.

[15] See, *Smith, supra* note 1; *Jackson v. Branick Indus.*, 254 Neb. 950, 581 N.W.2d 53 (1998).

[16] *Id.*

[17] *Jackson, supra* note 15; *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988).

[18] *Smith, supra* note 1.

[19] See, *id.*; *Jackson, supra* note 15; *Behrens, supra* note 17.

[20] *Smith, supra* note 1.

[21] *Jackson, supra* note 15.

[22] Compare Neb. Rev. Stat. § 48-118 (Reissue 1993), with § 48-118 (Cum. Supp. 1996).

At the time of the employee's injury in *Jackson*, § 48-118 gave the employer and its insurer a subrogation interest against a third-party tort-feasor in the amount of any compensation paid to or on behalf of the employee. This was construed to entitle the employer to "dollar-for-dollar" subrogation recovery from a third-party settlement.[23] However, by the time the employee settled with a third party, § 48-118 had been amended to allow the court to make a "'fair and equitable'" distribution of the third-party settlement as between the employee and the employer or its insurer.[24]

The district court in *Jackson* found the amendment was procedural, and thus made an equitable distribution of the third-party settlement proceeds. The employer appealed, and this court reversed, finding instead that the amendment was substantive in nature. We reasoned:

> [The amendment] did not merely change the way in which the employer's right to subrogation would be exercised, it actually changed the nature of the subrogation interest itself. The 1994 amendment to § 48-118 injected an element of equity into statutory subrogation where one was not present before and is, therefore, a substantive change in the law.[25]

Unlike the amendment considered in *Jackson*, the provisions of L.B. 953 changed neither the nature of the late payment penalty under § 48-139(4) nor the manner in which such a penalty is calculated. Instead, L.B. 953 merely changed the point in the settlement process when a verified release becomes effective.

At the time we decided *Holdsworth*, the verified release became effective once it was filed with the Workers' Compensation Court. The 2014 amendments to § 48-139(4) made the verified release effective "[u]pon making payment

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[23] *Id.* at 957, 581 N.W.2d at 57.

[24] *Id.* at 953, 581 N.W.2d at 55.

[25] *Id*. at 960-61, 581 N.W.2d at 59.

owed by the employer as set forth in the release . . . .” And L.B. 953 makes the verified release effective once payment is made and the court enters an order of dismissal with prejudice.

[7,8] We have recognized that “[l]aws prescribing the time within which particular rights may be enforced generally relate to remedies only and not substantive rights.”[26] In this case, the pertinent provisions of L.B. 953 merely changed the point in time when the verified release becomes effective in the lump-sum settlement process. We therefore conclude that L.B. 953 is a procedural amendment to § 48-139(4) and is applicable to this pending appeal.

Dragon Is Entitled to Late Payment Penalty

Under § 48-139(4) as amended by L.B. 953, Dragon did not waive his right to a late payment penalty. It remains true under *Holdsworth* that once the verified release becomes effective, it results in a full and complete discharge from all liability under the Nebraska Workers’ Compensation Act, including a claim for late payment penalties and attorney fees.[27] But post-L.B. 953, the verified release signed by Dragon does not become effective until the Workers’ Compensation Court files an order of dismissal with prejudice.[28] Applying the current version of § 48-139(4), we find Dragon is entitled to a late payment penalty as a matter of law. Thus, it is contrary to law to conclude the release became effective upon the employer’s payment of the settlement sums, and we must reverse the Workers’ Compensation Court’s finding to the contrary, in light of the change in the law.

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[26] *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 986, 698 N.W.2d 58, 63-64 (2005).

[27] See *Holdsworth, supra* note 5.

[28] See, also, Workers’ Comp. Ct. R. of Proc. 47J (2018) (when order of dismissal is required under § 48-139(4), parties must file receipt, satisfaction, or joint stipulation for dismissal setting forth amount(s) received by employee from employer).

We thus vacate the order of dismissal with prejudice, reverse the finding that Dragon waived his right to late payment penalties under § 48-139(4), and remand the cause with directions to award such penalty based on the existing record.

Reasonable Controversy Doctrine Does Not Apply

The employer argues that even if § 48-139(4) authorizes a late payment penalty, it should be exempt from paying the penalty, because a "reasonable controversy" existed. Specifically, the employer claims it delayed paying the settlement sums in this case because it was waiting for information on whether and how to pay child support liens. The record is undisputed that the parties had notice of the child support liens prior to the time they reached a lump-sum settlement.

[9,10] The reasonable controversy doctrine has long been applied to excuse waiting-time penalties for delayed benefit payments under § 48-125.[29] The employer urges us to extend the doctrine to excuse late payment penalties for delayed lump-sum settlement payments under § 48-139(4). We decline the invitation and conclude the reasonable controversy doctrine has no application to late payment penalties under § 48-139(4).

In 1920, this court recognized an exception to waiting-time penalties imposed for delayed benefit payments when there is a reasonable controversy over entitlement to workers' compensation benefits.[30] We reasoned:

> It was not intended by this provision of the statute that an employer should comply with every demand of the employee at his peril, and in every case, when it is later

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[29] *Armstrong, supra* note 4 (recognizing "reasonable controversy" doctrine has been part of our waiting-time penalty jurisprudence under § 48-125 for more than 90 years).

[30] *Updike Grain Co. v. Swanson*, 104 Neb. 661, 178 N.W. 618 (1920) (superseded by statute as stated in *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009)).

> proved that the employer was mistaken as to his liability, that he should be required to increase the award 50 per cent . . . and be penalized in that amount. The statute was not intended to prevent the employer from having a fair opportunity to be heard and to have his just controversies tried . . . .[31]

Since that time, we have consistently held that an employer is not liable for the waiting-time penalty under § 48-125 when there is a reasonable controversy over entitlement to benefits.[32] In that context, we have explained that a reasonable controversy exists if (1) there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court about an aspect of an employee's claim, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.[33]

We have not previously addressed whether the reasonable controversy exception applies to late payment penalties for lump-sum settlement payments made more than 30 days after the verified release is filed under § 48-139. But given the rationale for the doctrine, we see no compelling reason to extend the doctrine to excuse penalties for delayed payments of lump-sum settlements.

The waiting-time penalty provisions of § 48-125 are designed to encourage prompt payment of benefits[34] and to

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[31] *Id.* at 665, 178 N.W. at 619.

[32] See *Armstrong, supra* note 4.

[33] *Id.*

[34] *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005); *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000).

encourage employers and insurers to promptly handle and decide disputed claims.[35] We have said that to avoid waiting-time penalties under 48-125, an employer must have an actual basis in law or fact for disputing the claim and refusing compensation.[36]

But once an employer and an employee reach a lump-sum settlement agreement, there is no remaining factual or legal dispute over the claim and thus no reason to refuse to pay the agreed-upon settlement amount.[37] If, as in this case, there are concerns about the enforceability of liens against the proceeds of a lump-sum settlement, parties should endeavor to resolve such issues before they file the verified release and trigger the 30-day payment period under § 48-139(4).

For these reasons, we find the reasonable controversy exemption is inapplicable to late payment penalties under § 48-139(4) and does not exempt the employer from paying such penalties in this case.

Attorney Fees

Finally, Dragon argues it was error for the Workers' Compensation Court to deny his request for attorney fees under § 48-125. We find no abuse of discretion in denying attorney fees on this record.

[11] If an attorney seeks a fee for his or her client, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made.[38] The record on appeal contains no such evidence supporting Dragon's request for attorney fees. We thus are unable to

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[35] See *Armstrong, supra* note 4; *Dawes, supra* note 34.

[36] *Dawes, supra* note 34, citing *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

[37] See § 48-139.

[38] *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

address this assignment of error,[39] and we express no opinion on Dragon's argument that an employee who is entitled to a late payment penalty under § 48-139(4) may also recover attorney fees under § 48-125.

CONCLUSION

For the foregoing reasons, we vacate the order of dismissal with prejudice, reverse the finding that Dragon waived his right to late payment penalties under § 48-139(4), and remand the cause with directions to award such penalties based on the existing record. In all other respects, we affirm the decision of the Workers' Compensation Court.

Order vacated in part and in part reversed, and cause remanded with directions.

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[39] See, *Centurion Stone of Neb. v. Whelan*, 286 Neb. 150, 835 N.W.2d 62 (2013); *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012) (holding appellant must present record supporting errors assigned; absent such record, appellate court will affirm lower court's decision).



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Maria T., appellant, v. Jeremy S. and Jamie S., appellees.

915 N.W.2d 441

Filed July 20, 2018. No. S-17-925.

1. **Habeas Corpus: Child Custody: Appeal and Error.** A decision in a habeas corpus case involving the custody of a child is reviewed by an appellate court de novo on the record.
2. **Habeas Corpus: Appeal and Error.** Whether the allegations in an application for a writ of habeas corpus are sufficient to warrant discharge is a matter of law that an appellate court reviews de novo.
3. **Habeas Corpus: Constitutional Law.** The writ of habeas corpus derives from common law and is guaranteed by the Nebraska Constitution.
4. **Habeas Corpus.** The function of the application for a writ of habeas corpus is to procure the issuance of the writ, and ordinarily when this is done, the application is functus officio for procedural purposes.
5. **Habeas Corpus: Courts.** Courts are cautioned in habeas proceedings to follow the traditional procedure illustrated by the habeas corpus statutes rather than make up their own procedure.
6. **Habeas Corpus: Child Custody.** The writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants.
7. ____: ____. In the case of a writ of habeas corpus sued out for the detention of a child, the law is concerned not so much about the illegality of the detention as about the welfare of the child.
8. ____: ____. When habeas corpus is used in child custody cases, such proceedings are governed by considerations of expediency and equity and should not be bound by technical rules of practice.
9. **Habeas Corpus.** In a habeas corpus proceeding, before a hearing on the merits, the person to whom the writ is directed makes a response to the writ and not, strictly speaking, to the relator's application.
10. **Habeas Corpus: Child Custody.** A habeas corpus proceeding involving the custody of a child is a proceeding in rem, in which the res is the child and its custody.

11. **Habeas Corpus: Child Custody: Jurisdiction.** After the court's jurisdiction has been invoked by a petition for habeas corpus seeking the custody of children, the children become wards of the court and their welfare lies in the hands of the court.
12. **Habeas Corpus.** The proper method for attacking the sufficiency of the application for a writ of habeas corpus is by a motion to quash the writ.
13. **Habeas Corpus: Child Custody.** The procedure set forth in Neb. Rev. Stat. §§ 29-2801 through 28-2824 (Reissue 2016 & Supp. 2017) applies to child custody habeas proceedings.
14. **Habeas Corpus: Pleadings.** The motion to quash admits all ultimate facts well pleaded in a relator's application, as distinguished from conclusions of law therein, and when thus tested it is ascertained that the allegations thereof are not sufficient to warrant discharge, the motion should be sustained and the writ of habeas corpus dissolved or quashed.
15. **Adoption: Parent and Child: Parental Rights.** Agreements in adoption proceedings allowing contact between an adopted child and the child's biological parents require court approval to be enforceable, and even if approved, noncompliance may not be the basis for setting aside a particular adoption, or revoking a relinquishment to the Department of Health and Human Services.
16. **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.
17. **Adoption: Statutes: Legislature: Intent.** There is no ambiguity in the Legislature's stated intent to encompass within Neb. Rev. Stat. § 43-163 (Reissue 2016) all written or oral agreements regarding communication or contact after an adoption, when the prospective adoptee is in the custody of the Department of Health and Human Services.
18. **Appeal and Error.** Appellate courts do not generally consider arguments and theories raised for the first time on appeal.
19. **Constitutional Law: Appeal and Error.** Except in the most unusual cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.
20. **Constitutional Law: Rules of the Supreme Court: 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.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

David V. Chipman, of Monzón, Guerra & Associates, for appellant.

Steffanie J. Garner Kotik, of Kotik & McClure Law, for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Dobrovolny, District Judge.

Dobrovolny, District Judge.

NATURE OF CASE

The district court dismissed on the pleadings a biological mother's petition for habeas corpus challenging the adoptive parents' custody over the child. The mother alleged in the petition that her relinquishment of parental rights to the Department of Health and Human Services (DHHS) and consent to adoption had been obtained through coercion, false pretenses, or fraud. She attached a communication and consent agreement to the petition and alleged that the biological parents had failed to allow her to have contact with the child. The district court concluded the petition did not state a claim, because Neb. Rev. Stat. § 43-164 (Reissue 2016) provides that failure to comply with a court-approved communication or contact agreement shall not be grounds for setting aside or revoking the relinquishment, the consent to adoption, or the adoption decree. We affirm.

BACKGROUND

Petition

Maria T. filed a petition for writ of habeas corpus on May 2, 2017, naming Jeremy S. and Jamie S. as respondents. She alleged that she was the biological mother of a minor child, born in 2012, who was unlawfully restrained by Jeremy and Jamie.

In paragraph IV, Maria alleged that the restraint was illegal, because her "consent to adoption and/or voluntary relinquishment was obtained through coercion and/or false pretenses

and/or fraud, which invalidates such relinquishment and/or consent."

In paragraph V, Maria alleged that her relinquishment was conditioned upon the retention of some "parental rights and any relinquishment or consent given by [Maria] is therefore invalid." In this paragraph, she stated that she was attaching a "'Communication and Contact Agreement'" signed by the parties.

In paragraph VI, Maria alleged that Jeremy and Jamie had failed to allow her to have contact with the child after having made promises and representations that they would.

Maria asked that the court find the relinquishment was invalid and revoked. She asked that the court take custody of the child and determine whether the child's best interests would be served by returning the child to Maria.

The relinquishment was not attached to the petition, but Maria did attach the agreement signed by Maria, Jeremy, and Jamie.

Though the petition did not set forth whether the child was in the custody of DHHS at the time of the relinquishment, the agreement set forth that Jeremy and Jamie were the child's foster parents and that they would be entering into a foster parent adoption after Maria relinquished her parental rights to DHHS.

The agreement set forth that Jeremy and Jamie were to communicate with Maria regarding the child's welfare and allow periodic contact between Maria and the child. However, the agreement also set forth that the parties understood that "this agreement is subject to the approval of the court having jurisdiction over the adoption proceedings."

Further, in the agreement, the parties set forth their understanding that

> the failure to comply with the terms of the order as pursuant to Section 43-163 shall not be grounds for setting aside an adoption decree, for revocation of a written consent for adoption after the consent has been approved by the court having jurisdiction over the adoption proceedings,

> or for revocation or relinquishment of parental rights after the relinquishment has been accepted in writing by [DHHS] as provided in Section 43-106.01.

Instead, according to the agreement, any order pursuant to Neb. Rev. Stat. § 43-163 (Reissue 2016) could be enforced by civil litigation.

Neb. Rev. Stat. § 43-106.01 (Reissue 2016) provides:

> When a child shall have been relinquished by written instrument, as provided by sections 43-104 and 43-106, to [DHHS] or to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child. Nothing contained in this section shall impair the right of such child to inherit.

The petition did not specifically allege whether the court having jurisdiction over the child's adoption had approved the communication and contact agreement.

Hearing on Motion to Dismiss

Jeremy and Jamie moved to dismiss for failure to state a claim. Their motion is not in the record. At the hearing on the motion to dismiss, Jeremy and Jamie offered three exhibits into evidence. Maria objected on the ground that it was a hearing on a motion to dismiss "and you're not supposed to consider matters outside the pleading, otherwise it becomes a summary judgment." She did not challenge the authenticity of the documents in the exhibits or object on any other grounds. Jeremy and Jamie's attorney responded that she believed the evidence was appropriately offered in support of her motion to dismiss, because the exhibits contained documents recited in Maria's petition.

The court asked Maria if she would "like a time to submit evidence in this matter." Maria said she would not. But the court did not explicitly state it had changed the status of the motion. The parties proceeded with argument without the

court's ruling on the offer of exhibits and apparently under the assumption that the court was considering a motion to dismiss.

Jeremy and Jamie's attorney indicated her understanding that the allegations in Maria's petition were based on Jeremy and Jamie's alleged failure to comply with the agreement. At no point did Maria's attorney respond that her allegations of "coercion and/or false pretenses and/or fraud" were based on anything other than Jeremy and Jamie's failure to comply with the agreement. Maria's attorney did not ask the court for leave to amend the petition.

At the conclusion of the hearing, the court received the exhibits into evidence. Exhibit 1 consists of Maria's relinquishment to DHHS, her consent form, and DHHS' acceptance of her relinquishment. Exhibit 1 reflects that Maria voluntarily relinquished to DHHS her parental rights over the child on June 12, 2015. Exhibit 2 is the agreement that was attached to the petition. Exhibit 3 is the bill of exceptions for the adoption hearing. The bill of exceptions reflects that on May 13, 2016, the separate juvenile court approved the adoption of the child by Jeremy and Jamie, but explicitly did not approve the communication and contact agreement for the reason that it was not in the child's best interests.

District Court's Order

The district court dismissed the petition for failure to state a claim and alternatively addressed granting summary judgment in favor of Jeremy and Jamie.

In the court's analysis on the motion to dismiss, the court stated that it did not consider any of the exhibits. But the court considered the attached agreement as part of the allegations of the petition. The agreement, the court said, confirmed that the child was adopted by way of a foster parent adoption wherein Maria unconditionally relinquished her parental rights to DHHS.

The court concluded that Maria had failed to state a claim, because she had failed to allege that the agreement had been

approved by the court. Alternatively, after citing to both § 43-164 and Neb. Rev. Stat. § 43-166(6) (Reissue 2016), the court concluded that "neither the statutes in effect at the time, nor the case law, afford [Maria] the opportunity to allege fraud, duress or coercion on the basis of the Communication and Contact Agreement entered into between the parties."

Next, the court set forth an analysis regarding "if this Court were to treat [Jeremy and Jamie's] motion as a motion for summary judgment rather than a motion to dismiss." The court found no genuine issue as to the fact that the court never approved the agreement. Therefore, the court reasoned, the agreement could not provide any basis for Maria's allegation that the relinquishment was procured through fraud, duress, and coercion. Even if the agreement had been approved, the court stated that as a matter of law, Jeremy and Jamie's failure to comply with the agreement's terms could not be used as a basis for invalidating the relinquishment and setting aside the adoption.

In its conclusion, the court set forth in the order that it was sustaining Jeremy and Jamie's motion to dismiss. The court ordered the case dismissed with prejudice. Maria appeals.

ASSIGNMENTS OF ERROR

Maria assigns that the district court erred in (1) granting Jeremy and Jamie's motion to dismiss and (2) finding in the alternative that Jeremy and Jamie were entitled to summary judgment.

STANDARD OF REVIEW

[1] A decision in a habeas corpus case involving custody of a child is reviewed by an appellate court de novo on the record.[1]

[2] Whether the allegations in an application for a writ of habeas corpus are sufficient to warrant discharge is a matter of law that an appellate court reviews de novo.[2]

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[1] *Monty S. v. Jason W.*, 290 Neb. 1048, 863 N.W.2d 484 (2015).

[2] See *State v. Determan*, 292 Neb. 557, 873 N.W.2d 390 (2016).

ANALYSIS

As a threshold matter, we clarify the procedural rules applicable to an application for a writ of habeas corpus in a child custody matter. For the reasons that follow, we conclude that the court and the parties did not follow the correct procedure for a habeas proceeding. Nevertheless, the court did not err in its ultimate determination that Maria failed to allege facts that would establish that Jeremy and Jamie were not entitled to sole custody of Maria's biological child.

[3] The writ of habeas corpus derives from common law[3] and is guaranteed by the Nebraska Constitution in article I, § 8, which provides that "[t]he privilege of the writ of habeas corpus shall not be suspended." Neb. Rev. Stat. §§ 29-2801 through 29-2824 (Reissue 2016 & Supp. 2017) set forth certain procedures for a habeas corpus proceeding. The statutory procedure set forth in §§ 29-2801 through 29-2824 appears to have largely codified the traditional procedure under common law for the writ.[4] We have said that the Nebraska Constitution provides for the remedy of habeas corpus, while the procedure for the writ is governed by statute.[5] It is a special civil proceeding providing a summary remedy to persons illegally detained.[6]

The first step in order to initiate a habeas proceeding is for "any person," who "is or shall be confined in any jail . . . or shall be unlawfully deprived of his or her liberty," to "make application, either by him or herself or by any person on his or her behalf."[7] If, "by oath or affirmation," it appears in the application that "the person so imprisoned or

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[3] See, e.g., *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 14 N.W.2d 840 (1944).

[4] See, e.g., Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 Cornell L. Rev. 47 (2012).

[5] *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

[6] *Id.*

[7] § 29-2801.

detained is imprisoned or detained without any legal authority . . . it shall be [the judge's] duty forthwith to allow a writ of habeas corpus."[8]

Before anything else, the court must determine, sua sponte and based on the allegations in the application, if the writ should issue.[9] We have explained that if the relator shows by the facts alleged in the application for the writ that the relator is not entitled to relief, then the writ should be denied and the application dismissed, and that order may be appealed.[10] In contrast, when the relator sets forth facts which, if true, would entitle the relator to discharge, the writ is a matter of right and the relator should be produced before the court.[11] Habeas corpus is a Latin term that, translated literally, means "'"that you have the body,"'"[12] and the writ commands that the person holding the body of the person allegedly illegally detained produce the body on the day specified and submit to and receive whatever the court shall consider in the relator's behalf.[13]

Thus, pursuant to §§ 29-2802 and 29-2803, when a judge issues the writ, it must be obeyed, or resistance thereto made in the regular manner.[14] The person detained and named in the writ must be brought before the court on the day specified, and while the hearing and final disposition are pending, the person allegedly illegally detained will be subject to a court order for safekeeping or detention, as the nature of the case

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[8] *Id.*

[9] See *Hennings v. Chandler*, 229 Ill. 2d 18, 890 N.E.2d 920, 322 Ill. Dec. 1 (2008) (and discussion of cases therein).

[10] See *In re Application of Tail, Tail v. Olson, supra* note 3. See, also, e.g., *Johnson v. Gage*, 290 Neb. 136, 858 N.W.2d 837 (2015).

[11] *In re Application of Dunn*, 150 Neb. 669, 35 N.W.2d 673 (1949).

[12] *Sanders v. Frakes, supra* note 5, 295 Neb. at 379, 888 N.W.2d at 519.

[13] See, e.g., *Click v. Click*, 98 W. Va. 419, 127 S.E.2d 194 (1925); Black's Law Dictionary 825 (10th ed. 2014).

[14] See *Nebraska Children's Home Society v. State*, 57 Neb. 765, 78 N.W. 267 (1899).

may require.[15] "Neither ministerial officer nor private citizen can be permitted to ignore its mandate because he [or she] may think the judge allowed it on insufficient grounds."[16]

Section 29-2817 describes that before the hearing on the underlying merits, the person to whom the writ is directed shall file a "return," explaining whether he or she has the relator under his or her "custody or power, or under restraint" and the authority for such custody, power, or restraint. Under § 29-2819, the "return" is treated differently depending upon whether the person detained is in custody under any warrant or commitment in pursuance of law or is instead restrained of liberty by any alleged private authority. In the case of an alleged private authority, "the return of the writ shall be considered only as a plea of the facts therein set forth, and the party claiming the custody shall be held to make proof of such facts."[17]

[4] The habeas statutes do not describe by what means, if any, the respondent may challenge the sufficiency of the relator's application. But we have held that before filing a response, the respondent may challenge the sufficiency of the statements in the application of the relator by filing a motion to quash or to "dissolve" the writ.[18] This is consistent with traditional common-law habeas corpus procedure.[19] The function of the application is to procure the issuance of the writ, and

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[15] See §§ 29-2802 and 29-2822. See, also, § 29-2806.

[16] *Nebraska Children's Home Society v. State, supra* note 14, 57 Neb. at 770, 78 N.W. at 269.

[17] § 29-2819.

[18] See *Sedlacek v. Greenholtz*, 152 Neb. 386, 387, 41 N.W.2d 154, 156 (1950). See, also, *Case v. State*, 177 Neb. 404, 129 N.W.2d 107 (1964), quoting *Sedlacek v. Hann*, 156 Neb. 340, 56 N.W.2d 138 (1952), *vacated on other grounds* 381 U.S. 336, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965); *In re Application of Dunn, supra* note 11.

[19] See, *Kennedy v. Walker*, 135 Conn. 262, 63 A.2d 589 (1948); *Com. ex rel. Margiotti, Aplnt. v. U. Tr. Co. et al.*, 327 Pa. 497, 194 A. 661 (1937); Garrett, *supra* note 4.

ordinarily when this is done, the application is functus officio for procedural purposes.[20]

[5] As such, when the proper procedure is followed, the application has served its purpose by obtaining the writ and, by the time the respondent is on notice, the application is no longer in effect such that it could be subject to a motion to dismiss for failure to state a claim. For this reason, we have said that a demurrer is not a motion usually associated with writs of habeas corpus.[21] Courts are cautioned in habeas proceedings to follow the traditional procedure illustrated by the habeas corpus statutes rather than make up their own procedure.[22]

[6-8] The traditional procedure described above applies equally to child custody habeas proceedings. Since 1890,[23] we have recognized, "'"[T]he writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants."'"[24] This extension occurred under the English common law before the establishment of our state.[25] In the case of a writ of habeas corpus sued out for the detention of a child, the law is concerned not so much about the illegality of the detention as about the welfare of the child.[26]

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[20] See *In re Application of Tail, Tail v. Olson, supra* note 3.

[21] See *Rehbein v. Clarke*, 257 Neb. 406, 598 N.W.2d 39 (1999).

[22] See *O'Neal v. State*, 290 Neb. 943, 863 N.W.2d 162 (2015) (Cassel, J., concurring).

[23] See *Giles v. Giles*, 30 Neb. 624, 46 N.W. 916 (1890).

[24] *State ex rel. Cochrane v. Blanco*, 177 Neb. 149, 152, 128 N.W.2d 615, 617 (1964); *Lung v. Frandsen*, 155 Neb. 255, 51 N.W.2d 623 (1952); *Hanson v. Hanson*, 150 Neb. 337, 34 N.W.2d 388 (1948).

[25] See, e.g., Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 Colum. L. Rev. 1344 (1999); Eric M. Freedman, *Habeas Corpus in Three Dimensions, Dimension I: Habeas Corpus as a Common Law Writ*, 46 Harv. C.R.-C.L.L. Rev. 591 (2011).

[26] See *Christopherson v. Christopherson*, 177 Neb. 414, 129 N.W.2d 113 (1964).

Further, we have repeatedly recognized, as was acknowledged under common law,[27] that when habeas corpus is used in child custody cases, such proceedings are governed by considerations of expediency and equity and should not be bound by technical rules of practice.[28] But while there may be some distinctions in child custody habeas proceedings from prisoner habeas proceedings as to the treatment of the underlying merits, it does not follow that the traditional writ procedures outlined in our habeas statutes do not govern applications for writs of habeas corpus when child custody is involved.

[9-11] In *In re Application of Tail, Tail v. Olson*,[29] a prisoner habeas case, we considered the nature of habeas corpus proceedings, both involving prisoners and child custody. We cited to §§ 29-2802 and 29-2817, and explained that before a hearing on the merits, the person to whom the writ is directed makes a response to the writ and not, strictly speaking, to the relator's application. In *In re Application of Tail, Tail*, we observed that we previously held a habeas corpus proceeding involving the custody of a child is a proceeding in rem, in which the res is the child and its custody.[30] Once the writ issues, "[a]fter the court's jurisdiction has been invoked by a petition for habeas corpus seeking the custody of children, the children become wards of the court and their welfare lies in the hands of the court."[31]

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[27] See Annot., 4 A.L.R.3d 1277, § 1[c] (1965).

[28] *McCormick v. State*, 218 Neb. 338, 354 N.W.2d 160 (1984); *Walker v. Gehring*, 172 Neb. 398, 109 N.W.2d 724 (1961); *State ex rel. Hamilton v. Boiler*, 159 Neb. 458, 67 N.W.2d 426 (1954); *Lung v. Frandsen, supra* note 24; *Hanson v. Hanson, supra* note 24.

[29] See *In re Application of Tail, Tail v. Olson, supra* note 3, citing *Terry v. State*, 77 Neb. 612, 110 N.W. 733 (1906).

[30] *Id.*

[31] *Osterholt v. Osterholt*, 173 Neb. 683, 685, 114 N.W.2d 734, 736 (1962). See, also, *Hanson v. Hanson, supra* note 24.

[12] In *Nebraska Children's Home Society v. State*,[32] a child custody habeas case, we again cited to our habeas statutes, to what is now § 29-2804. And we applied the principle that the proper method for attacking the sufficiency of the application for a writ of habeas corpus is by a motion to quash the writ.[33] Several other child custody habeas cases in Nebraska appear to have followed the traditional writ procedure set forth in the habeas statutes, albeit without citing to the statutory scheme.[34]

We recognize that our case law concerning child custody habeas proceedings has not always been consistent. For the most part, our cases have failed to cite to §§ 29-2801 through 29-2824.[35] Furthermore, our child custody habeas case law appears to have oftentimes treated the application for a writ of habeas corpus as if it were a petition setting forth a cause of action, to which the respondents would file an answer, with the

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[32] *Nebraska Children's Home Society v. State, supra* note 14.

[33] *Id.*

[34] See, *Reynolds v. Green*, 232 Neb. 60, 439 N.W.2d 486 (1989), *overruled on other grounds, Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998); *Walker v. Gehring, supra* note 28; *State v. Porter*, 78 Neb. 811, 112 N.W. 286 (1907); *Terry v. Johnson*, 73 Neb. 653, 103 N.W. 319 (1905); *Nebraska Children's Home Society v. State, supra* note 14; *Janet K. v. Kevin B.*, 5 Neb. App. 169, 556 N.W.2d 270 (1996).

[35] See, e.g., *Brett M. v. Vesely*, 276 Neb. 765, 757 N.W.2d 360 (2008); *Gomez v. Savage, supra* note 34; *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992); *L.G.P. v. Nebraska Dept. of Soc. Servs.*, 239 Neb. 644, 477 N.W.2d 571 (1991); *Friedrichsen v. Koehn*, 216 Neb. 628, 344 N.W.2d 672 (1984); *Marcus v. Huffman*, 187 Neb. 798, 194 N.W.2d 221 (1972); *Hausman v. Shields*, 184 Neb. 88, 165 N.W.2d 581 (1969); *Gray v. Hartman*, 181 Neb. 590, 150 N.W.2d 120 (1967); *State ex rel. Cochrane v. Blanco, supra* note 24; *Osterholt v. Osterholt, supra* note 31; *Lakey v. Gudgel*, 158 Neb. 116, 62 N.W.2d 525 (1954); *Barnes v. Morash*, 156 Neb. 721, 57 N.W.2d 783 (1953); *Lung v. Frandsen, supra* note 24; *Hanson v. Hanson, supra* note 24; *In re Application of Schwartzkopf*, 149 Neb. 460, 31 N.W.2d 294 (1948); *State v. Bryant*, 95 Neb. 129, 145 N.W. 266 (1914); *Clarke v. Lyon*, 82 Neb. 625, 118 N.W. 472 (1908); *Norval v. Zinsmaster*, 57 Neb. 158, 77 N.W. 373 (1898).

writ issuing or not issuing at the close of all the proceedings rather than at the beginning.[36] Contrary to our cases stating that a motion to quash is the proper procedure to challenge the sufficiency of the application for the writ, in *Christopherson v. Christopherson*,[37] for example, we applied the civil procedure statutes to determine that the respondent's demurrer should be considered a motion to dismiss. We ultimately held that the motion to dismiss was improper insofar as it attempted to obtain dismissal by means of factual allegations as yet untested in court.[38]

[13] Thus, we clarify here that the procedure set forth in §§ 29-2801 through 29-2824 applies to child custody habeas proceedings. In *Mayfield v. Hartmann*,[39] we addressed a habeas proceeding involving civil commitment and said that we have uniformly applied rules limiting collateral attacks by habeas corpus to void judgments to "both civil and criminal cases alike." We likewise find that the procedure for child custody and prisoner custody habeas proceedings should be uniform. Even if §§ 29-2801 through 29-2824 did not directly control, the traditional common-law procedures would not be different.[40] The procedural mechanism to bring the child into court quickly and procure the court's temporary custody

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[36] See, e.g., *Brett M. v. Vesely, supra* note 35; *Gomez v. Savage, supra* note 34; *Uhing v. Uhing, supra* note 35; *L.G.P. v. Nebraska Dept. of Soc. Servs., supra* note 35; *Friedrichsen v. Koehn, supra* note 35; *Marcus v. Huffman, supra* note 35; *Gray v. Hartman, supra* note 35; *Osterholt v. Osterholt, supra* note 31; *Lakey v. Gudgel, supra* note 35; *Hanson v. Hanson, supra* note 24; *In re Application of Schwartzkopf, supra* note 35; *State v. Bryant, supra* note 35; *Clarke v. Lyon, supra* note 35.

[37] *Christopherson v. Christopherson, supra* note 26.

[38] See *id.*

[39] *Mayfield v. Hartmann*, 221 Neb. 122, 125, 375 N.W.2d 146, 149 (1985), citing *Schleuter v. McCuiston*, 203 Neb. 101, 277 N.W.2d 667 (1979); *State ex rel. Casselman v. Macken*, 194 Neb. 806, 235 N.W.2d 867 (1975); and *Sedlacek v. Hann, supra* note 18.

[40] See Freedman, *supra* note 25.

over that child's welfare through issuance of a writ pending a custody hearing protects the interests of the child and the parents alike.

Accordingly, a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b) should play no role in a child custody habeas proceeding. Instead, a challenge should be made to the writ, if it is issued, by means of a motion to quash.

That was not the procedure followed below. The court erred by failing to determine sua sponte whether to issue the writ, from which could have been followed a motion to quash rather than a motion to dismiss under § 6-1112(b). We will nevertheless review the court's ultimate conclusion that the allegations in the application were insufficient to state a claim challenging the lawfulness of the restraint of the child in Jeremy and Jamie's custody. In *Rehbein v. Clarke*,[41] we similarly considered whether the court had properly dismissed the application for writ of habeas corpus, even though we held that the court had failed to follow proper procedure when it entertained a demurrer instead of a motion to quash. The question regardless was whether the allegations of the application were sufficient to warrant discharge.[42]

In accordance with *Rehbein*, we will examine whether Maria's allegations were sufficient to warrant the child's discharge from Jeremy and Jamie's custody, but we will not address the mandate in § 6-1112(b) regarding conversion of a motion to dismiss into a motion for summary judgment. Habeas corpus proceedings, like postconviction proceedings, are not governed by the Nebraska Court Rules of Pleading in Civil Cases.[43] The mandate in § 6-1112(b) is thus inapplicable to habeas proceedings. Further, we can determine, without considering the exhibits admitted at the hearing, whether Maria failed to allege facts warranting relief.

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[41] *Rehbein v. Clarke, supra* note 21.

[42] See *id.*

[43] See *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

[14] The motion to quash admits all ultimate facts well pleaded in a relator's application, as distinguished from conclusions of law therein, and when thus tested it is ascertained that the allegations thereof are not sufficient to warrant discharge, the motion should be sustained and the writ of habeas corpus dissolved or quashed.[44] Maria alleged in her application that the relinquishment was "conditioned upon the retention of some parental rights" and that Jeremy and Jamie "made promises and representations to [Maria] that she could see the child" and had failed to allow her to do so. The attached agreement provides the additional factual allegations that this was a foster parent adoption after Maria gave consent to adopt and signed a voluntary relinquishment to DHHS (which DHHS accepted). The agreement is asserted to amount to a *condition* under paragraph V of the petition, therefore rendering the relinquishment invalid.

[15] Communication and contact agreements are contemplated and discussed by the law at Neb. Rev. Stat. §§ 43-162 to 43-166 (Reissue 2016). These statutes specifically provide that the agreements require court approval to be enforceable, and even if approved, noncompliance may not be the basis for setting aside a particular adoption, or revoking a relinquishment to DHHS. Therefore, under the law, such an agreement in any form could never be considered an invalidating condition, and noncompliance cannot be the basis for the relief Maria seeks.

[16] Section 43-162 provides for court approval of communication or contact agreements for adoptees in the custody of DHHS:

> The prospective adoptive parent or parents and the birth parent or parents of a prospective adoptee may enter into an agreement regarding communication or contact after the adoption between or among the prospective adoptee and his or her birth parent or parents if the prospective

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[44] See *Sedlacek v. Greenholtz, supra* note 18.

> adoptee is in the custody of [DHHS]. Any such agreement shall not be enforceable unless approved by the court pursuant to section 43-163.

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.[45] Under the plain language of § 43-162, "an agreement regarding communication or contact . . . shall not be enforceable unless approved by the court."

While the application failed to describe whether the agreement was approved by the juvenile court, even had the agreement been approved, its breach would not have rendered Maria's relinquishment and consent invalid. Section 43-164 states that failure to comply with a court-approved communication or contact agreement shall not be grounds for setting aside or revoking a relinquishment, consent to adoption, or an adoption decree:

> Failure to comply with the terms of an order entered pursuant to section 43-163 shall not be grounds for setting aside an adoption decree, for revocation of a written consent to adoption after the consent has been approved by the court, or for revocation of a relinquishment of parental rights after the relinquishment has been accepted in writing by [DHHS] as provided in section 43-106.01.

[17] Maria argues on appeal that her factual allegations in the application for the writ included an alleged breach of a private, apparently oral, promise to maintain contact, as opposed to the written agreement presented during the adoption proceeding. But these statutes are not limited to written agreements or agreements presented to the juvenile court. We find no ambiguity in the Legislature's stated intent to encompass within § 43-163 all written or oral agreements regarding communication or contact after an adoption, when the prospective

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[45] *In re Interest of Joseph C.*, 299 Neb. 848, 910 N.W.2d 773 (2018).

adoptee is in the custody of DHHS. Under § 43-163, such agreements are enforceable only if approved by the juvenile court and, pursuant to § 43-164, such agreements are never enforceable by way of revoking the consent and dissolving the adoption.

Thus, the facts alleged in Maria's application, as distinguished from conclusions of law therein, were not sufficient to warrant discharge. Rather, the allegations in the application show on their face that there is an insuperable bar to relief. While Maria asserted more broadly in her application that her relinquishment and consent was invalid because it was "obtained through coercion and/or false pretenses and/or fraud," this naked conclusion of law was insufficient to warrant a writ of habeas corpus.

[18-20] For the first time on appeal, Maria raises the constitutionality of the statutes governing consent and contact agreements in relinquishments to DHHS. Appellate courts do not generally consider arguments and theories raised for the first time on appeal.[46] Except in the most unusual cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court.[47] If not so raised, it will be considered to have been waived.[48] Furthermore, 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.[49] Maria failed to file a separate notice challenging the constitutionality of a statute and serve her brief on the Attorney General, as required by § 2-109(E).

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[46] *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

[47] *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997).

[48] *Id.*

[49] *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016).

While habeas corpus is an appropriate remedy to challenge the legality of a child's adoption and custody,[50] §§ 43-162 and 43-164 present an insuperable bar to relief under the circumstances and events alleged in Maria's petition. Although the proper procedure was not followed, we affirm the court's ultimate determination that the application failed to allege facts that could warrant relief in a habeas proceeding. For this reason, we find no merit to Maria's assignments of error.

CONCLUSION

For the foregoing reasons, we hold that the district court did not err in dismissing Maria's application for a writ of habeas corpus.

Affirmed.

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[50] See *Jesse B. v. Tylee H.*, 293 Neb. 973, 883 N.W.2d 1 (2016).

Nebraska Supreme Court
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Estate of Gerald Schluntz et al., appellants, v. Lower Republican Natural Resources District, a political subdivision, appellee.

915 N.W.2d 427

Filed July 20, 2018. No. S-17-970.

1. **Rules of the Supreme Court: Appeal and Error.** Headings in the argument section of a brief do not satisfy the requirements of Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2014).
2. **Jurisdiction: Appeal and Error.** Jurisdictional determinations that do not involve a factual dispute are reviewed de novo.
3. **Statutes: Appeal and Error.** Issues of statutory interpretation present a question of law that an appellate court independently reviews.
4. **Rules of the Supreme Court: Appeal and Error.** Where an appellate brief fails to comply with the mandate of the appellate rule governing the form and content thereof, the appellate court may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error.
5. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
6. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Where a statute has been judicially construed and that construction has not evoked an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.
7. **Actions: Jurisdiction: Appeal and Error.** Where a district court has statutory authority to review an action, the district court acquires jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.

Appeal from the District Court for Furnas County: David W. Urbom, Judge. Affirmed.

Thomas G. Lieske, of Lieske, Lieske & Ensz, P.C., L.L.O., for appellants.

Katherine J. Spohn and Blake E. Johnson, of Bruning Law Group, for appellee.

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

Papik, J.

In certain statutorily defined circumstances, parties aggrieved by actions taken by Nebraska administrative agencies or political subdivisions can seek review in district court in accordance with the Administrative Procedure Act (APA). The APA directs that proceedings for such review be instituted by filing a petition in the "district court of the county where the action is taken." Neb. Rev. Stat. § 84-917(2)(a)(i) (Reissue 2014). We have previously held and reaffirm today that this language requires that a petition for review be filed in the district court of the county in which the first adjudicated hearing of a disputed claim took place. Because the petition in this case was not filed in the district court of the county where the first adjudicated hearing occurred, we affirm the district court's dismissal for lack of subject matter jurisdiction.

BACKGROUND

In July 2016, the Lower Republican Natural Resources District (LRNRD), filed a complaint against the estate of Gerald Schluntz, Julie Smith, and Tamara Bishop (appellants) in this matter. LRNRD is a political subdivision authorized to regulate ground water usage. In its complaint, LRNRD alleged that appellants, owners and operators of farmland located in Furnas County, Nebraska, had violated LRNRD rules regarding ground water use. Public hearings followed in which appellants were represented by counsel. Importantly for

purposes of this appeal, it is undisputed that the first hearing (and all subsequent hearings) took place in LRNRD's offices in Harlan County, Nebraska. LRNRD later issued an order entitled "Cease and Desist Order and Order Imposing Civil Penalties." Appellants contend that the LRNRD order had the effect of prohibiting them from irrigating certain acres of farmland.

Appellants attempted to obtain review of the LRNRD order by filing a petition in the district court for Furnas County. In the petition, appellants asked that the LRNRD order be vacated, alleging, among other things, that LRNRD did not follow proper procedures and that its actions were arbitrary and capricious.

LRNRD moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. The district court granted the motion on subject matter jurisdiction grounds. The district court explained that under the Nebraska Ground Water Management and Protection Act, appeals of orders issued by natural resources districts are governed by the APA, which requires that proceedings for review be commenced by "filing a petition in the district court of the county where the action is taken." § 84-917(2)(a)(i). The district court then noted several decisions from this court interpreting "the county where the action is taken" under the APA to mean the county where the first adjudicated hearing of a disputed claim took place. Because there was no dispute that all hearings regarding the LRNRD order were held in Harlan County, the district court concluded it did not have subject matter jurisdiction over the petition brought in Furnas County and granted the motion to dismiss.

ASSIGNMENT OF ERROR

[1] Appellants failed to include in their brief on appeal a separate section assigning error in the district court's order of dismissal. The table of contents in appellants' brief does

contain a sentence under the heading for "Argument" stating, "The Court erred by dismissing the appeal of the Appellants' Petition in Error which was filed in the District Court of Furnas County." We have previously made clear, however, that headings in the argument section of a brief do not satisfy the requirements of Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2014), see, e.g., *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 839 N.W.2d 265 (2013), and we see no reason to treat a heading within the table of contents differently.

STANDARD OF REVIEW

[2-5] We review jurisdictional determinations that do not involve a factual dispute de novo. See *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012). Issues of statutory interpretation also present a question of law that we independently review. *Id.* However, where a party's brief fails to comply with § 2-109(D)(1), we may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error. See *In re Interest of Samantha L. & Jasmine L., supra*. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Id.*

ANALYSIS

Despite appellants' failure to assign error in the manner contemplated by our rules, the basis for appellants' appeal is nonetheless clear: They contend that the district court erred by finding it lacked subject matter jurisdiction and ordering dismissal. In the end, the appropriate standard of review is not crucial to resolving this appeal, because we find no error in the district court's order of dismissal, let alone error sufficiently obvious to merit reversal on the basis of plain error.

Appellants contend that this action was properly brought in the district court for Furnas County, because the farmland at

issue is located in Furnas County. According to appellants, the district court for Furnas County had jurisdiction pursuant to Neb. Rev. Stat. § 25-401 (Reissue 2016). Section 25-401 does not, however, apply to the petition appellants filed in this case. Section 25-401 states that "[a]ll actions to recover damages for any trespass upon or any injury to real estate . . ." shall be brought in the district court in the county where the real estate at issue is located. Appellants did not bring an action for damages for trespass upon or injury to real estate or any other type of action covered by § 25-401. Rather, they filed a petition for judicial review of an order issued by a natural resources district. Section 25-401 does not apply here.

The statute that does govern here is a provision of the Ground Water Management and Protection Act, Neb. Rev. Stat. § 46-750 (Reissue 2010). That statute provides that those aggrieved by orders of a natural resources district have the right to seek review but that such review "shall be in accordance with the [APA]." As noted above, the APA, in turn, directs that petitions for review be filed "in the district of the county where the action is taken." § 84-917(2)(a)(i). On numerous occasions over the last several decades, we have held that for purposes of the APA, the "county where the action is taken" is the county where the first adjudicated hearing regarding a disputed claim was held. See, *Nebraska Dept. of Health & Human Servs. v. Weekley*, 274 Neb. 516, 741 N.W.2d 658 (2007); *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 562 N.W.2d 355 (1997); *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996), *disapproved on other grounds, State v. Nelson*, 274 Neb. 304, 739 N.W.2d 199 (2007); *Bd. of Ed. of Keya Paha County v. State Board of Education*, 212 Neb. 448, 323 N.W.2d 89 (1982).

Appellants acknowledge our decisions adopting the "first adjudicated hearing" interpretation, but invite us to adopt a different interpretation of the APA's language when a party seeks

review of an administrative action pertaining to real estate. Appellants suggest that such an interpretation would eliminate potential confusion, because while there may be multiple hearings in multiple counties regarding a given matter, litigants "always know where the land is." Brief for appellants at 5. They also contend that their preferred interpretation would reduce the potential for confusion, because other types of actions involving land can be brought in the county where the land is located.

We must decline appellants' invitation to deviate from our decisions interpreting the exact same statutory language of the APA that is at issue in this case. Rather than reducing the potential for confusion, we believe we would be producing confusion if we were to interpret the phrase "county where the action is taken" to mean different things depending on the factual context of the underlying administrative action. As we have previously explained, the "first adjudicated hearing" interpretation provides a clear rule and "grafting unnecessary exceptions upon it" would only "complicate compliance." *Essman*, 252 Neb. at 352, 562 N.W.2d at 358.

[6] Furthermore, where a statute has been judicially construed and that construction has not evoked an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017). As the Legislature has not responded to any of our prior decisions interpreting this language with an amendment, we must presume it has acquiesced to the "first adjudicated hearing" interpretation.

[7] Because the APA requires that review be sought in the district court in the county where the first adjudicated hearing took place, appellants filed their petition in the wrong court. There is no dispute that the first hearing regarding the LRNRD order was held in Harlan County, yet appellants filed their petition in the district court in Furnas County.

Faced with a petition for review filed in the wrong court, the district court had no choice but to dismiss. Where a district court has statutory authority to review an action, the district court acquires jurisdiction only if the review is sought in the mode and manner and within the time provided by statute. *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017). Appellants did not seek review in the manner provided by statute, and thus the district court did not acquire jurisdiction.

CONCLUSION

Because appellants did not file their petition for review in the district court in the county in which the first adjudicated hearing regarding the disputed claim was held, the district court correctly dismissed on subject matter jurisdiction grounds. We affirm.

Affirmed.

Nebraska Supreme Court
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Miko Maroulakos, appellant, v. Walmart Associates, Inc., appellee.

915 N.W.2d 432

Filed July 20, 2018. No. S-17-1110.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. **Workers' Compensation.** The Nebraska Workers' Compensation Act provides that when an employee suffers personal injury caused by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation from his or her employer if the employee was not willfully negligent at the time of receiving such injury.
4. **Workers' Compensation: Words and Phrases.** The phrase "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job.
5. **Workers' Compensation.** All risks causing injury to an employee can be placed within three categories: (1) employment related—risks distinctly associated with the employment; (2) personal—risks personal to the claimant, e.g., idiopathic causes; and (3) neutral—a risk that is neither distinctly associated with the employment nor personal to the claimant.

6. ____. Generally, harm that can be attributed solely to personal or idiopathic causes is universally noncompensable.
7. ____. Unexplained-fall cases begin with a completely neutral origin of a mishap, while idiopathic-fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie issue of personal origin.
8. **Appeal and Error.** Absent plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted to it for disposition.
9. ____. Plain error is plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
10. **Workers' Compensation.** A workers' compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can be reached only on the basis thereof, then the claimant cannot recover.
11. ____. A finding in regard to causation of an injury is one for determination by the Workers' Compensation Court as the finder of fact.

Appeal from the Workers' Compensation Court: James R. Coe, Judge. Affirmed.

David M. Handley, of Watson & Carroll, P.C., L.L.O., for appellant.

Jennifer S. Caswell and Zachary W. Anderson, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Schreiner, District Judge.

Funke, J.

Miko Maroulakos appeals from a Workers' Compensation Court's order, which determined his injuries did not "arise out of" his employment. At trial, Maroulakos argued only that his injury arose out of employment, because his fall resulted from a risk of employment, but on appeal, he argues that his injury arose out of employment under the "increased-danger" rule, because he fell into an industrial shelving unit. We hold

Maroulakos waived this argument by failing to present it to the compensation court. Therefore, we affirm.

I. BACKGROUND

In August 2014, Maroulakos was working for Walmart Associates, Inc. (Walmart), as an overnight support manager. After coming back from his meal break, Maroulakos felt overheated, exhausted, and lightheaded. He told some coworkers that he would go home once he finished his overnight stock audits. Video surveillance captured Maroulakos walking past product aisles, approaching a product shipper, moving to the right of and away from the shipper, and then falling into a product aisle.

While on the floor, Maroulakos appeared to have a seizure lasting at least 30 seconds. As a result of the accident, Maroulakos sustained a facial laceration, sinus fractures, and possibly a traumatic brain injury causing neurocognitive impairment.

Maroulakos' amended complaint requested workers' compensation benefits, alleging personal injuries that resulted from his tripping over a pallet in the course of his employment. At trial, Maroulakos testified he had no memory of the actual fall and relied on Walmart's video surveillance, his medical reports, and a report by neurologist Srinivasan Mani, M.D.

Mani's report stated that based on Maroulakos' medical history and the video surveillance, it appeared Maroulakos tripped and fell and sustained a head injury, which caused a subsequent seizure. Mani diagnosed Maroulakos as likely suffering from an associated cognitive disturbance, which he opined resulted from the fall. The report, however, made no mention of Maroulakos' hitting an industrial shelving unit as he fell or whether his injuries were inconsistent with falling to the floor. The only reference to Maroulakos' hitting a shelf was in a "History of Present Illness" in one of the medical reports, which contained the following statement: "Patient fell on the end of shelf and sustained facial laceration."

Walmart called two employees who had witnessed Maroulakos' fall. One witness stated that she was standing in a product aisle 2 feet from Maroulakos when he walked face first into an industrial shelving unit and fell backward onto the floor. She stated she did not see Maroulakos trip over anything or remember a pallet on the floor. The other witness was 40 to 50 feet away but looked toward Maroulakos, in the midst of falling, after he heard grunting and other audible noises from Maroulakos' direction. The witness stated that Maroulakos fell face first into a shelf but that he did not remember seeing a pallet on the floor.

Evidence presented at trial showed that when Maroulakos was 12 years old, he contracted viral encephalitis, which required him to undergo at least seven brain surgeries to remove a cyst and implant a shunt. Because Maroulakos suffered at least one seizure during these surgeries, he was prescribed antiseizure medication, which he stopped taking after high school. Maroulakos testified he did not have any seizures or related health issues between being removed from antiseizure medication and his August 2014 fall, at which time he was 44 years old.

The compensation court determined that the only issue presented was whether Maroulakos' accident arose out of employment. It rejected Maroulakos' argument and Mani's interpretation of the video that he had tripped over a pallet. Instead, the court ruled that the surveillance video showed that "[Maroulakos] begins to rock back and forth on his feet as he walks and staggers briefly . . . then falls to the ground." The court determined Maroulakos' fall resulted from an idiopathic seizure and syncope event that was personal to him and not compensable under the Nebraska Workers' Compensation Act.[1] The court dismissed Maroulakos' complaint with prejudice.

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[1] Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2010, Cum. Supp. 2016 & Supp. 2017).

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

II. ASSIGNMENT OF ERROR

Maroulakos assigns error to the trial court's determination that his accident did not arise out of his employment.

III. STANDARD OF REVIEW

[1] Pursuant to § 48-185, an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[3]

[2] Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.[4]

IV. ANALYSIS

Maroulakos admits that at trial, he focused on whether he tripped over a pallet instead of whether he struck a shelf during his fall. He further admits that he did not argue before the trial court that his injury arose out of employment under the increased-danger rule. However, he argues that the Court of Appeals has held in *Svehla v. Beverly Enterprises*[5] and

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

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

[4] *Id.*

[5] *Svehla v. Beverly Enterprises*, 5 Neb. App. 765, 567 N.W.2d 582 (1997).

Lucas v. Anderson Ford[6] that when an employment hazard causes or increases the severity of an injury sustained from an idiopathic accident, the injury becomes compensable as arising out of employment. He further contends that because evidence showed that he sustained facial and brain injuries by landing face first on an industrial shelving unit, the Workers' Compensation Court was required to apply the rule from *Svehla* and *Lucas* after determining his fall resulted from an idiopathic condition.

Walmart does not dispute that the compensation court was bound by the rule adopted in *Svehla* and *Lucas*, but it argues Maroulakos had the burden of proving that he, in fact, fell into the shelving unit and that doing so increased the injuries he suffered from his idiopathic fall.

[3] The Nebraska Workers' Compensation Act provides that when an employee suffers personal injury caused by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation from his or her employer if the employee was not willfully negligent at the time of receiving such injury.[7] Section 48-151(2) provides that there is no presumption that an employee's injury sustained in the course of his or her employment was in fact caused by the employment, and a claimant has the burden of proving an injury arose out of employment by a preponderance of the evidence.[8]

[4-6] The phrase "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job.[9] All risks causing injury to an employee can be placed

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[6] *Lucas v. Anderson Ford*, 13 Neb. App. 133, 689 N.W.2d 354 (2004).

[7] § 48-101. See *Hintz v. Farmers Co-op Assn.*, 297 Neb. 903, 902 N.W.2d 131 (2017).

[8] See, also, *Hintz, supra* note 7.

[9] *Potter v. McCulla*, 288 Neb. 741, 851 N.W.2d 94 (2014).

within three categories: (1) *employment related*—risks distinctly associated with the employment; (2) *personal*—risks personal to the claimant, e.g., idiopathic causes; and (3) *neutral*—a risk that is neither distinctly associated with the employment nor personal to the claimant.[10] Harm that arises from risks distinctly associated with the employment is universally compensable.[11] Generally, harm that can be attributed solely to personal or idiopathic causes is universally noncompensable.[12] Harm that arises from neutral risks is generally compensable.[13]

As noted in *Maradiaga v. Specialty Finishing*[14]:

> Generally, a risk may be classified as "'neutral'" for either of two reasons: (1) "[t]he nature of the risk may be known, but may be associated neither with the employment nor the employee personally," or (2) "the nature of the cause of harm may be simply unknown." . . . Examples of neutral risks of the first type are stray bullets, lightning, or hurricanes, . . . while the most common example of a neutral risk of the second type is a purely unexplained fall . . . .

[7] In *Logsdon v. ISCO Co.*,[15] we considered whether an individual's purely unexplained fall in the course of his employment arose out of his employment. We distinguished purely unexplained falls causing injuries from idiopathic falls, explaining: "Unexplained-fall cases begin with a completely neutral origin of a mishap, while idiopathic-fall cases begin

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[10] *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000).

[11] *Id.*

[12] See *id.*

[13] *Id.*

[14] *Maradiaga v. Specialty Finishing*, 24 Neb. App. 199, 206, 884 N.W.2d 153, 159 (2016), citing 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law §§ 4.03 and 7.04[1][a] (2016).

[15] *Logsdon, supra* note 10.

with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie issue of personal origin."[16]

A vast majority of courts nationally have adopted the increased-danger rule, which provides that "the effects of [an idiopathic-caused] fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall."[17] The Nebraska Court of Appeals considered this rule in *Svehla* and *Lucas*, though it did not reference the increased-danger rule. In both cases, the appellate court considered whether a fall with a potential idiopathic cause became compensable as a result of the contribution of an employment condition.

In *Svehla*, the employee fell on the level ground of her employer's premises while walking to her vehicle after work and died from her injuries.[18] The trial court concluded that the evidence failed to establish the cause of the employee's fall but that the evidence showed her idiopathic condition was just as likely to have caused the fall as the employee's tripping, and it denied compensation.[19]

The appellate court ruled that the compensation court's determination that the fall may have resulted from an idiopathic cause prevented treating the fall as purely unexplained.[20] The court then noted that injuries sustained in an idiopathic fall "are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners,

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[16] *Id.* at 633, 618 N.W.2d at 675, citing *Svehla, supra* note 5.

[17] 1 Arthur Larson et al., Larson's Workers' Compensation Law § 9.01[1] at 9-2 (2017). See § 9.01[4] (citing cases).

[18] *Svehla, supra* note 5.

[19] *Id.*

[20] *Id.*

or in a moving vehicle."[21] Nevertheless, the appellate court agreed with the trial court that the injury was noncompensable because the plaintiff failed to determine how the employee sustained the injury leading to her death.[22]

In *Lucas*, the employee fell when rising from a chair while seated at his desk. The trial court determined that the fall was due to the employee's being hypoglycemic and that the fall resulted in a fractured hip.[23] Though there was no evidence the employee struck the chair or the desk during his fall, the trial court stated in its order, "'I find that the desk and the chair created an increased risk in that the fracture is a result of how one hits the floor, and how one hits the floor is depend[e]nt on what obstacles are present which change the way the plaintiff lands on the floor.'"[24]

The workers' compensation review panel reversed the trial court's order, stating that the trial court was clearly wrong in finding the employee suffered an accident arising out of his employment and finding that there was insufficient evidence "'to remove his idiopathic fall from the application of the general rule that harm that can be attributed to personal or idiopathic causes is universally non compensable.'"[25] The Court of Appeals noted that "[b]ecause the trial court found that [the employee's] fall was not an unexplained fall, but, rather, an idiopathic fall, [the employee] was required to show some affirmative employment contribution to offset the fact that his fall was precipitated by a personal condition."[26] Ultimately however, the appellate court agreed with the

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[21] *Id.* at 777, 567 N.W.2d at 591. Accord 1 Larson et al., *supra* note 17, § 9.01[1].

[22] *Svehla, supra* note 5.

[23] *Lucas, supra* note 6.

[24] *Id.* at 139, 689 N.W.2d at 360.

[25] *Id.*

[26] *Id.*

review panel that there was no evidence to support the trial court's finding that the employee's risk of injury was increased by getting up from a chair behind a desk when he fell to the ground.[27]

Neither our statements in *Logsdon*[28] nor the Court of Appeals' statements in *Svehla* or *Lucas* support Maroulakos' argument—the court was required to consider whether an employment hazard caused or contributed to his ultimate injury, because it determined an idiopathic condition caused his fall. As stated in *Logsdon*, the presumption is that a personal risk is non-compensable and it is incumbent on the employee to prove an affirmative condition of employment caused or contributed to the ultimate injury.[29] The increased-danger rule may be a valid theory for establishing that an injury arose out of employment, which we need not determine here, but it is a separate theory from arguing a fall was caused by an employment condition or a neutral cause.

[8,9] Absent plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted to it for disposition.[30] Plain error is plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[31]

[10] The rule of liberal construction of the Nebraska Workers' Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law.[32] The rule does not dispense with the necessity that claimant shall

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[27] *Id.*

[28] *Logsdon, supra* note 10.

[29] See, also, § 48-151(2).

[30] *State v. Lester*, 295 Neb. 878, 898 N.W.2d 299 (2017).

[31] *Id.*

[32] *Smith v. Ruan Transport, Inc.*, 190 Neb. 509, 209 N.W.2d 146 (1973).

prove his right to compensation within the rules above set forth, nor does it permit a court to award compensation where the requisite proof is lacking.[33] A workers' compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can be reached only on the basis thereof, then the claimant cannot recover.[34]

As in *Lucas*, there is no evidence in the record that Maroulakos' injuries were caused or aggravated by a hazard of employment. Maroulakos did not present any evidence that his facial and potential brain injuries were inconsistent with a fall to a hard tile floor or that his potential brain injuries did not result solely from his idiopathic condition. Therefore, any finding that the increased-danger rule did apply would have been purely speculative.

Further, Maroulakos did not prove that he struck the industrial shelving unit during his fall. While the employees testifying for Walmart both stated that he fell face first into the shelving unit, there was also video evidence of the fall that did not clearly show that he hit the shelving unit and which contradicted the testimony that he fell backward after making contact with the shelving unit. Additionally, despite one comment in a medical report, there was no medical evidence discussing Maroulakos' making contact with the shelving unit and stating that such was a cause of the injuries.

[11] The trial court ruled that Maroulakos fell to the floor after falling from his syncope event. A finding in regard to causation of an injury is one for determination by the Workers' Compensation Court as the finder of fact.[35] Based on the record before us, this finding was supported by competent evidence.

Thus, the court did not commit plain error by not applying the increased-danger rule, and Maroulakos' assignment of error

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[33] *Haufe v. American Smelting & Refining Co.*, 163 Neb. 329, 79 N.W.2d 570 (1956).

[34] *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013).

[35] *Miller v. Meister & Segrist*, 255 Neb. 805, 587 N.W.2d 399 (1998).

is without merit because he waived his argument by failing to present it to the compensation court.

V. CONCLUSION

For the preceding reasons, we affirm the decision of the compensation court.

Affirmed.

Miller-Lerman, J., concurring.

In cases where a compensation court finds that an accident occurred from an "idiopathic" condition, it logically follows that the compensation court should address the increased-danger rule when there is evidence suggesting that features of the workplace increased the severity of the worker's injuries. The evidence in this case shows the area where Maroulakos fell had an industrial shelving unit proximate to his path of descent to the floor, and two Walmart coworkers testified that they witnessed Maroulakos collide with the shelving. A note in a medical report also suggests that Maroulakos' facial injuries are consistent with falling on the end of a shelf. Although the compensation court found that Manoulakos had an idiopathic condition and "[fell] to the ground," it would have been helpful to address whether Maroulakos hit a shelf on the way down and, if so, whether such hit increased his injuries. However, this specific question was not raised before the compensation court. Therefore, I concur.

Schreiner, District Judge, joins in this concurrence.

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

State of Nebraska, appellee, v. Nathan W. Clemens, appellant.

915 N.W.2d 550

Filed July 27, 2018. No. S-17-872.

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. **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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently.
4. **Pleas.** To support a plea of guilty or no contest, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.
5. **Pleas: Effectiveness of Counsel.** When a court accepts a defendant's plea of guilty or no contest, the defendant is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.
6. **Pleas.** A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily.
7. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
8. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.
9. **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.

10. **Convicted Sex Offender: Jurisdiction: States.** Under Neb. Rev. Stat. § 29-4003(1)(a)(iv) (Reissue 2016), whether one is "required to register as a sex offender" in another jurisdiction is determined under the laws of the other jurisdiction rather than under Nebraska law. Section 29-4003(1)(a)(iv) adds no additional requirement that registration in the other jurisdiction must be based on a "conviction" or an offense that would have required the person to register in Nebraska if the offense had been committed in Nebraska.
11. ____: ____: ____. A sex offender registrant's actual registration under another jurisdiction's law is conclusive evidence that the registrant was required to register within the meaning of Neb. Rev. Stat. § 29-4003(1)(a)(iv) (Reissue 2016).

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, Todd Molvar, and Sarah L. Burghaus, Senior Certified Law Student, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Hall, District Judge.

Miller-Lerman, J.

NATURE OF CASE

Nathan W. Clemens appeals his plea-based conviction and sentence in the district court for Lancaster County for attempted violation of Nebraska's Sex Offender Registration Act (SORA). He claims that the district court committed plain error when it accepted the factual basis for the plea and sentenced him. We affirm Clemens' conviction and sentence.

STATEMENT OF FACTS

In August 2016, Clemens was taken into custody by a Lancaster County sheriff's deputy following a disturbance

in a bar. As a result of conducting a background check on Clemens, the deputy determined that Clemens was registered as a sex offender in Colorado; that he was still required to be registered in Colorado; and that he had last registered in Colorado on January 14, 2016, with an Aurora, Colorado, address. Further investigation indicated that Clemens had been living and working in Nebraska since June 2016, but that he had never registered as a sex offender in Nebraska. The State charged Clemens with a violation of SORA under Neb. Rev. Stat. § 29-4011(1) (Reissue 2016) based on his failure to register within 3 working days after entering Nebraska, as required by Neb. Rev. Stat. §§ 29-4003(1)(a)(iv) and 29-4004(1) (Reissue 2016).

As part of a plea agreement, the State amended the charge to attempted violation of SORA, and on June 5, 2017, Clemens pled guilty to the amended charge. At the plea hearing, the State set forth a factual basis which included, inter alia, the following: that Clemens "was a registered sex offender in Colorado"; that "on February 18th of 1999, [he] was found to have committed the offense of sexual assault of a child" in Colorado; that "[a]s a result of his conviction, [he] was required to register as a sex offender" in Colorado; that a law enforcement officer in Colorado confirmed that Clemens "was still required to registered as a sex offender, and his last registration in Colorado was on January 14th, 2016, when he listed his address at that time as being in Aurora, Colorado"; that Clemens had posted on social media in June 2016 that he was leaving Colorado and "was going to Nebraska for a new start"; that his employer provided timecards showing that he "had been working in Nebraska since June 20th of 2016"; that Clemens had "acknowledge[d] that he knew he was required to register as a sex offender, but said he did not know the rules in Nebraska"; and that a "review of the Nebraska State Patrol Registry and the records of the Lancaster County Sheriff's Office show that . . . Clemens had never registered as a sex offender in Nebraska or in Lancaster County." After the State

finished giving its factual basis, the court asked Clemens, "Sir, did you commit this offense?" and Clemens replied, "Yes, sir." After further colloquy, the court accepted Clemens' plea and found him guilty of attempted violation of SORA.

On July 28, 2017, the court sentenced Clemens to imprisonment for 270 days and to postrelease supervision for 9 months. On August 15, Clemens filed a notice of appeal. At an appeal bond hearing held on August 16, the district court received into evidence two exhibits offered by Clemens: an August 4, 2017, letter from the Nebraska State Patrol stating that Clemens did not need to register under SORA and a copy of the decision of the U.S. Court of Appeals for the Eighth Circuit in *A.W. by and through Doe v. State*, 865 F.3d 1014 (8th Cir. 2017). Clemens stated that he was offering the exhibits "just for the purpose of setting the appeal bond."

In the August 4, 2017, letter, legal counsel for the Nebraska State Patrol advised Clemens that his "registration is being terminated due to a decision of the 8th Circuit Court of Appeals relating to out-of-state juvenile adjudications." The Eighth Circuit opinion to which the letter referred was *A.W. by and through Doe, supra*, filed on July 31, 2017. In that opinion, the Eighth Circuit interpreted SORA and, in particular § 29-4003(1)(a), which provides: "[SORA] applies to any person who on or after January 1, 1997: . . . (iv) [e]nters the state and is required to register as a sex offender under the laws of another village, town, city, state, territory, commonwealth, or other jurisdiction of the United States." In its opinion in *A.W. by and through Doe*, based on its interpretation of the term "sex offender," the Eighth Circuit concluded that § 29-4003(1)(a)(iv) of SORA did not apply to persons who move to Nebraska from another state and were required to register in that other state if the registration required in the other state was a result of a juvenile adjudication rather than a criminal conviction.

At the appeal bond hearing, Clemens stated that the letter from the Nebraska State Patrol and the Eighth Circuit decision were "why [he] filed the appeal" and that they indicated

"a mitigating circumstance [such that he should be] released on an appeal bond." Clemens did not ask to withdraw his plea, nor did he request any relief other than the setting of an appeal bond.

The State responded that it did not have any objection to the court's setting a bond in this case, but it stated that it had sent an email to the court and to Clemens' counsel "with a determination by the Patrol, subsequent to the letter that [Clemens had] offered [to the court] that says, oh, wait a minute, we didn't know some other things." The State continued by saying that the "issue is not cut and dry, as it would appear from just those two exhibits." The State concluded that it "just want[ed] the Court to be aware of that" and repeated that it did not object to setting a bond. The court then set a bond for Clemens.

Clemens appeals his conviction and sentence.

ASSIGNMENT OF ERROR

Clemens claims that the district court "committed plain error by accepting the factual basis at the plea, and by sentencing [him]." Clemens argues that there was no factual basis for the district court to accept his plea, because under the Eighth Circuit's interpretation of SORA, he was not required to register in Nebraska and therefore he could not have violated SORA by failing to register in Nebraska.

We note that while Clemens claimed that the court committed plain error "by sentencing" him, he does not make a separate argument regarding sentencing per se. Instead, his argument appears to be that because the court should not have accepted his plea, the court should not have sentenced him at all. Therefore, our resolution of the sentencing claim is based entirely on our resolution of the claim relating to acceptance of the plea.

STANDARDS OF REVIEW

[1,2] 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). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *State v. Jones*, 297 Neb. 557, 900 N.W.2d 757 (2017).

[3] Statutory interpretation presents a question of law, which an appellate court reviews independently. See *State v. Kennedy*, 299 Neb. 362, 908 N.W.2d 69 (2018).

ANALYSIS

This Court Treats Clemens' Claim of Plain Error as Challenge to Court's Finding That His Plea Was Entered Understandingly and Voluntarily.

We first address the procedural posture of this case and the manner in which Clemens claims error on appeal. Clemens asserts on appeal that the district court committed plain error when it accepted the factual basis of his plea and sentenced him. In particular, he contends that he was not required to register as a sex offender in Nebraska and that therefore, he could not have been found guilty of a violation or attempted violation of SORA based on a failure to register.

Clemens phrases his assignment of error as an assertion that the court committed "plain error." He apparently raises the issue as plain error because he did not object to the factual basis at the plea hearing and he did not move to withdraw his plea after he received the letter from the Nebraska State Patrol. Thus, Clemens could not assign error based on the court's "overruling" an objection he did not raise or a motion he did not make.

Instead of seeking a ruling directly challenging the necessity to register, the only point at which Clemens brought to the district court's attention the issue of whether he was required to register was in the context of the appeal bond hearing. At that hearing, he stated that he was offering evidence regarding the issue of whether he was required to register "just for

the purpose of setting the appeal bond" and, as noted above, that the evidence he presented indicated "a mitigating circumstance [such that he should be] released on an appeal bond." Although the State took issue with the import of the evidence offered by Clemens, it stated that it did not object to the court's setting a bond for Clemens. The court then set a bond for Clemens, and thus, Clemens could not assign error to the denial of a bond.

Regarding the substance of the assertion of plain error in this appeal, we note that in *State v. Wilkinson*, 293 Neb. 876, 881 N.W.2d 850 (2016), we concluded that a defendant did not waive a challenge to the factual basis for a plea when he entered a plea. We stated that a sufficient factual basis is a requirement for finding that a plea is entered into understandingly and voluntarily. Therefore, on appeal, one of the limited challenges a defendant may raise to a plea that was accepted by the trial court is the claim that the plea was not understandingly and voluntarily made. In view of the foregoing, we read Clemens' assertion of plain error in this appeal as a challenge to the court's acceptance of his plea on the limited basis that the plea was not understandingly and voluntarily made because there was not a sufficient factual basis for the plea.

Based on Plain Reading of SORA Registration Requirements, Clemens Was Required to Register Under SORA: The Factual Basis for Clemens' Plea Was Sufficient.

We note at this point that the parties indicate on appeal, and it is reflected in the presentence report prepared after the plea was accepted, that Clemens was a juvenile at the time of the events leading to his adjudication in Colorado. We accept that understanding for the purpose of our analysis.

Relying on the Nebraska State Patrol's letter and the Eighth Circuit's interpretation of § 29-4003(1)(a)(iv) in *A.W. by and through Doe v. State*, 865 F.3d 1014 (8th Cir. 2017), Clemens contends that the factual basis in this case was not sufficient

because, inter alia, his Colorado registration from a juvenile adjudication and the factual basis recited by the State did not include an allegation that he was required to register in Colorado based on an actual "conviction." Brief for appellant at 5. He contends there was not a sufficient factual basis because he was not in fact required to register in Nebraska and therefore could not have violated or attempted to violate SORA by failing to register. Clemens basically argues that he could not have understandingly and voluntarily pled guilty to an offense he did not commit. We conclude that there was a sufficient factual basis to support Clemens' plea to an attempted violation of SORA and that the court did not err when it accepted the plea.

[4-6] To support a plea of guilty or no contest, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged. *State v. Wilkinson, supra*. "When a court accepts a defendant's plea of guilty or no contest, the defendant is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel." *Id*. at 881, 881 N.W.2d at 855. A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily. *Id*.

Clemens pled guilty to an attempted violation of § 29-4011(1), which provides that "[a]ny person required to register under [SORA] who violates the act is guilty of a Class IIIA felony." The offense as charged by the State was that Clemens violated SORA when he failed to timely register as required by §§ 29-4003(1)(a)(iv) and 29-4004(1). Section 29-4003(1)(a) provides that SORA "applies to any person who on or after January 1, 1997," meets one of the listed criteria, including the criterion listed in subsection (1)(a)(iv), referring to a person who "[e]nters the state and is required to register as a sex offender under the laws of another village, town, city, state, territory, commonwealth, or other jurisdiction of

the United States." Section 29-4004(1) provides that "[a]ny person subject to [SORA] shall register within three working days after becoming subject to the act at a location designated by the Nebraska State Patrol for purposes of accepting such registration."

As noted above, the factual basis provided by the State at the plea hearing held on June 5, 2017, included allegations to the effect that prior to June 2016, Clemens had lived in Colorado; that he moved to Nebraska in June 2016; that at the time he moved to Nebraska, he was required to register as a sex offender in Colorado; and that he had never registered as a sex offender in Nebraska or in Lancaster County. The foregoing factual basis would appear to support a conviction under § 29-4011(1) based on the plain language of §§ 29-4003(1)(a)(iv) and 29-4004(1).

Notwithstanding the facts recited by the State, Clemens argues that the factual basis was not sufficient, because the language in § 29-4003(1)(a)(iv) that one is "required to register as a sex offender" should be made by reference to Nebraska law concerning who is required to register in Nebraska—not Colorado law concerning who is required to register in Colorado. In this regard, Clemens points out that juveniles adjudicated delinquent in Nebraska do not have to register under SORA, whereas in Colorado, they are required to do so. As a consequence of his interpretation of subsection (1)(a)(iv), Clemens maintains that the plea did not satisfy his reading of § 29-4003(1)(a)(iv).

Clemens' interpretation is based on the Eighth Circuit's decision in *A.W. by and through Doe v. State*, 865 F.3d 1014 (8th Cir. 2017). As we noted above, that case held that the term "sex offender" as used in § 29-4003(1)(a)(iv) refers only to a person who has been criminally convicted of a sex offense, but does not include one who is required to register in another state based on a juvenile adjudication which is generally not considered a criminal "conviction" under Nebraska law. Clemens argues that because he was required to register

in Colorado based on a juvenile adjudication but not a criminal conviction, he was not a "sex offender" within the meaning of § 29-4003(1)(a)(iv).

In *A.W. by and through Doe, supra*, the Eighth Circuit rejected the State's argument that under § 29-4003(1)(a)(iv), the determination of whether one is required to register as a sex offender in another jurisdiction is to be determined based on that other jurisdiction's definition of the term "sex offender." The Eighth Circuit reasoned instead that whether one is required to register as a sex offender in the other jurisdiction depends on whether the registration requirement in that other jurisdiction is based on the person's being a "sex offender" as that term is defined by Nebraska law. Because SORA does not include a definition of the term "sex offender," and given its approach to subsection (1)(a)(iv), the Eighth Circuit looked to ascertain who would be required to register as a "sex offender" under Nebraska law. The Eighth Circuit then determined a criminal "conviction" is necessary to being considered a "sex offender" under Nebraska law, and it reasoned that because a juvenile adjudication is not considered a "conviction" under Nebraska law, one who is required to register in another state because of a juvenile adjudication is not a "sex offender" under Nebraska law and therefore not "required to register as a sex offender under the laws of another" jurisdiction for purposes of § 29-4003(1)(a)(iv).

[7-9] Resolution of the issue of whether Clemens was required to register under SORA requires us to interpret § 29-4003(1)(a)(iv), and we therefore review standards relevant to statutory interpretation. Statutory language is to be given its plain and ordinary meaning. *State v. Jasa*, 297 Neb. 822, 901 N.W.2d 315 (2017). An appellate court will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous. *Id.* 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. *State v.*

Kennedy, 299 Neb. 362, 908 N.W.2d 69 (2018). An appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Id*.

[10] We respectfully disagree with the Eighth Circuit's interpretation of § 29-4003(1)(a)(iv) and reject Clemens' argument based thereon. We think that the Eighth Circuit's decision to focus on the meaning of "sex offender" under Nebraska law and the posited requirement of a "conviction" deviates from a plain reading of § 29-4003(1)(a)(iv). To repeat, § 29-4003(1)(a) provides that SORA "applies to any person who on or after January 1, 1997: . . . (iv) [e]nters the state and is required to register as a sex offender under the laws of another village, town, city, state, territory, commonwealth, or other jurisdiction of the United States." Our plain reading of the statute leads us to conclude that "required to register as a sex offender" is modified by "under the laws of another . . . jurisdiction." Reading the section as a whole, whether one is "required to register as a sex offender" in another jurisdiction is determined under the laws of the other jurisdiction rather than under Nebraska law. Section 29-4003(1)(a)(iv) adds no additional requirement that registration in the other jurisdiction must be based on a "conviction" or an offense that would have required the person to register in Nebraska if the offense had been committed in Nebraska.

In this regard and in contrast to SORA's § 29-4003(1)(a)(iv), we are aware of other states' sex offender statutes and note that elsewhere there is deliberate language, such as requiring registration if the individual was "convicted" in the other state; such statutes would be compatible with the Eighth Circuit's approach to § 29-4003(1)(a)(iv). E.g., *State v. Frederick*, 292 Kan. 169, 174, 251 P.3d 48, 51 (2011) (determining person required to register in other state based on juvenile adjudication not required to register in Kansas, because Kansas statute refers to person *convicted* in other state and under Kansas law, "convictions" do not include "adjudications").

Our reading of § 29-4003(1)(a)(iv) is bolstered by reading other provisions of § 29-4003(1)(a) as well as the statute as a whole. Section 29-4003(1)(a) describes persons to whom SORA applies. Section 29-4003(1)(a)(i)(A) through (N) lists the sexual predatory conduct to which SORA applies. Subsection 29-4003(1)(a)(ii) in particular requires persons to register in Nebraska who have "ever pled guilty to, pled nolo contendere to, or been found guilty of any offense that is substantially equivalent to a registrable offense under subdivision (1)(a)(i) of this section by" another jurisdiction.

Section 29-4003(1)(a)(ii) uses the language of criminal law and essentially requires a person with a "conviction" for a sex offense in another jurisdiction to register in Nebraska. By imposing a "conviction" requirement onto § 29-4003(1)(a)(iv), in *A.W. by and through Doe v. State*, 865 F.3d 1014 (8th Cir. 2017), the Eighth Circuit's reading of subsection (1)(a)(iv) tends to make it superfluous to subsection (1)(a)(ii). We recognize there is some overlap between subsections (1)(a)(ii) and (1)(a)(iv), for example, where one was convicted of an offense and required to register in another jurisdiction and also would have been required to register in Nebraska if the offense had been committed in Nebraska. However, as we read § 29-4003(1)(a), each subsection covers some circumstances that the other does not. Subsection (1)(a)(ii) covers persons convicted of an offense in another state that would have required registration in Nebraska, whether or not that person is required to register under the laws of the other jurisdiction, whereas subsection (1)(a)(iv) covers persons who are required to register as a sex offender in another jurisdiction whether or not they would otherwise have been required to register in Nebraska. Thus, in contrast to the Eighth Circuit's approach to § 29-4003(1)(a)(iv), our reading tends to make subsections (1)(a)(ii) and (1)(a)(iv) harmonious.

We have reviewed the jurisprudence relative to registrable offenses and believe our reading of § 29-4003(1)(a)(iv) is consistent with the approaches taken by other states addressing

when to require registration of a person coming into the state from another state. The literature recognizes differing approaches in imposing registration requirements for one who moves from another state to the forum state. Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. Pa. L. Rev. 257 (2005). Alternative approaches have been described as being either "internal" or "external." *Id.* at 261. Under an internal approach, the forum state "requires that out-of-state convictions, and any punishment resulting from those convictions, satisfy the eligibility requirements of the forum state's registration . . . law." *Id.* Under an external approach, the forum state "allows such decisions to be based on the legal determinations of the forum state's fellow sovereigns." *Id.* Some state courts have noted that their statutes take both approaches. See *Crabtree v. State*, 389 S.W.3d 820 (Tex. Crim. App. 2012) (Alcala, J., dissenting; Johnson and Cochran, JJ., join).

Nebraska's statute uses both approaches. Section 29-4003(1)(a)(ii) uses the internal approach. And, although the Eighth Circuit applied an internal approach analysis to § 29-4003(1)(a)(iv), we believe § 29-4003(1)(a)(iv) is an external approach statute. See *Com. v. Bell*, 83 Mass. App. 82, 981 N.E.2d 220 (2013) (Grainger, J., dissenting in part) (identifying § 29-4003(1)(a)(iv) as being among statutes from other states that require registration in forum state based on registration requirement in another state whether or not offense would have required registration if committed in forum state).

We note that in *Murphy v. Commonwealth*, 500 S.W.3d 827 (Ky. 2016), the Supreme Court of Kentucky considered a statute that used an external approach similar to that used in § 29-4003(1)(a)(iv). Referring to the Kentucky statute, the court in *Murphy* stated that the law at issue required registration in Kentucky for "'a person . . . required to register under . . . the laws of another state . . . .'" 500 S.W.3d at 829. The court in *Murphy* concluded that the "plain language of the statute" required the defendant, who was required to register

in another state based on that other state's law, to register in Kentucky. 500 S.W.3d at 831. In so concluding, the court rejected an argument—similar to that urged by Clemens—that a defendant is not required to register in Kentucky, because his registration in the other state arose from a juvenile adjudication and Kentucky did not require registration for persons found to have committed a sex offense in a juvenile adjudication in Kentucky.

When it rejected the defendant's argument, the court in *Murphy* reasoned that public policy regarding whether and which juveniles should register was to be determined by the Kentucky General Assembly rather than the court and that "if the General Assembly has required registration of some juveniles from other states, then that is the law." 500 S.W.3d at 832. For completeness, we note that after the decision in *Murphy*, the Kentucky General Assembly amended the statute to exclude registration based on juvenile adjudications in other states. See Ky. Rev. Stat. Ann. § 17.510(6)(b) (LexisNexis Cum. Supp. 2017) (providing in part that "[n]o person shall be required to register under this subsection for a juvenile adjudication if such an adjudication in this Commonwealth would not create a duty to register").

As we discussed above, the external approach of the plain language of § 29-4003(1)(a)(iv) requires registration in this state when the person was required to register as a sex offender in the other jurisdiction. This statute's registration requirement does not explicitly require a "conviction" in the other state, nor does it explicitly exclude from registration a juvenile adjudication in the other state. If the policy of Nebraska is to exclude registration when a person moves to Nebraska with a registration requirement in another state based on a juvenile adjudication, then our Legislature would need to make that decision and amend our statutes. As our statute now reads, we conclude § 29-4003(1)(a)(iv) requires registration based on a registration requirement from another state even if the requirement in the other state is based on a juvenile adjudication.

[11] In *Skaggs v. Nebraska State Patrol*, 282 Neb. 154, 804 N.W.2d 611 (2011), we held that a sex offender registrant's actual registration under another jurisdiction's law is conclusive evidence that the registrant was required to register within the meaning of § 29-4003(1)(a)(iv). Given *Skaggs* and our current holding, there was a sufficient factual basis in the instant case to accept the plea, because the basis set forth at the plea hearing showed that at the time Clemens entered Nebraska, he was required to register and actually was registered as a sex offender in Colorado. Under § 29-4003(1)(a)(iv), that registration requirement under Colorado law was all that was needed to establish that he was required to register in Nebraska under SORA. When the facts showed that Clemens failed to register in Nebraska within 3 working days as required by § 29-4004(1), a factual basis was established to find him guilty under § 29-4011(1) of an attempted violation of SORA.

For completeness, we note that there are issues we need not and do not address in this opinion. We are aware that there is some argument by Clemens that it would violate certain constitutional rights to require registration in Nebraska based on his Colorado juvenile adjudication. In this case, Clemens did not raise a constitutional challenge to § 29-4003(1)(a)(iv) in the district court and therefore did not preserve any such challenge for our review on appeal. In this regard, we also note that certain constitutional issues were raised in *A.W. by and through Doe v. State*, 865 F.3d 1014 (8th Cir. 2017), but not resolved, because of the Eighth Circuit's interpretation of SORA as not requiring registration in that case.

We also are aware that issues were raised in *A.W. by and through Doe, supra*, regarding whether it would be appropriate for Nebraska to make registration information public when the person is required to register in Nebraska based on a juvenile adjudication in another state and the person would not have been subject to public disclosure in the other state. For purposes of the present case, our decision is limited to whether

there was a factual basis to support Clemens' plea to attempted violation of SORA. We determined that Clemens was required to register under SORA; however, whether the State may make certain information public after a person has registered is a separate issue from whether the person is required to register, and the public disclosure question is not at issue in this case. Similarly, issues regarding the length of time one may be required to register in Nebraska based on a registration requirement from another state are outside the scope of this decision.

CONCLUSION

We read SORA's § 29-4003(1)(a)(iv) to require registration in Nebraska where an individual is required to register in another village, town, city, state, territory, commonwealth, or other jurisdiction of the United States, regardless of whether the registration in the other jurisdiction is based on a juvenile adjudication. Based on our interpretation of § 29-4003(1)(a)(iv), we determine that there was a sufficient factual basis for Clemens' plea to attempted violation of SORA, and we reject his claim that the plea was not made understandingly and voluntarily. We therefore find no error in the district court's acceptance of Clemens' plea or the sentence imposed upon him. Accordingly, we affirm Clemens' conviction and sentence.

Affirmed.

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

State of Nebraska, appellee, v. Markel D. Steele, appellant.

915 N.W.2d 560

Filed July 27, 2018. No. S-17-951.

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. **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.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a 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. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Jeffrey Pickens and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Dobrovolny, District Judge.

Papik, J.

Markel D. Steele pled guilty to one count of second degree murder and one count of first degree assault for his involvement in an armed robbery and shooting that left one victim dead and another paralyzed. Steele, who was 17 years old at the time of the offenses, was sentenced to 60 years' to life imprisonment for second degree murder and to 40 to 50 years' imprisonment for first degree assault, with the sentences to run consecutively. Because we find no merit to the contentions Steele raises on appeal regarding his sentences, we affirm.

BACKGROUND

Factual Basis for Charges.

The following details regarding the incident underlying Steele's convictions are summarized from the factual basis recited by the State at Steele's plea hearing.

On April 18, 2016, at approximately 3 p.m., law enforcement responded to a report of gunshots at a residence near 19th and Euclid Streets in Lincoln, Nebraska. Dispatchers relayed to law enforcement that approximately eight gunshots were heard in the residence and that "two black males" were seen leaving the residence around the time of the shooting. One was reported as wearing black jeans and a gray hoodie with the letters "USA" on the back, and the other was wearing jeans and a black "puffy" coat.

As officers first arrived in the area, they located a black male wearing black jeans and a gray hoodie with the letters "USA" walking westbound a block or two from the reported location of the shooting. This individual, later identified as Xheronte Lewis, was detained by police and admitted to being at the residence when shots were fired.

Inside the residence, officers located two victims, identified as Christopher Coleman and Jerry Griffis, both of whom had sustained gunshot wounds. Officers also found a dog that was suffering from gunshot wounds. Three small children were also present in the residence.

Coleman, who was found just inside the front doorway in the living room, was pronounced dead at the scene. Griffis, who was found in the kitchen, was transported to a nearby hospital where he received extensive treatment for a gunshot wound that passed through his spine. The dog was taken to an emergency veterinary clinic where it died from its wounds.

An autopsy on Coleman later revealed that the cause of his death was a gunshot wound to the neck. Griffis was hospitalized for approximately 1½ months as a result of his injuries. He was diagnosed with multiple gunshot wounds, a vertebra fracture, paraplegia, "right and left hemopneumothorax," bilateral pulmonary contusion, and a rib fracture. He is now partially paralyzed.

Griffis gave a statement to police approximately a week after the shooting. He stated that he had gone to Coleman's house on April 18, 2016, to sell him some marijuana. While there, he heard the front door open and immediately heard two gunshots in quick succession. He stated that he could not see the shooter initially, but could see Coleman facing the shooter. He then saw Coleman turn "180 degrees" and fall to the floor and believed that Coleman was struck by one or both of the shots fired. Griffis stated that he then observed a black male in his early twenties wearing all black clothing holding a black semiautomatic handgun.

Griffis reported that the black male shot Coleman's dog two or three times when it appeared in the kitchen doorway. The dog yelped and ran to its kennel toward the back of the kitchen. Immediately after shooting the dog, the black male pointed the gun at Griffis and fired one or two shots into his torso. Griffis immediately fell to the ground. When he looked up, the black male had walked a few steps toward him and was pointing the gun at his head. Griffis put his left hand out

in front of the gun in an attempt to block a shot to his head. He heard another gunshot and felt pain on his hand and face. Griffis stated that he "played dead" in order to avoid being shot again.

After the last shot, Griffis heard two male voices in the kitchen. He "heard the male closest to him, presumably the shooter, say, . . . Where's it at? Find the shit . . . ." He then heard the intruders rifling through cabinets and drawers. A quantity of marijuana was later found to have been taken from the residence. Using a photograph that had been posted on Facebook, Griffis was able to identify Steele as the shooter.

Investigators processed the crime scene and recovered seven bullet casings from the residence. Two spent rounds were found in the dog's body, one round was collected from Griffis' body, and two rounds were discovered at the residence. A firearms analyst concluded that all of the bullets were fired from the same gun, which was identified as a "Hi-Point JHP" .45-caliber firearm.

Investigators also took photographs and castings of fresh footprints from the kitchen floor and from the mud in the backyard of the residence, which appeared to be consistent with Nike "Air Force" tennis shoes. A witness described Steele as having worn Nike "Air Force or Air Max" tennis shoes at the time of the shooting. When Steele was later arrested, he was wearing Nike "Air Force" tennis shoes, which were seized by police and analyzed at the Nebraska State Patrol crime laboratory. The analyst found that the castings and photographs of the footprints taken at the crime scene corresponded to the pattern and size of Steele's left shoe.

Steele was arrested and interviewed by police on May 5, 2016. He denied any involvement in the robbery or homicide, but admitted that he had a Facebook account and that he used Facebook to communicate with others. Investigators obtained a search warrant to access his Facebook records, which showed that on April 7, Steele was in communication with Lewis about possibly doing a narcotics-related robbery on Euclid Street. This conversation continued over the course

of 11 days while the two attempted to find a gun and a driver for the robberies. The conversation included a screen shot of a text message conversation in which Lewis asked another individual to drive. That individual then asked Lewis where this would occur, and Lewis responded, "'Euclid.'"

After that individual declined to participate, Steele told Lewis that he found a driver named "T.J.," later identified as Terique Jackson, and that they would be over to pick him up in a BMW, which was the vehicle Jackson was driving at the time.

Lewis was deposed and testified that he observed Steele with a black .45-caliber semiautomatic handgun just before the robbery and homicide on Euclid Street. He also testified that Jackson was the driver who transported them to the Euclid Street residence on April 18, 2016, and that Lewis made plans with Steele to meet up after the robbery.

While incarcerated at the Lancaster County jail, Steele admitted to more than one confidential informant that he had shot Coleman and Griffis on April 18, 2016, at the Euclid Street residence.

Steele was 17 years old on the date of the offenses.

Steele's Guilty Pleas.

Steele was initially charged with eight different felony offenses arising out of the incident on Euclid Street: first degree murder, first degree assault, robbery, abandonment or cruel neglect of an animal, and four counts of the use of a firearm to commit a felony. The parties later advised the district court that they had reached a plea agreement. Under the agreement, Steele would plead guilty to an amended information which reduced his first degree murder charge to second degree murder, retained the first degree assault charge, and dropped the other six counts. As part of the plea agreement, the State also agreed to dismiss various charges it had filed against Steele in Lancaster County District Court arising out of two different incidents and to forgo any additional charges based on those other incidents.

Steele entered guilty pleas in accordance with the parties' agreement. The district court accepted the pleas after concluding that there was a sufficient factual basis for the pleas and that Steele understood the nature of the charges and made the plea freely, voluntarily, knowingly, and intelligently.

Sentencing Hearing.

At the sentencing hearing, the district court acknowledged receipt of the presentence investigation report and heard arguments from both parties. Then, prior to imposing sentences, the district court stated:

> In determining the appropriate sentences, the Court considers a number of factors. I recognize that Mr. Steele was 17 years of age when these crimes were committed. Although I do not believe that the Court is required to do so, I have followed the requirements of *Miller versus Alabama*, where the United States Supreme Court indicated that the court consider the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing, and I have taken into account how children are different and how these differences counsel against irrevocably sentencing a juvenile to a lifetime in prison.
>
> I have considered the defendant's age; mentality; education and experience; social and educational background and cultural background; past criminal record or record of law abiding conduct; motivation for the offense; the nature of the offense; the amount of violence involved in the commission of the crime.
>
> And although not required to do so, I have also considered the mitigating factors which led to the commission of this offense as set forth in Nebraska Revised Statute Section 28-105.02. I have considered the age of the defendant; the impetuosity of the defendant; his family and community environment; his ability to appreciate the risk and the consequences of the conduct; his intellectual capacity; and the mental health evaluation that was

submitted by defense counsel from the mental health professional, including all of the statutory mitigating factors; including information from the family, which includes prenatal history, developmental history, medical history, substance abuse treatment history, social history and psychological history.

The Court has also considered and cannot ignore the senselessness of these acts of violence; the motivation for the crime, to steal marijuana; the premeditated actions, this crime had been planned for some time; there was no provocation for these offenses. I've considered that the defendant used a firearm to commit these crimes. And I have considered the depravity of these crimes, cold-blooded shooting and killing of Mr. Coleman, and the cold-blooded shooting of Mr. Griffis, numerous times, and leaving him for dead, and he is now permanently paralyzed.

I've considered that you shot and killed the dog. Considered that fact that your intent was to leave no witnesses. And I considered the fact that Mr. Coleman's three children were present in the home when you shot and killed him. I've considered the effect that these crimes have had on the family members of Mr. Coleman, including his three children, who will grow up now without a father. I've considered the effect that it has had on Mr. Griffis, he's paralyzed for life. And the effect that this has had on his daily life, for the rest of his life.

I considered your other acts of violence, and although you've not been convicted of those other crimes, they were in the Presentence Report, including an armed robbery, that, again, was for marijuana, and included the taking of a four-year-old girl from a vehicle, and brought into an apartment where an armed robbery was in progress.

I do have to consider the safety of the public. You are dangerous. Society needs to be protected from your dangerousness.

> Having regard for the nature and circumstances of the crimes, and the history, character and condition of the defendant, and all other relevant factors, including the age, mentality, education and experience, social and cultural background, past criminal record, motivation for the offense, nature of the offense, amount of violence involved, impetuosity of the defendant, family and community environment, your ability to appreciate the risk and consequences of your conduct, your intellectual capacity, and the mental health evaluation, including all of the factors set forth in *Miller versus Alabama*, *Graham versus Florida*, and all of the mitigating factors set forth in Section 28-105.02.
>
> The Court does find that imprisonment of the defendant is necessary for the protection of the public, because the risk is substantial that during any period of probation the defendant would engage in additional criminal conduct, and because a lesser sentence would depreciate the seriousness of the defendant's crimes and promote disrespect for the law.

The district court then pronounced its sentences. It sentenced Steele to 60 years' to life imprisonment for second degree murder. It sentenced Steele to 40 to 50 years' imprisonment for first degree assault. It ordered the sentences to run consecutively. The court also advised Steele that he would be eligible for parole in 50 years.

ASSIGNMENTS OF ERROR

On appeal, Steele assigns, rephrased, that the district court abused its discretion (1) in imposing a "*de facto* life sentence," and (2) in imposing excessive sentences.

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. *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018). 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. *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

ANALYSIS

De Facto Life Sentence.

In many recent appeals to this court, individuals convicted of offenses committed while they were juveniles have challenged their sentences, arguing that the sentence imposed is unlawful because it amounts to a "de facto life sentence" that is not permitted under the U.S. Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), or *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). See, e.g., *State v. Thieszen, ante* p. 112, 912 N.W.2d 696 (2018); *State v. Russell, supra*; *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017). Steele makes such an argument here, contending that under *Miller*, a "*de facto* life sentence" can only be imposed upon a finding that the offender is "*irreparably corrupt*." Brief for appellant at 8.

In *Miller v. Alabama, supra*, the U.S. Supreme Court held that a sentence of mandatory life imprisonment without parole for a juvenile violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Miller* did not, however, foreclose the possibility of a life-without-parole sentence for a juvenile. Such a sentence may be imposed so long as the court considers specific, individualized factors before handing down that sentence. See *State v. Russell, supra*.

Steele, like previous challengers, urges us to find that *Miller* places an additional restriction on life-without-parole sentences. According to Steele, life-without-parole sentences are permitted by *Miller* only if the offender is found to be "*irreparably corrupt*." Brief for appellant at 8. Steele contends that because no such finding was made by the district court here, his sentences are unlawful.

Under the sentences the district court imposed, Steele will be eligible for parole in 50 years, or when he is 67 years old. While some other states have found that a sentence expressed as a term of years may constitute a de facto life sentence, we have not done so. See *State v. Russell, supra*. On the other hand, we have found that sentences that allow for a "meaningful and realistic opportunity to obtain release" are not de facto life sentences for purposes of *Miller v. Alabama, supra*, or *Graham v. Florida, supra*. See *State v. Russell*, 299 Neb. at 495, 908 N.W.2d at 677 (*Miller*). Accord, *State v. Thieszen, supra* (*Miller*); *State v. Smith, supra* (*Graham*).

In *State v. Russell, supra*, we found the defendant's sentence allowed him a "meaningful and realistic opportunity to obtain release" and thus was not a de facto life sentence. That sentence did not make the offender eligible for parole until he was 72 years old. As Steele will be eligible for parole at age 67, our decision in *Russell* leaves no room for a determination that Steele received a de facto life sentence. We thus need not decide whether *Miller* requires a finding that the offender is "irreparably corrupt" for a life-without-parole sentence, because Steele did not receive such a sentence. Steele's first assignment of error is meritless.

Excessive Sentences.

Steele also argues that the district court imposed excessive sentences. Steele does not argue that his sentences were outside the statutory limits. Rather, he argues that the court abused its discretion in imposing the sentences.

[3-5] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018). 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. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Thieszen, ante* p. 112, 912 N.W.2d 696 (2018).

Steele contends that the district court abused its discretion in various ways, but we disagree in every respect. First, we reject Steele's argument that the district court abused its discretion by not considering certain factors set forth in Neb. Rev. Stat. § 29-2260(3) (Reissue 2016), which, he contends should have been considered as mitigating factors. Section 29-2260(3) sets forth factors that courts are to consider when deciding "if it is appropriate to withhold a sentence of imprisonment and grant probation." *State v. Cerritos-Valdez*, 295 Neb. 563, 569, 889 N.W.2d 605, 610 (2017). Neither the language of § 29-2260(3) nor logic would permit us to find that district courts are required to consider the § 29-2260(3) factors in cases like this one, in which a probation-only sentence would not even be *permitted* by statute. See Neb. Rev. Stat. §§ 28-304(2) and 28-308(2) (Reissue 2016) and 28-105 (Supp. 2017).

While the district court was not required to specifically consider the factors set forth in § 29-2260(3), the district court did state that it had considered the familiar factors set forth above, which courts customarily consider and apply in fashioning any sentence. In particular, after noting that it had considered Steele's age when he committed the offenses, the court said it took "into account how children are different and how these differences counsel against irrevocably sentencing a juvenile to a lifetime in prison." The court also stated that it had considered, among other things, Steele's impetuosity, his family and community environment, and a mental health evaluation that

was submitted by defense counsel. But the court also stated that it had considered the senselessness of Steele's actions, as well as the motivation behind them (to steal), the lack of provocation, and the depravity that was exhibited by shooting and killing one person and leaving another permanently paralyzed. We cannot say that the court abused its discretion in its assessment of the relevant sentencing factors.

Neither are we persuaded by Steele's argument that the district court relied on personal bias or prejudice in determining his sentences. Steele cites to *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998), and *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004), in support of this argument. In *Pattno*, we vacated a sentence, concluding that the court's reliance on "personal religious beliefs as a basis for a sentencing decision injects an impermissible consideration in the sentencing process." 254 Neb. at 742, 579 N.W.2d at 509. In *Bruna*, the Nebraska Court of Appeals, citing *Pattno*, also vacated a sentence on the ground that the sentencing judge had considered his personal religious views when sentencing the defendant.

Unlike the defendants in *Pattno* and *Bruna*, Steele does not point to any specific information or beliefs that he contends the district court improperly relied upon in sentencing him. Without any elaboration from Steele as to what particular beliefs or information he contends improperly motivated the district court, we have no basis to vacate his sentences on the ground of bias.

CONCLUSION

Because we find that the district court did not abuse its discretion in sentencing Steele, we affirm.

Affirmed.

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

State of Nebraska, appellee, v. Trevelle J. Taylor, appellant.

915 N.W.2d 568

Filed July 27, 2018. No. S-17-1034.

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: Right to Counsel: Appeal and Error.** An appellate court reviews the failure of the district court to provide court-appointed counsel in a postconviction proceeding for an abuse of discretion.
3. **Postconviction: Constitutional Law: Judgments.** Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.
4. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
5. ____: ____: ____. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
6. **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.
7. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.

8. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.
9. **Effectiveness of Counsel: Presumptions: Proof.** The two prongs of the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.
10. **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.
11. **Trial: Effectiveness of Counsel: Prosecuting Attorneys: Appeal and Error.** Determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.
12. **Trial: Prosecuting Attorneys: Juries.** A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.
13. **Trial: Prosecuting Attorneys.** A prosecutor is entitled to draw inferences from the evidence in presenting his or her case, and such inferences generally do not amount to prosecutorial misconduct.
14. **Postconviction: Right to 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.
15. **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, thus

establishing that the postconviction proceeding 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 Douglas County: Marlon A. Polk, Judge. Affirmed.

Trevelle J. Taylor, pro se.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Johnson, District Judge.

Miller-Lerman, J.

NATURE OF CASE

Trevelle J. Taylor was convicted of first degree murder and use of a deadly weapon to commit a felony. In this postconviction action, he claimed that he received ineffective assistance of counsel. In a written order, the district court for Douglas County overruled Taylor's postconviction motion without an evidentiary hearing and without appointing counsel. Taylor appeals. We affirm the district court's order.

STATEMENT OF FACTS

Taylor was originally convicted of first degree murder and use of a weapon to commit a felony in 2010, but his convictions were reversed on direct appeal because of an erroneous jury instruction. See *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011) (*Taylor I*). After a new trial on remand, Taylor was again convicted of both charges. We affirmed the convictions on appeal; we also affirmed the sentence of imprisonment for 10 to 10 years for use of a weapon to commit a felony, but because Taylor was under 18 years of age at the time of the offense, we vacated the sentence of life imprisonment for first degree murder and remanded the cause for resentencing as to that conviction. See *State v. Taylor*, 287 Neb. 386, 842 N.W.2d 771 (2014) (*Taylor II*). Taylor was resentenced on February 5,

2016, to imprisonment for 40 to 40 years for first degree murder, with the sentence to run consecutively to his sentence for use of a weapon to commit a felony.

Taylor was charged and convicted of fatally shooting Justin Gaines outside Gaines' residence on September 19, 2009. The facts related to the charges in this case are set forth in greater detail in *Taylor I* and *Taylor II*, but certain facts are set forth in the analysis below as they pertain to Taylor's postconviction claims.

On March 30, 2016, Taylor filed a pro se motion for postconviction relief. He set forth three claims of ineffective assistance of trial counsel. He claimed that counsel was ineffective for (1) failing to object to the admission of evidence obtained from an allegedly unconstitutional detention and arrest, (2) failing to object to allegedly inadmissible hearsay testimony regarding the general location in which a gun tied to the shooting was found, and (3) failing to object to and move for a mistrial based on the prosecutor's allegedly improper closing arguments. He also claimed that the cumulative effect of these alleged errors denied him effective assistance of counsel. Taylor requested an evidentiary hearing, appointment of postconviction counsel, and relief including reversal of his convictions and vacation of his sentences.

In a written order filed August 31, 2017, the district court rejected each of Taylor's claims. The specific allegations of the claims and the court's disposition of each is set forth in the analysis below. The court overruled Taylor's motion for postconviction relief, denied his request for an evidentiary hearing, and denied his request for appointment of counsel.

Taylor appeals.

ASSIGNMENTS OF ERROR

Taylor claims that the district court erred when it found each of his claims to be without merit and overruled his motion for postconviction relief without an evidentiary hearing. He also claims the district court erred when it refused to appoint postconviction counsel.

STANDARDS OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Collins*, 299 Neb. 160, 907 N.W.2d 721 (2018).

[2] We review the failure of the district court to provide court-appointed counsel in a postconviction proceeding for an abuse of discretion. *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018).

ANALYSIS

Postconviction Standards.

[3,4] Because Taylor appeals from the denial of postconviction relief, we begin by reviewing standards related to postconviction cases. Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable. *State v. Vela*, 297 Neb. 227, 900 N.W.2d 8 (2017). Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *Id*.

[5,6] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *Id*. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id*.

Taylor's claims for postconviction relief assert that he received ineffective assistance of counsel. Because Taylor was

represented both at trial and on direct appeal by the same lawyer or lawyers from the same office, this motion for postconviction relief was his first opportunity to assert ineffective assistance of counsel. See *State v. Haynes, supra*.

[7-9] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *State v. Vela, supra*. 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. *State v. Vela, supra*. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *Id*. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *Id*. 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. *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018).

With these principles in mind, we turn to Taylor's specific claims of ineffective assistance of counsel.

Claim I: Suppression of Evidence.

Taylor's first claim was that counsel was ineffective for failing to object to the admission of evidence obtained from an allegedly unconstitutional detention and arrest. Taylor noted that prior to his first trial, counsel had filed a motion to suppress evidence obtained as a result of his detention and arrest, which he alleged were made without reasonable suspicion or probable cause. Taylor's motion was successful in part. The court determined that statements made by Taylor should be

suppressed because he was interrogated before he was read his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The court also determined that a DNA sample should be suppressed because Taylor was coerced into giving the sample. However, the court denied the remainder of the motion to suppress because it found that the detention and arrest were not unconstitutional.

The facts related to Taylor's detention and arrest were generally as follows: A witness saw two men shooting into a vehicle in which the victim, Gaines, was seated. The witness described one of the shooters as wearing a brown shirt. Police officers who arrived on the scene of the shooting broadcast a description of a white vehicle that was believed to have been connected with the suspects. Officer Joel Strominger heard the broadcast and was in the vicinity of the shooting when he saw a vehicle that matched the description in the broadcast. Strominger observed a man standing near the passenger side of the vehicle who appeared to have exited the vehicle. The man was holding something brown in his hand. When the vehicle and the man departed in opposite directions, Strominger followed the vehicle. He radioed a description of the man and the direction the man was heading to other officers.

Officer Jarvis Duncan heard Strominger's description and was traveling in the direction that Strominger had said the man was going. Duncan saw a man, Taylor, who fit the description given by Strominger. When Duncan and his partner pulled their cruiser up next to Taylor, Taylor started running. Duncan and his partner chased after Taylor and ordered him to stop, but he kept running. They caught up to Taylor at the front door of a house. Before the officers apprehended Taylor, they saw him throw something behind a tree in the front yard of the house. Duncan later found a brown shirt by the tree. At trial, a witness to the shooting identified the brown shirt found under the tree as the shirt worn by one of the shooters. Duncan and his partner handcuffed Taylor and placed him inside their cruiser.

The officers took Taylor to Strominger, who was nearby. Strominger identified Taylor as the man he had seen earlier beside the vehicle.

Taylor claimed in his postconviction motion that trial counsel failed to properly object at trial to the admission of evidence that was obtained as a result of his arrest and, thus, failed to preserve for appeal the issue of the constitutionality of his arrest. He asserted that counsel either did not object to such evidence or that counsel's objection was inadequate because counsel objected on bases other than the constitutionality of his detention and arrest. Taylor's allegations in support of this claim focused on the brown shirt, which was received into evidence, and testimony by witnesses who identified one of the shooters as wearing a brown shirt.

The postconviction district court rejected Taylor's first postconviction claim. The district court reasoned in part that the trial court had reviewed Duncan's actions in stopping and arresting Taylor and had "ruled Officer Duncan's actions to be legal" and that therefore, the stop and arrest were not unconstitutional.

[10] We have reviewed the trial court's ruling on Taylor's motion to suppress. We determine that even if trial counsel had challenged the constitutionality of the detention and arrest on appeal, the ruling would have been affirmed. 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. *State v. Botts*, 299 Neb. 806, 910 N.W.2d 779 (2018). Based on the evidence presented by the State at the hearing on Taylor's motion to suppress, we agree with the district court's conclusion that the detention and arrest of Taylor did not violate the Fourth Amendment. Therefore, no evidence obtained

as a result of Taylor's arrest or detention should have been suppressed based on an illegal search or seizure.

Because the trial court's ruling on the motion to suppress was correct, we conclude that Taylor has not shown prejudice resulting from trial counsel's failure to object at trial to evidence obtained as a result of his detention and arrest. Even if such objection had been made, it would properly have been overruled, and even if the issue had been preserved and raised on appeal, it would not have resulted in a reversal of Taylor's conviction. See *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017) (counsel not ineffective for failing to renew motion to suppress at trial when motion raised meritless argument). We therefore conclude that the district court did not err when it rejected Taylor's first postconviction claim without an evidentiary hearing.

Claim II: Hearsay Regarding Location of Gun.

Taylor's second claim was that counsel was ineffective for failing to object to allegedly inadmissible hearsay testimony regarding the general location in which a gun tied to the shooting was found. In *Taylor II*, Taylor claimed that the trial court erred when it overruled his objection based on hearsay to testimony regarding the specific location in which the gun was found. We rejected the claim in *Taylor II*, in part because it was cumulative of prior testimony, to which Taylor did not object, regarding the general location in which the gun was found. In this postconviction claim, Taylor asserts counsel was ineffective for failing to object to the testimony regarding the general location. In effect, the claim is that trial counsel was deficient when he failed to object sooner.

Joseph Copeland was a witness called by the State. Copeland lived near where the shooting occurred, and he testified that at the time of the shooting, just after he heard gunfire, he saw a man running down his street. Copeland further testified that approximately 2 months after the shooting, he called police to

his residence because his son and a neighbor boy had found a gun "in the trees" when they were looking for an airplane they had lost when they "were playing down at the school." Copeland testified that his son had brought the gun to him and that his son had shown him where he found the gun.

When the State asked Copeland to indicate on a map the location where his son had said he had found the gun, Taylor's counsel objected based on hearsay and the court sustained the objection. The State then asked Copeland whether he "physically went to that location," and Copeland responded, "Yes." The State again asked Copeland to identify the location on the map, and this time the court overruled Taylor's counsel's objection and allowed Copeland to identify the exact location.

On appeal in *Taylor II*, the State conceded that Copeland's testimony regarding the exact location of the gun was inadmissible hearsay, but it argued that admission of the testimony was harmless error. We agreed that the testimony was inadmissible hearsay and that the error was harmless. We reasoned that Copeland's testimony regarding the precise location of the gun was cumulative of earlier testimony by Copeland to which Taylor had not objected. We noted that Copeland had already testified without objection that his son had found the gun in the trees at the school. We also noted that Copeland's earlier testimony had indicated that he lived near the school. We reasoned that this evidence, admitted without objection, already established that the gun was found near Copeland's home. We further reasoned that the precise location of the gun "was not vital to the State's case" and instead that "[t]he important fact was that the gun was found near Copeland's home, in the area where Copeland had seen someone running the day of the shooting." *Taylor II*, 287 Neb. at 394, 842 N.W.2d at 778. We concluded that "[b]ecause evidence of the general location of the gun was received without objection, the subsequent hearsay [regarding the exact location] was cumulative." *Id.* We additionally reasoned that "there was a substantial amount of other evidence that established Taylor's guilt." *Id*.

Taylor claimed in his postconviction motion that trial counsel was ineffective for failing to object based on hearsay as soon as Copeland mentioned the gun and the general location in which it was found. He argued that counsel knew from prior proceedings the nature of Copeland's testimony and should have known where the testimony was going. He further argued that the error in admitting the evidence was not harmless because other evidence that we relied on in *Taylor II* to support his conviction was also improperly admitted.

In its written order, the district court rejected Taylor's second postconviction claim. The court noted that in *Taylor II*, we had found the error in admitting hearsay testimony regarding the exact location of the gun was harmless not only because it was cumulative of earlier testimony regarding the general location of the gun, but also "more significantly" because there was a substantial amount of other evidence that supported Taylor's conviction. The court stated that it was apparent that "even if the Copeland testimony was completely disregarded the record contained sufficient evidence to support . . . Taylor's conviction."

Taylor claims in this appeal that the postconviction district court erred in its legal analysis when it relied on our decision in *Taylor II* that admission of hearsay testimony regarding the location of the gun was harmless error because of the substantial amount of other evidence that support Taylor's conviction. He argues that much of the other evidence on which we relied in reaching our determination in *Taylor II* was also inadmissible because it was obtained as the result of his detention and arrest. However, as we discussed above, the trial court did not err when it determined that Taylor's detention and arrest were not unconstitutional. Therefore, the other evidence upon which we relied in *Taylor II* was not improper based on a claim of illegal detention and arrest and it did support our conclusion in *Taylor II* that error in admitting hearsay regarding the specific location in which the gun was found was harmless error.

In contrast to our analytical framework in the direct appeal, *Taylor II*, we note that in this postconviction action the operative question is not whether error in admitting the evidence was harmless error. Instead, with regard to Taylor's claim of ineffective assistance of counsel, the court must determine whether counsel's alleged deficient performance caused prejudice to the defendant. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *State v. Vela*, 297 Neb. 227, 900 N.W.2d 8 (2017). This is a different standard from the harmless error analysis in *Taylor II*, which required us to find that Taylor's conviction was surely unattributable to the error in admitting hearsay evidence of the specific location of the gun.

In this postconviction action, the operative question is whether there is a reasonable probability that but for counsel's failure to object to Copeland's testimony regarding the general location of the gun the result of the proceeding would have been different. In other words, we must determine whether, if counsel had objected and the testimony had been excluded, there is a reasonable probability that Taylor would not have been convicted. We determine that because there was sufficient other evidence of Taylor's guilt, the admission of Copleand's unchallenged testimony regarding the location of the gun does not undermine confidence in the outcome of the trial and there was not a reasonable probability that the result of the trial would have been different if the testimony had been excluded. We conclude that the district court did not err when it rejected Taylor's second postconviction claim without an evidentiary hearing.

Claim III: Prosecutor's Comments in Closing Arguments.

Taylor's third claim was that counsel was ineffective for failing to object to and move for a mistrial based on allegedly

improper closing arguments made by the prosecutor. Taylor identified five occurrences from the prosecutor's closing arguments that he claimed were improper.

In the first occurrence, the prosecutor referred to evidence that Taylor was riding in a car with a codefendant and told the jury, "you use your own common sense. There's conversation going on in that car." The prosecutor later stated, "We don't have evidence of what happened in that car, but use your common sense, the discussion that took place before they get out of the car." Taylor argued these comments were improper because the prosecutor was "inject[ing] her personal belief which was unsupported by the evidence more than once."

In the second occurrence, the prosecutor referred to Copeland's testimony and stated, "Copeland sees him on this block right here . . . . [Copeland] testified that he saw the defendant cut across right here . . . towards Mary Street where the gun's found." Taylor argued that these comments misstated the evidence because Copeland testified only that he saw a "black male" running down the street and that Copeland gave no further description and he never identified Taylor as the person he had seen.

In the third occurrence, the prosecutor stated, "[Taylor] had just run through the neighborhood with that brown shirt holding this gun . . . in his shorts." Taylor argued this comment was not supported by the evidence, because no witness testified to seeing Taylor holding a gun as he ran through the neighborhood.

In the fourth occurrence, the prosecutor referred to Taylor's codefendant, who testified at Taylor's trial and stated:

> What [the codefendant] testified to is the truth. Did he tell you everything? No. He's not telling you everything because he's friends with [Taylor] . . . . He doesn't want to give everything up, what he is telling you is the truth, because it's corroborated throughout the testimony and evidence of all the other witnesses.

The prosecutor stated in rebuttal:

> [Defense counsel] wants you to say that we called [the codefendant] a liar. We didn't call him a liar. He told you the truth. Everything he told you is corroborated. . . .
>
> What he did tell you is the truth. And it's corroborated by every other piece of evidence you have in this case . . . .

Taylor argued that the prosecutor was improperly vouching for its main witness.

In the fifth occurrence, the prosecutor referred to a witness who had seen the shooting and stated that she

> came in here and she told you who she identified. Didn't get a good look at either one of their faces, but think about it, use your common sense. If you're standing there, you're going through what [the witness] went through, are you going to remember a visual face or are you going to remember — is clothing going to stand out more? Is a brown shirt with orange writing, are you going to forget that?

Taylor argued that this comment was improper because it asked the jurors to put themselves in the shoes of the witness and it therefore encouraged the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on evidence.

The district court rejected Taylor's third postconviction claim. The court stated, "Having reviewed the record it is clear to this Court that the prosecution did not engage in prosecutorial misconduct as any statements made by the prosecutor that may have been inaccurate did not mislead and unduly influence the jury. The prosecutor was merely making her closing argument to the jury." The court further stated that the prosecutor's comments "were reasonably drawn inferences from the evidence" and that trial counsel had "used his opportunity, during his closing argument to contest and/or discredit" the prosecutor's comments.

[11-13] Determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct. *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017). A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct. *Id*. A prosecutor is entitled to draw inferences from the evidence in presenting his or her case, and such inferences generally do not amount to prosecutorial misconduct. *Id*. We determine that the first, second and third occurrences described above were instances of the prosecutor's drawing inferences from the evidence in making her arguments to the jury and did not amount to prosecutorial misconduct.

Regarding the fourth occurrence, Taylor argues that the prosecutor was improperly vouching for the witness. However, we do not read the prosecutor's comments as vouching for the truth of the witness' testimony. The prosecutor was not asserting that she had personal knowledge of the witness' veracity. Instead, the prosecutor was pointing out that the testimony was corroborated by other evidence, and therefore, the prosecutor was drawing the inference that the witness' testimony was credible because it was consistent with other evidence. This argument did not amount to prosecutorial misconduct. See *State v. Gonzales*, 294 Neb. 627, 884 N.W.2d 102 (2016) (stating that while prosecutor should not express his or her personal belief or opinion as to truth or falsity of any testimony, when prosecutor's comments rest on reasonably drawn inferences from evidence, prosecutor is permitted to highlight relative believability of witnesses).

Regarding the fifth occurrence, Taylor contends that the prosecutor improperly asked the jurors to put themselves in the shoes of the witness and base their verdict on personal interest or bias. In his motion for postconviction relief, Taylor cited *Forrestal v. Magendantz*, 848 F.2d 303, 309 (1st Cir. 1988), for the proposition that it is improper for an attorney to make

a "so-called Golden Rule argument" which encourages the jury to put itself in the shoes of a plaintiff and which encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. However, the prosecutor's comments in this case were significantly different from this sort of argument. Instead, the prosecutor used inferences from the evidence to explain why the witness may have remembered certain details but not remembered other details of the suspects' appearances. The prosecutor did not ask the jurors to put themselves in the shoes of a party or in the shoes of the victim and to therefore render a verdict based on personal interest or bias. Instead, the prosecutor asked the jurors to consider how the circumstances may have affected the witness' observations and recollections. These comments did not constitute misconduct.

Because none of the occurrences urged by Taylor constituted prosecutorial misconduct, the district court did not err when it rejected Taylor's third claim of ineffective assistance of counsel.

Cumulative Effect and Summary.

Taylor also claimed that even if each of his individual claims of ineffective assistance of counsel was insufficient to support postconviction relief, then the cumulative effect of all the alleged instances of counsel's deficient performance resulted in an unfair trial requiring postconviction relief. However, because we conclude that each of Taylor's individual claims was without merit, we further conclude that the cumulative effect of such claims did not result in an unfair trial and does not merit postconviction relief. See *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014).

Because none of Taylor's claims of ineffective assistance of counsel had merit, either individually or collectively, we conclude that the district court did not err when it overruled his motion for postconviction relief without granting an evidentiary hearing.

Appointment of Counsel.

[14,15] Taylor finally claims that the court erred when it denied his 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. *State v. Epp*, 299 Neb. 703, 910 N.W.2d 91 (2018). Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, thus establishing that the postconviction proceeding 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. *Id*. We therefore conclude the district court did not abuse its discretion when it denied Taylor's motion to appoint postconviction counsel.

CONCLUSION

We conclude that the district court did not err when it overruled Taylor's motion for postconviction relief without an evidentiary hearing and that it did not abuse its discretion when it denied his motion to appoint counsel. We therefore affirm the district court's order.

Affirmed.

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

In re Guardianship of Carlos D., a minor child. Eleany Esmerelda Zunun Gonzalez, appellant, v. State of Nebraska, appellee.

915 N.W.2d 581

Filed July 27, 2018. No. S-17-1056.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Courts: Jurisdiction: Guardians and Conservators.** A Nebraska county court has exclusive original jurisdiction in all matters relating to the guardianship of a person, subject to exceptions.
3. **Guardians and Conservators: Child Custody.** Under Nebraska statutes and jurisprudence, a guardianship of a child is a child custody determination.
4. **Courts: Jurisdiction: Child Custody: Federal Acts.** The 2018 amendment to Neb. Rev. Stat. § 43-1238(b) (Reissue 2016) clarifies that courts with jurisdiction over an "initial child custody determination" as that term is used in § 43-1238(a) also have jurisdiction and authority to make special findings of fact similar to those contemplated by 8 U.S.C. § 1101(a)(27)(J) (Supp. V 2018).
5. **Legislature: Statutes: Time.** Generally, legislation that is passed takes effect 3 calendar months after the Legislature adjourns unless the Legislature evidences otherwise.
6. **Statutes: Time.** Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.
7. **Statutes: Words and Phrases.** A substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. A procedural amendment simply changes the method by which an already existing right is exercised.
8. **Statutes: Child Custody: Time.** A statutory amendment to Neb. Rev. Stat. § 43-1238(b) (Reissue 2016) which merely clarifies the authority and procedure for making the factual findings in a case involving child custody is a procedural amendment and applies to pending cases.

Appeal from the County Court for Lancaster County: Holly J. Parsley, Judge. Reversed and remanded for further proceedings.

David V. Chipman, of Monzón, Guerra & Associates, for appellant.

Kevin Ruser and Morgan Nelson, Senior Certified Law Student, of Immigration Clinical Law Program, University of Nebraska College of Law, and Robert McEwen, Sarah Helvey, and Allison Derr, Senior Certified Law Student, of Nebraska Appleseed Center for Law in the Public Interest, for amici curiae University of Nebraska Immigration Clinic and Nebraska Appleseed Center for Law in the Public Interest.

Charles Shane Ellison, of Creighton Immigrant and Refugee Clinic, Creighton University School of Law, for amici curiae National Justice For Our Neighbors and Immigrant Legal Center, an affiliate of Justice For Our Neighbors Network.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Vaughan, District Judge.

Miller-Lerman, J.

NATURE OF CASE

Although the county court for Lancaster County appointed Eleany Esmerelda Zunun Gonzalez as guardian of her juvenile nephew, Carlos D., it declined to make special factual findings that are necessary to apply for special immigrant juvenile (SIJ) status under 8 U.S.C. § 1101(a)(27)(J) (Supp. V 2018). Following a hearing on Gonzalez' motion to amend this initial ruling, the county court stated in an order that Carlos was "not dependent on this court" and that Gonzalez had not satisfied 8 U.S.C. § 1101(a)(27)(J) and therefore denied Gonzalez' motion to make specific findings to be used in immigration proceedings. Gonzalez appealed. During the pendency of this appeal, the Nebraska Legislature amended Neb. Rev. Stat. § 43-1238(b)

(Reissue 2016) in 2018 Neb. Laws, L.B. 670, to clarify that courts with jurisdiction over initial child custody determinations under § 43-1238(a) also have "jurisdiction and authority" to make special findings of fact similar to those contemplated by 8 U.S.C. § 1101(a)(27)(J). Amendments to § 43-1238(b) have gone into effect, and because they are procedural rules, they apply to pending cases. In this case, the county court made a custody determination under § 43-1238(a), but it erred when it concluded Gonzalez had not satisfied the dependency or custody component of 8 U.S.C. § 1101(a)(27)(J) and refused to make special findings on this basis. Accordingly, we reverse the order of the county court and remand the cause for further proceedings consistent with this opinion based on the existing record.

FACTS

Carlos was born in Guatemala in November 1998 and arrived in Nebraska in 2015 at age 16 without any support or parental supervision. On January 23, 2017, Gonzalez filed a petition for the appointment of a permanent guardian for Carlos, her minor nephew, in the county court for Lancaster County. The following facts are taken from the petition and Carlos' declaration, which the county court found to be credible:

Carlos traveled to the United States by foot and public transportation and arrived on or about April 27, 2015. Before reaching Nebraska, Carlos was detained at the border by U.S. Customs and Border Protection, but he was released to his aunt, Gonzalez, who, according to U.S. Department of Health and Human Services Office of Refugee Resettlement information, lived in Lincoln, Nebraska.

Carlos' declaration stated that he was born in Tacana de San Marcos, Guatemala, and that he grew up with his mother, stepfather, and three sisters. Carlos never knew his father and denied having any contact with him. Carlos' stepfather drank almost every day and was verbally and physically abusive toward Carlos, his sisters, and his mother. The stepfather would

punch Carlos' mother in the mouth with a fist and pull her hair. Two or three times a week, the stepfather hit Carlos and his sisters with a belt or whatever item he would find in his path. Verbal abuse happened daily. After 13 years, the stepfather decided to leave and abandoned the family.

After Carlos' mother became separated from the stepfather, she began to reject Carlos. She would make comments to him such as, "'You're a mistake/error in my life'" and "'I don't want to see you and don't care if you run away.'" Carlos' mother would not feed him because she would be mad at him. He became the "'man'" of the home at age 8 and had to work at a farm during the evenings after school to earn food for the family. When Carlos was 10 years old, his mother would not allow him to go to school, so that he could be employed full time in order to sustain his mother and sisters. The work that he was required to do was that of an adult man carrying "heavy sacks."

When Carlos was 13 years old, he began to be approached by some members of the "'MS 13'" gang. They would wait for him after work to try to recruit him. At first, they were friendly, but once he declined to join the gang, things changed. The gang verbally harassed Carlos and then, after the third encounter with the gang members, four or five gang members who were heavily armed "beat up" Carlos because he declined to join the gang. The assault included hitting Carlos with "big wooden sticks" on the stomach and face and kicking him while he was on the ground. One gang member used a knife and cut Carlos on his right arm and each of his index fingers. The members threatened Carlos that he would be killed if he did not join.

Carlos stated that he was in fear for his life after the gang had beaten him. He was anxious and always checking his surroundings. He would try to find a different route to work and to avoid the gang members. However, he would inevitably run into them, and each time, he would be verbally abused, beat up, "threatened with [his] life," and robbed. He was robbed

approximately 10 times, and each time, he had either a gun to his head or a knife behind his back, or both.

Carlos fled Guatemala and was eventually united with his aunt, Gonzalez. Carlos stated that his aunt provides him with "all of [his] care and need, including food and a place to live."

The petition for guardianship alleged that Carlos' father abandoned him prior to birth and his mother had neglected him in Guatemala. In addition to seeking a permanent guardianship, the petition requested certain special findings that "unification with [Carlos'] parents is not viable due to abuse and neglect" and that "it would not be in [Carlos'] best interests to be returned to Guatemala." There is no dispute that the county court had jurisdiction to hear the petition for guardianship.

The matter came before the county court for hearing on June 13, 2017. The county court received the declaration by Carlos with details of his life and conditions in Guatemala. At the hearing, the county court filed Gonzalez' proof of service to Carlos' mother in her village in Guatemala and by publication.

At the hearing, the county court stated it was not inclined to make special findings regarding Carlos' best interests "based on a number of different things." Gonzalez submitted a proposed order which included special findings consistent with 8 U.S.C. § 1101(a)(27)(J). The county court denied Gonzalez' request for special findings. The county court entered a written order appointing Gonzalez as Carlos' guardian.

Gonzalez, on Carlos' behalf, filed a motion to alter or amend the judgment, requesting that the county court make the special findings of fact contemplated in 8 U.S.C. § 1101(a)(27)(J). Gonzalez sought special findings of fact from the state court to potentially become eligible for SIJ status. SIJ status allows a juvenile immigrant to remain in the United States and apply for lawful permanent resident status. Obtaining the special findings is the first step in the process to achieve SIJ status.

To achieve SIJ status under 8 U.S.C. § 1101(a)(27)(J), a state court must have made a predicate finding that (1) the minor is dependent on a juvenile court or has been "placed under the custody of . . . an individual . . . appointed by a State or juvenile court"; (2) "reunification with . . . the . . . parents is not viable due to abuse, neglect, [or] abandonment"; and (3) it would not be in the minor's best interests to be returned to his or her country of origin.

At the hearing on the motion to alter or amend the judgment, the county court found Carlos' declaration to be credible. However, on September 2, 2017, the county court denied the request for specific findings, stating in its order that Carlos is "not dependent on this court."

Gonzalez appeals.

ASSIGNMENTS OF ERROR

Gonzalez generally claims that the county court erred when it concluded that because Carlos was not dependent on the county court, it could not make the requested special findings. Gonzalez specifically claims that although it found a need to appoint a permanent guardian, the county court erred (1) when it failed to determine that Carlos was "declared dependent" on the county court or "legally committed to, or placed under the custody of, . . . an individual or entity appointed by a . . . juvenile court" as these terms are defined by 8 U.S.C. § 1101(a)(27)(J) and (2) when it refused to make the requested findings of fact that (a) reunification with one or both parents is not viable due to abuse, neglect, or abandonment and (b) it would not be in Carlos' best interests to return to Guatemala.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018). We independently review questions of law decided by a lower court. *Id*.

ANALYSIS

As we read the challenged order, the county court believed that it did not have authority to make the special findings of fact requested by Gonzalez. However, during the pendency of this appeal, the Nebraska Legislature enacted 2018 Neb. Laws, L.B. 670, which became effective on July 19, 2018, and made clear, inter alia, that a county court making a guardianship determination also has authority to make the special findings necessary for the ward to establish a SIJ status. Below, we set forth the statutory provisions applicable to the analysis of this appeal.

Federal Definition of SIJ

Federal provisions allow a juvenile immigrant to apply for SIJ status and seek lawful permanent residence if several prerequisites are met. 8 U.S.C. § 1101(a)(27)(J) provides, in pertinent part, that a "special immigrant" is

> an immigrant who is present in the United States—
>
> (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, *or placed under the custody of*, an agency or department of a State, or *an individual* or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
>
> (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and
>
> (iii) in whose case the Secretary of Homeland Security consents to the grant of [SIJ] status[.]

(Emphasis supplied.)

In this case, Carlos was placed in the custody of Gonzalez in fulfillment of 8 U.S.C. § 1101(a)(27)(J)(i). In order to achieve SIJ status, the individual whose custody has been determined prior to age 21, 8 C.F.R. § 204.11 (2018), must also obtain the judicial determinations listed above in 8 U.S.C. § 1101(a)(27)(J)(i) and (ii) from a "juvenile court," as that term is used in the federal provisions. The Code of Federal Regulations defines "juvenile court" as "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a). As we explain below, a guardianship of a child is a child custody determination, and thus, the county court was considered a "juvenile court" for purposes of 8 U.S.C. § 1101(a)(27)(J)(i) and (ii). Courts have generally held that a guardianship over a juvenile renders the juvenile subject to 8 U.S.C. § 1101(a)(27)(J)(i). E.g., *Jisun L. v. Young Sun P.*, 75 A.D.3d 510, 905 N.Y.S.2d 633 (2010).

State Law: L.B. 670 and Child Custody Proceedings

[2,3] A Nebraska county court has exclusive original jurisdiction in all matters relating to the guardianship of a person, subject to exceptions not applicable here. Neb. Rev. Stat. § 24-517(2) (Reissue 2016). Under Nebraska statutes and jurisprudence, a guardianship of a child is a child custody determination. *In re Guardianship of D.J.*, 268 Neb. 239, 248, 682 N.W.2d 238, 246 (2004) (stating "[a] guardianship is no more than a temporary custody arrangement established for the well-being of a child"). See Neb. Rev. Stat. § 43-1227(4) (Reissue 2016) (concerning "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue," including a proceeding for guardianship in which the issue may appear). Elsewhere, the statutes provide that a "[c]hild custody determination means a judgment, decree, or other order of a court providing for the

legal custody, physical custody, or visitation with respect to a child." § 43-1227(3).

[4] As noted above, the recently enacted L.B. 670 amended § 43-1238(b) and clarifies that courts with jurisdiction over an "initial child custody determination" as that term is used in § 43-1238(a) also have jurisdiction and authority to make special findings of fact similar to those contemplated by 8 U.S.C. § 1101(a)(27)(J). Gonzalez sought a guardianship of the minor Carlos in the county court, see Neb. Rev. Stat. § 30-2605 et seq. (Reissue 2016), and the county court's order declaring Gonzalez as guardian was an initial custody determination.

Section 43-1238(a) generally deals with child custody determinations which are appropriately raised in a court in Nebraska, and § 43-1238(b), as amended, lists the factual findings which can be made by a Nebraska state court with such initial child custody determination authority and the circumstances under which such courts must make such findings.

L.B. 670 amended § 43-1238, which now provides, with the amended portion emphasized:

> (a) Except as otherwise provided in section 43-1241, a court of this state has jurisdiction to make an initial child custody determination only if:
>
> (1) this state is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;
>
> (2) a court of another state does not have jurisdiction under subdivision (a)(1) of this section, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 43-1244 or 43-1245, and:
>
> (A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have

> a significant connection with this state other than mere physical presence; and
>
> (B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;
>
> (3) all courts having jurisdiction under subdivision (a)(1) or (a)(2) of this section have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under section 43-1244 or 43-1245; or
>
> (4) no court of any other state would have jurisdiction under the criteria specified in subdivision (a)(1), (a)(2), or (a)(3) of this section.
>
> (b) Subsection (a) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state. *In addition to having jurisdiction to make judicial determinations about the custody and care of the child, a court of this state with exclusive jurisdiction under subsection (a) of this section has jurisdiction and authority to make factual findings regarding (1) the abuse, abandonment, or neglect of the child, (2) the nonviability of reunification with at least one of the child's parents due to such abuse, abandonment, neglect, or a similar basis under state law, and (3) whether it would be in the best interests of such child to be removed from the United States to a foreign country, including the child's country of origin or last habitual residence. If there is sufficient evidence to support such factual findings, the court shall issue an order containing such findings when requested by one of the parties or upon the court's own motion.*

(Emphasis omitted.) (Emphasis supplied.)

[5-7] Generally, legislation that is passed takes effect 3 calendar months after the Legislature adjourns, see Neb. Const. art. III, § 27, unless the Legislature evidences otherwise. *Smith v. Mark Chrisman Trucking*, 285 Neb. 826, 829 N.W.2d

717 (2013). Thus, L.B. 670 became operative on July 19, 2018, 3 calendar months after the adjournment of the legislative session on April 18. In considering whether to apply § 43-1238(b), as amended, to this case, we note that procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not. *Smith v. Mark Chrisman Trucking, supra*. This is because a substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. *Id*. A procedural amendment, on the other hand, simply changes the method by which an already existing right is exercised. *Id*. Put another way, a substantive law commonly creates duties, rights, and obligations of a party, whereas a procedural law prescribes the means and methods through and by which substantive laws are enforced and applied. See *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001).

[8] Section 43-1238(b), as amended, instructs a court with the jurisdictional basis of a child custody determination under § 43-1238(a) that it has the authority to also make factual findings, where requested and where there is sufficient evidence to support the findings. Because this amendment merely clarifies the authority and procedure for making the factual findings in a case involving child custody, we conclude that the addition to § 43-1238(b) in L.B. 670 is a state court procedural amendment and applies to pending cases. A statute requiring a court to make explicit findings of fact on the record is procedural. See, e.g., *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007) (characterizing explicit findings regarding custody as procedural); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987) (characterizing specific findings of fact supporting parental rehabilitative plan as procedural). Any substantive effect of these findings is a result of federal law in that these findings are a requisite to SIJ status. But the fact that these findings may have some substantive effect as a matter of federal law does not

transform the state law before us into substantive legislation. For completeness, we note that making findings for SIJ status purposes has long been accepted by the Nebraska courts, and § 43-1238(b), as amended, codifies this practice. See, e.g., *In re Interest of Erick M.*, 284 Neb. 340, 820 N.W.2d 639 (2012); *In re Interest of Luis G.*, 17 Neb. App. 377, 764 N.W.2d 648 (2009).

Statutory interpretation presents a question of law. *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018). Section 43-1238(b) as amended provides that when requested by one of the parties or upon the court's own motion, such a court "shall issue" an order containing the enumerated findings where there is sufficient evidence. Given the language of the amendments, we conclude that under § 43-1238(b), a court with jurisdiction to make an initial child custody determination under § 43-1238(a) can make factual findings regarding the three factors enumerated in § 43-1238(b).

As explained above, the county court in this case made an initial child custody determination when it granted Gonzalez a guardianship over the minor Carlos. Carlos had been placed in the custody of an individual—Gonzalez—in satisfaction of 8 U.S.C. § 1101(a)(27)(J)(i), and the county court's determination to the contrary was error. The county court has the authority to make findings outlined in § 43-1238(b). Although we reverse the county court's order of September 2, 2017, we express no opinion of the impact upon remand of Neb. Rev. Stat. § 30-2614 (Reissue 2016), providing for the termination of a guardian's authority upon the minor's attainment of majority.

CONCLUSION

In this guardianship case, the suitability of appointing Gonzalez as guardian for Carlos is not at issue in this appeal. The evidence submitted by Carlos has been deemed credible. The county court erred when it concluded it had not made a custody determination for purposes of 8 U.S.C.

§ 1101(a)(27)(J)(i). Section 43-1238(b), as amended, applies to pending cases. A county court with a jurisdictional basis under § 43-1238(a) and which has made an initial child custody determination, such as appointing a guardian, has authority under § 43-1238(b) to make factual findings regarding the enumerated items where the evidence is sufficient and the court has been requested to do so. The enumerated items are similar to the immigration-related findings in 8 U.S.C. § 1101(a)(27)(J). Thus, we reverse the order of September 2, 2017, and remand the cause for further proceedings consistent with this opinion based on the existing record.

Reversed and remanded for
further proceedings.

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

In re Guardianship of Luis J., a minor child. Joaquin Tomas Joaquin Alberto, appellant, v. State of Nebraska, appellee.

915 N.W.2d 589

Filed July 27, 2018. No. S-17-1142.

1. **Courts: Jurisdiction: Evidence: Child Custody.** A county court with a jurisdictional basis under Neb. Rev. Stat. § 43-1238(a) (Reissue 2016) and which has made an initial child custody determination, such as appointing a guardian, has the authority to make immigration-related factual findings where the evidence is sufficient and the court has been requested to do so.
2. **Courts: Juvenile Courts: Jurisdiction: Guardians and Conservators: Child Custody.** A county court properly taking jurisdiction over a guardianship and making an initial custody determination is not excluded from Neb. Rev. Stat. § 43-1238(b) (Reissue 2016), even where there is a juvenile court in that county, and the county court may make special findings of fact where appropriate.
3. **Courts: Juvenile Courts: Guardians and Conservators: Child Custody: Federal Acts.** A Nebraska county court which properly appoints a guardian for a juvenile makes a custody determination, and thus, the county court is considered a "juvenile court" for purposes of 8 U.S.C. § 1101 (a)(27)(J)(i) and (ii) (Supp. V 2018).
4. **Courts: Jurisdiction: Guardians and Conservators.** Under Neb. Rev. Stat. § 24-517(2) (Reissue 2016), a Nebraska county court has exclusive original jurisdiction in all matters relating to the guardianship of a person, subject to exceptions.
5. **Guardians and Conservators: Child Custody.** A guardianship is no more than a temporary custody arrangement established for the well-being of a child.
6. **Courts: Child Custody: Evidence.** Neb. Rev. Stat. § 43-1238(b) (Reissue 2016), as amended in 2017, provides that when requested by one of the parties or upon the court's own motion, a court making an

initial custody determination "shall issue" an order containing the three enumerated factual findings if there is sufficient evidence.

Appeal from the County Court for Douglas County: Thomas K. Harmon, Judge. Reversed and remanded for further proceedings.

Roxana Cortes Reyes, of Immigrant Legal Center, an affiliate of Justice For Our Neighbors Network, for appellant.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Johnson, District Judge.

Miller-Lerman, J.

NATURE OF CASE

Although the county court for Douglas County appointed Joaquin Tomas Joaquin Alberto as guardian of his juvenile grandson, Luis J., it declined to make special factual findings necessary for Luis to apply for special immigrant juvenile (SIJ) status under 8 U.S.C. § 1101(a)(27)(J) (Supp. V 2018). Following a hearing on Alberto's motion to amend this initial ruling, relying on Nebraska statutes, the county court concluded that the county court for Douglas County "does not function as juvenile court" and that the issue of making specific findings to be used in immigration proceedings is committed to "the Separate Juvenile Court of Douglas County." Alberto appealed. During the pendency of this appeal, the Nebraska Legislature amended Neb. Rev. Stat. § 43-1238(b) (Reissue 2016) in 2018 Neb. Laws, L.B. 670, to clarify that courts with jurisdiction over initial child custody determinations under § 43-1238(a) also have "jurisdiction and authority" to make special findings of fact similar to those contemplated by 8 U.S.C. § 1101(a)(27)(J). Amendments to § 43-1238(b) have gone into effect, and because they are procedural rules, they apply to pending cases. In this case, the county court made a custody determination under § 43-1238(a), but it erred when it concluded it was not a "juvenile court" for purposes of 8 U.S.C. § 1101(a)(27)(J)(i) and refused to make

special findings on this basis. Accordingly, we reverse the order of the county court and remand the cause for further proceedings consistent with this opinion based on the existing record.

FACTS

Luis was born in San Pedro Soloma, Guatemala, in 1999 and arrived in Nebraska in 2016 at age 17 without resources or parental supervision. On July 21, 2017, Alberto filed a petition for the appointment of a permanent guardian for Luis as a minor, under Neb. Rev. Stat. § 30-2605 et seq. (Reissue 2016), in the county court for Douglas County. He also sought findings that "reunification with his parents is not viable due to neglect, abandonment, and child abuse" and that "it would not be in Luis [sic] best interests to be returned to Guatemala." These special findings would potentially allow Luis to apply to the U.S. Citizenship and Immigration Services for SIJ status. 8 U.S.C. § 1101(a)(27)(J). The record includes a sworn statement by Luis detailing the facts of his situation.

The petition and statement indicate that Luis' homelife in Guatemala was troubled and that he fled because "[f]ood, shelter and safety are things [he] did not have in Guatemala." He lived with his mother, father, and four siblings. His father is an alcoholic, and every time he was drunk, he beat up Luis' mother in front of Luis and his siblings. He beat her with open and closed fists and with a belt. Luis would try to defend his mother during these attacks, but he was a child and lacked the bodily strength to do so. When Luis tried to defend his mother, his father would beat him in the same manner, leaving bruises all over Luis' body. The beatings would end with Luis' father kicking him and his mother out of the house. Luis also testified regarding the abuse.

Luis' parents were unable to care for the five children. Luis stated that in Guatemala, he was forced to work in dangerous conditions and not allowed to go to school. Luis had to drop out of school when he was 11 years old to work full time to help his family. He first started working on his family's land

without pay. At the age of 14, he was required to work on other land doing hard labor for payment. The labor included preparing the land for planting, by hand, using a hoe; weeding; and carrying 100-pound sacks of crops. When he could not carry a sack, his father beat him. His parents required him to turn over all the money he made at his field jobs to pay for the family's food.

Luis left Guatemala, where the money he made working was not enough to feed his family. Luis was expected to send money back to the family. Luis left without necessary financial or food resources to survive. Luis stopped and worked in Mexico multiple times to afford the next bus ticket to continue his journey.

Since arriving in the United States alone on or about September 26, 2016, Luis has not seen his parents, nor have they provided him any food, shelter, security, or education. Instead, his grandfather, Alberto, provides for Luis' needs and sends him to school. Luis stated that he now lives in an environment free of violence. He stated that he needs Alberto's help to continue with schooling, find a job, and build a life in the United States.

As noted, in addition to seeking to be appointed as Luis' guardian, Alberto requested that the county court make special findings of fact contemplated in 8 U.S.C. § 1101(a)(27)(J). Alberto sought special findings of fact from the state court to potentially become eligible for SIJ status. SIJ status allows a juvenile immigrant to remain in the United States and apply for lawful permanent resident status. Obtaining the special findings is the first step in the process to achieve SIJ status. To achieve SIJ status under 8 U.S.C. § 1101(a)(27)(J), a state court must have made a predicate finding that (1) the minor is dependent on a juvenile court or has been "placed under the custody of . . . an individual . . . appointed by a State or juvenile court"; (2) "reunification with . . . the . . . parents is not viable due to abuse, neglect, [or] abandonment"; and (3) it would not be in the minor's best interests to be returned to his or her country

of origin. Under 8 C.F.R. § 204.11(a) (2018), "[j]uvenile court means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." (Emphasis omitted.)

In its September 27, 2017, order, the county court found it was in the best interests of Luis to have Alberto appointed as his legal guardian. However, because it concluded that the Douglas County Court's probate division does not function as a "juvenile court," it declined to make the requested special findings of fact that Luis could use in his immigration petition. In reaching its conclusion as to what constituted a "juvenile court" for SIJ findings purposes, the county court relied on Nebraska statutes, rather than the federal definition. Under the county court's reasoning, the request for findings would require that the Douglas County Court find that (1) Luis was "dependent" on the Nebraska juvenile court system, (2) he was eligible for long-term foster care or kinship placement, and (3) it is not in Luis' best interests to be returned to Guatemala to his parents. The court determined that such findings are "exclusive functions of and are determinations to be made solely by the Separate Juvenile Court of Douglas County Nebraska[,] or to those County Courts throughout greater Nebraska who exercise exclusive jurisdiction over juveniles." The order concluded that immigration status should be determined by the U.S. government, not by the county court.

Alberto moved to alter or amend the county court's September 27, 2017, order and again requested factual findings regarding Luis' best interests for SIJ purposes. After briefing and another hearing, the county court denied the motion to alter or amend on October 17. In its order, the county court noted that pursuant to the population guidelines of Neb. Rev. Stat. § 43-2,111 (Reissue 2016), there are presently three counties with a separate juvenile court: Douglas, Lancaster, and Sarpy Counties. The county court acknowledged that under Neb. Rev. Stat. § 24-517(2) (Reissue 2016), the county court can have concurrent original jurisdiction over a child in need of

a guardian, but determined that making additional findings of fact would exceed its jurisdictional directives under state law. The county court stated that it "cannot and does not function as a juvenile court and the applicable statutes and regulations commit these specific issues to the Separate Juvenile Court of Douglas County, Nebraska."

Alberto appeals.

ASSIGNMENTS OF ERROR

Alberto generally claims that the county court erred when it concluded that it is not a "juvenile court" for purposes of the federal SIJ process. Alberto specifically claims that although it found a need to appoint a permanent guardian, the county court erred (1) when it concluded that although the Douglas County Court has the power to appoint a guardian for a minor, it lacks the authority to make the special findings of fact for SIJ purposes, and (2) when it refused to make the requested findings of fact that (a) reunification with one or both parents is not viable due to abuse, neglect, or abandonment and (b) it would not be in Luis' best interests to return to Guatemala.

STANDARD OF REVIEW

Statutory interpretation presents a question of law. *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018). We independently review questions of law decided by a lower court. *Id*.

ANALYSIS

[1,2] We recently considered the central issue in this case in *In re Guardianship of Carlos D., ante* p. 646, 915 N.W.2d 581 (2018), in which we held that a county court with a jurisdictional basis under § 43-1238(a) and which has made an initial child custody determination, such as appointing a guardian, has the authority to make immigration-related factual findings where the evidence is sufficient and the court has been requested to do so. In this case, the county court concluded

that in Douglas County, only the separate juvenile court of Douglas County would have authority to make SIJ findings, and thus, it refused to make the special findings. During the pendency of this appeal, the Nebraska Legislature enacted 2018 Neb. Laws, L.B. 670, which became effective on July 19, 2018, and made clear, inter alia, that a county court making a guardianship determination also has authority to make the special findings for the ward to establish SIJ status. See § 43-1238(b). As explained below, a county court properly taking jurisdiction over a guardianship and making an initial custody determination is not excluded from § 43-1238(b), even where there is a juvenile court in that county, and the county court may make special findings of fact where appropriate.

"Juvenile Court" Under 8 U.S.C. § 1101(a)(27)(J)(i) Encompasses Courts With Jurisdiction to Make Determinations About the Custody and Care of Juveniles and Is Not Limited in Nebraska to the Separate Juvenile Courts: The County Court Was a "Juvenile Court" Under 8 U.S.C. § 1101(a)(27)(J)

The county court placed Luis in the custody of Alberto, a situation encompassed by 8 U.S.C. § 1101(a)(27)(J)(i). Federal provisions allow a juvenile immigrant to apply for SIJ status and seek lawful permanent residence if several prerequisites are met. 8 U.S.C. § 1101(a)(27)(J) provides, in pertinent part, that a "special immigrant" is

> an immigrant who is present in the United States—
>
> (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, *or placed under the custody of*, an agency or department of a State, or *an individual* or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

> (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and
>
> (iii) in whose case the Secretary of Homeland Security consents to the grant of [SIJ] status[.]

(Emphasis supplied.)

Here, the county court concluded that it was not a "juvenile court" under Nebraska statutory provisions and that therefore, it could not make the findings required of a "juvenile court" in 8 U.S.C. § 1101(a)(27)(J)(i) and (ii). The county court erred as a matter of law when it concluded it was not a "juvenile court" as that term is defined for purposes of 8 U.S.C. § 1101(a)(27)(J).

[3] In order to achieve SIJ status, the individual whose custody has been determined prior to age 21, 8 C.F.R. § 204.11, must have obtained the judicial determinations listed above in 8 U.S.C. § 1101(a)(27)(J)(i) and (ii) from a "juvenile court," as that term is used in the federal provisions. *In re Guardianship of Carlos D., ante* p. 646, 915 N.W.2d 581 (2018). The Code of Federal Regulations defines "juvenile court" as "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a). As we explain below, a Nebraska county court which properly appoints a guardian for a juvenile makes a custody determination, and thus, the county court was considered a "juvenile court" for purposes of 8 U.S.C. § 1101(a)(27)(J)(i) and (ii). Courts have generally held that a guardianship over a juvenile renders the juvenile subject to 8 U.S.C. § 1101(a)(27)(J)(i). E.g., *Jisun L. v. Young Sun P.*, 75 A.D.3d 510, 905 N.Y.S.2d 633 (2010). Having made a "custody" determination, the county court was considered a "juvenile court" for purposes of 8 U.S.C. § 1101(a)(27)(J)(i) and (ii), and the county court's conclusion to the contrary was error.

The County Court Made a Custody Determination When it Appointed a Guardian for Luis

[4,5] A Nebraska county court has exclusive original jurisdiction in all matters relating to the guardianship of a person with exceptions not applicable here. § 24-517(2). Under Nebraska statutes and jurisprudence, a guardianship of a child is a child custody determination. *In re Guardianship of D.J.*, 268 Neb. 239, 248, 682 N.W.2d 238, 246 (2004) (stating "[a] guardianship is no more than a temporary custody arrangement established for the well-being of a child"). See Neb. Rev. Stat. § 43-1227(4) (Reissue 2016) (concerning "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue," including a proceeding for guardianship in which the issue may appear). Elsewhere, the statutes provide that a "[c]hild custody determination means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." § 43-1227(3).

In *In re Guardianship of Carlos D., supra*, we held that under a recent amendment to § 43-1238(b), courts with jurisdiction over "initial child custody determination[s]" as used in § 43-1238(a) also have jurisdiction and authority to make special findings of fact similar to those contemplated by 8 U.S.C. § 1101(a)(27)(J). Alberto sought a guardianship of the minor Luis in the county court, and the county court's order declaring Alberto as guardian was an initial custody determination.

Section 43-1238(a) generally deals with child custody determinations which are appropriately raised in a court in Nebraska, and § 43-1238(b), as amended, lists the factual findings which can be made by a Nebraska state court with such initial child custody determination authority and the circumstances under which such courts must make such findings. Section 43-1238(b) now provides:

> (b) Subsection (a) of this section is the exclusive jurisdictional basis for making a child custody determination

> by a court of this state. In addition to having jurisdiction to make judicial determinations about the custody and care of the child, a court of this state with exclusive jurisdiction under subsection (a) of this section has jurisdiction and authority to make factual findings regarding (1) the abuse, abandonment, or neglect of the child, (2) the nonviability of reunification with at least one of the child's parents due to such abuse, abandonment, neglect, or a similar basis under state law, and (3) whether it would be in the best interests of such child to be removed from the United States to a foreign country, including the child's country of origin or last habitual residence. If there is sufficient evidence to support such factual findings, the court shall issue an order containing such findings when requested by one of the parties or upon the court's own motion.

(Emphasis omitted.)

[6] As we noted in *In re Guardianship of Carlos D., ante* p. 646, 915 N.W.2d 581 (2018), the amendment to § 43-1238(b) became operative on July 19, 2018, 3 calendar months after the adjournment of the legislative session on April 18. We held that § 43-1238(b) is a state court procedural amendment which applies to pending cases. *In re Guardianship of Carlos D., supra.* We also noted that § 43-1238(b), as amended, provides that when requested by one of the parties or upon the court's own motion, a court making an initial custody determination "shall issue" an order containing the three enumerated factual findings if there is sufficient evidence. *In re Guardianship of Carlos D., supra*.

As explained above, the county court in this case made an initial child custody determination when it granted Alberto a guardianship over the minor Luis and was therefore a "juvenile court" for federal purposes of making special findings. As noted, a court with jurisdiction to make a custody determination under § 43-1238(a) has the authority to make the findings outlined in § 43-1238(b) as amended. In sum, in a guardianship

case, the county court is a court making a custody determination in satisfaction of 8 U.S.C. § 1101(a)(27)(J)(i) and (ii), and in this case, the county court erred when it concluded it was not a "juvenile court" under 8 U.S.C. § 1101(a)(27)(J)(i) and (ii) based on its erroneous reliance on Nebraska statutes rather than by reference to the federal provisions describing "juvenile court." We reverse the court's order of October 17, 2017, which denied Alberto's motion to alter or amend. The county court has the authority to make findings outlined in § 43-1238(b). Although we reverse the county court's order of October 17, we express no opinion of the impact upon remand of Neb. Rev. Stat. § 30-2614 (Reissue 2016), providing for the termination of a guardian's authority upon the minor's attainment of majority.

CONCLUSION

In this guardianship case, the suitability of appointing Alberto as guardian for Luis is not at issue in this appeal. The county court erred as a matter of law when it concluded it was not a "juvenile court" for purposes of making findings consistent with 8 U.S.C. § 1101(a)(27)(J)(i) and (ii). A county court with a jurisdictional basis under § 43-1238(a) and which has made an initial child custody determination, such as appointing a guardian, has authority under § 43-1238(b) to make factual findings regarding the enumerated items where the evidence is sufficient, and the court has been requested to do so. The enumerated items are similar to the immigration-related findings in 8 U.S.C. § 1101(a)(27)(J). Thus, we reverse the order of October 17, 2017, and remand the cause for further proceedings consistent with this opinion based on the existing record.

Reversed and remanded for
further proceedings.

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

Fredericks Peebles & Morgan LLP, appellee, v. Fred Assam, appellant.

915 N.W.2d 770

Filed August 3, 2018. No. S-16-855.

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. **Partnerships: Accounting: Appeal and Error.** An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record.
3. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Partnerships.** The interpretation of a partnership agreement presents a question of law.
5. **Appeal and Error.** An appellate court independently reviews a lower court's rulings on questions of law.
6. **Courts: Jurisdiction: States.** In answering any choice-of-law question, a court first asks whether there is any real conflict between the laws of the states.
7. **Jurisdiction: States.** An actual conflict exists when a legal issue is resolved differently under the law of two states.
8. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
9. **Actions: Appeal and Error.** An appellate court determines the nature of an action from the relief sought.

10. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
11. **Trial: Expert Witnesses.** The trier of fact is not bound to accept expert opinion testimony.
12. **Trial: Evidence.** Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.
13. **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.
14. **Options to Buy or Sell: Valuation: Words and Phrases.** "Fair market value" is the price that a willing buyer would pay a willing seller, both persons having reasonable knowledge of all relevant facts and neither person being under compulsion to buy or to sell.
15. **Options to Buy or Sell: Presumptions.** The willing buyer-willing seller rule presumes that a potential transaction is to be analyzed from the viewpoint of a hypothetical buyer whose only goal is to maximize his or her advantage.
16. **Options to Buy or Sell.** The willing buyer-willing seller rule is applied using the viewpoint of an objective hypothetical buyer, rather than a subjective buyer.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellant.

Daniel P. Chesire, Brian J. Brislen, and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., and James J. Banks, of Banks & Watson, for appellee.

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

Funke, J.

This appeal concerns a determination of Fred Assam's ownership interest in the law firm of Fredericks Peebles & Morgan LLP (FPM). After Assam voluntarily withdrew from

the firm, FPM filed suit seeking a declaration of the rights of FPM and Assam under the governing partnership agreement (Partnership Agreement). Following a bench trial, the district court for Douglas County declared the fair market value of Assam's interest in FPM to be $590,000. For the reasons stated herein, we affirm.

I. BACKGROUND

1. Partnership

FPM is a limited liability partnership composed of legal professionals. FPM has a nationwide practice which specializes in handling legal issues impacting Native American tribes, including, but not limited to, facilitating interrelationships between Native American tribes and the federal government, state governments, and other tribes, as well as foreign governments and foreign companies. FPM represents Native American tribes, entities, and individuals, as well as banks and financial institutions which deal with Native American tribes.

FPM was organized under the laws of the District of Columbia, and its principal place of business is located in Omaha, Nebraska. At the relevant time, FPM had dozens of attorneys throughout offices in Sacramento, California; Louisville, Colorado; Sioux Falls, South Dakota; Omaha, Nebraska; Winnebago, Nebraska; Peshawbestown, Michigan; and Washington, D.C.

As of October 1, 2014, FPM had five equity partners: Thomas W. Fredericks, John M. Peebles, Lance G. Morgan, Conly J. Schulte, and Assam. Fredericks, Peebles, Schulte, and Assam each held a 23.25 percent interest in FPM, and Morgan held the remaining 7 percent. FPM traditionally implemented a team approach in servicing its clients' accounts, but nearly 90 percent of FPM's clients were brought in by Fredericks, Peebles, Morgan, and Schulte. Assam, a financial attorney, worked on accounts brought in by the other equity partners. Only three clients followed Assam when he left FPM, two of which maintained a relationship with FPM.

In early 2014, FPM undertook a thorough financial review in order to implement long-term planning. The partners began to discuss changes to their compensation structure in order to reward younger partners for bringing in new clients. Fredericks proposed that compensation should be based on client generation, while others proposed that compensation should be based upon equity ownership. The partners exchanged and refined proposals over a period of months, and FPM ultimately arrived at a hybrid of the two compensation structures.

According to the testimony of Peebles, Assam had not kept up to date on the various proposals and voiced concern about only Fredericks' initial proposal, which Assam felt negatively impacted his compensation. As a result of his concerns, Assam hired the accounting firm Eide Bailly LLP to perform a valuation of his equity interest in FPM.

On the evening of October 2, 2014, Assam sent an email to his partners in which he voluntarily resigned from FPM. In the email, Assam advised, "As you are all aware, over the course of the last few months, I have been under a personal attack by . . . Fredericks." Assam stated the compensation structure Fredericks had proposed would "transfer complete control of [FPM] over to [Fredericks]. This means the life of my family and me will [sic] in complete control of a man who does not care for me and, in fact, will apparently act with intent to only to [sic] harm me."

The following morning, Assam, whose office is located in Sioux Falls, flew to Denver, Colorado, to attend a partner meeting at the Louisville office, which had been scheduled prior to Assam's resignation email. During his flight, Assam reviewed some of the more recent compensation structure proposals and realized the documents he had relied on when deciding to resign had significantly changed. At the meeting, Assam told the partners he had made a mistake and wanted to rescind his resignation and rejoin FPM. The partners declined and formally voted to accept Assam's resignation.

The FPM partners then continued their meeting and, as part of their ongoing financial review, addressed the agenda item of how to treat approximately $10 million in old accounts receivable. Many of FPM's clients are sovereign under federal law and therefore may not be sued to collect on past-due billing absent a waiver of sovereign immunity. FPM has a practice of not requesting such a waiver from its clients so as to not jeopardize client relationships. As a result, according to the testimony of Morgan, FPM has a lower-than-average collection rate.

FPM carried a significant amount of outstanding accounts receivable for an extended period of time. At the partnership meeting, FPM decided to write off as uncollectable approximately $10 million in old accounts receivable.

After Assam's resignation, the partners made him an offer of payment intended to represent the fair market value of his equity interest as set out in the Partnership Agreement. However, the two sides could not agree as to the value of Assam's interest.

In late 2014, FPM filed a declaratory judgment action to determine the value of Assam's interest. Assam filed an answer and counterclaim for an accounting and fair valuation of his interest in FPM, based on the Partnership Agreement. Assam sought a money judgment and attorney fees. FPM filed an amended complaint which asserted claims for breach of contract, breach of fiduciary duty, fraud, constructive fraud, rescission, disgorgement, and an accounting. Assam filed an answer which denied such claims and stated affirmative defenses.

At trial, FPM moved without objection to conform its pleadings to the adduced evidence in order to clarify that its sole claim was for declaratory judgment as to the amount it owed Assam for the fair market value of his ownership interest, as provided under the Partnership Agreement. Assam clarified that he maintained his counterclaim for an accounting, fair valuation, and a money judgment, plus attorney fees.

The Partnership Agreement is dated May 1, 2007, and was signed by Fredericks, Peebles, Morgan, Schulte, and Assam on August 9, 2008. The parties agree that the provision which governs the determination of Assam's equitable interest in FPM is:

> In the event any Equity Partner gives a notice of voluntary withdrawal more than sixty months of **July 1, 2003**, such withdrawing Equity Partner will receive an amount equal to 100% of the fair market value of the Equity Partner's interest in the Partnership as of the date of such notice of voluntary withdrawal, which amount will be paid out in six equal monthly installments without interest.

2. Expert Testimony

The court heard valuation testimony from several expert witnesses. FPM called William Brennan, a management consultant for the legal profession. Assam called Chad Flanagan and Jay Fullerton, of Eide Bailly. In addition, Assam called Matthew Stadler as an expert witness. Assam himself also opined as to valuation.

(a) Brennan

Brennan has worked for over a decade as a principal with a law firm management consulting group. He testified that in the past 25 years, he has consulted with over 500 firms of all types and sizes. Prior to becoming a management consultant, Brennan worked as an accountant and auditor. Brennan's work experience includes serving as chief financial officer and executive director for two law firms, one of which had 250 attorneys.

As a consultant, Brennan developed a specialty in law firm mergers and acquisitions, which included performing firm valuations. Over his career, he had performed about 25 firm valuations. He previously testified in court seven times as an expert in law firm valuation. He is published in the area of valuation and is a frequent speaker on the issue of law firm financial management.

Brennan spent over 100 hours on his valuation of FPM and drafted a 48-page report. Brennan's report demonstrated several different business valuation approaches for comparison. Brennan testified that although market-based, asset-based, and income-based approaches are each generally accepted, the income approach is best for valuing law firms. Brennan stated the market-based approach is not useful for valuing law firms, because such businesses are privately owned and therefore a firm's private transaction data is not publicly available to be used to compare value with other businesses in the market. As for an asset-based approach, Brennan testified firm assets must be adjusted down to their cash value in order to determine the asset's "net realizable value." Without this adjustment, assets such as encumbered assets and uncollectible accounts receivable would be overvalued.

Brennan testified that the income approach has several subsets, including the discounted cashflow approach and the "capitalization of economic income" approach. Brennan's methodology focused on future cashflows and relied on 5 years of historical income statements which were adjusted to normalize the income stream by removing nonrecurring expenses and adding liabilities not present on income tax forms. Brennan's analysis considered economic environment risks, government regulation risks, and risks specific to FPM such as sustainability, infrastructure, and technological and data security risks. Brennan employed the "Ibbotson Build-Up Method" to determine an appropriate discount rate which considered a risk-free rate, an equity premium, systemic environmental risk unique to the legal industry, and specific risks unique to FPM such as aging partners generating the majority of the client revenue and lower-than-average collection rates, coupled with an inability to pursue legal action against nonpaying clients. Brennan also emphasized that certain factors limit the control and marketability of a law firm, including that only attorneys can own law firms, that lawyers cannot ethically restrict their ability to serve

clients through the use of noncompete agreements, and that most firms have partnership agreements which control compensation and/or admission into the firm. In considering all of these factors, Brennan applied a 60-percent discount to Assam's partnership interest. Brennan's ultimate opinion was a valuation of $590,000.

(b) Eide Bailly

Flanagan, the director of Eide Bailly's business valuation department, and Fullerton, a senior official in Eide Bailly's business valuation department, coauthored two reports regarding the value of Assam's interest. Their reports complied with industry standards outlined by the "Statements on Standards for Valuation Services" and the National Association of Certified Valuation and Analysts. The first report was a calculation engagement in 2014, and the second report was a more detailed valuation engagement in 2016. Between Flanagan and Fullerton, approximately 50 hours were spent compiling the second report.

Flanagan is a certified public accountant who is a member of the American Institute of Certified Public Accountants. Flanagan also holds the designation of being accredited in business valuation. Fullerton holds a juris doctorate degree, a master's degree in business administration, and a bachelor of science degree in economics with a minor in accounting.

In his practice, Flanagan performs between 150 and 200 business valuations per year. Fullerton testified he had performed 300 business valuations in his career. Flanagan and Fullerton performed business valuations for various industries including wholesale, retail, manufacturing, insurance, real estate holding companies, restaurants, dental practices, construction, and farming operations. Flanagan had performed one law firm valuation, and Fullerton had not performed a law firm valuation prior to this case. Neither had ever performed financial consulting services for a law firm or had published any scholarly articles in the area of law firm valuation.

Eide Bailly's opinion also employed a buildup rate which included industry risk and firm risk to reach a discount rate of 4 percent. The opinion also incorporated a 10-percent discount for lack of control as to nonoperating assets and a 5-percent discount for lack of marketability, because the Partnership Agreement provides a market for the sale of those shares.

Flanagan admitted his valuation assumed that in a fair market value analysis, FPM should be understood as the specific hypothetical buyer of Assam's interest. Fullerton admitted this assumption was part of Eide Bailly's scope of engagement. In addition, Fullerton testified that Assam suggested to Eide Bailly that the reference to fair market value in the Partnership Agreement should equate to fair value. Fullerton further testified that fair value is essentially the same thing as fair market value without any discounts for lack of control or lack of marketability.

Prior to commencing the valuation engagement, Assam's counsel sent a letter to Eide Bailly, dated April 28, 2016, which indicated:

> The District of Columbia statutes permit a partnership agreement or a limited partnership agreement to specify buy-out terms. The [Partnership] Agreement in this case uses the phrase "fair market value". However, the [Partnership] Agreement provides for a market within [FPM] and its Equity Partners. This means the transaction occurs at a fair price and on fair terms, not as if the sale were to a stranger. The internal market assures retention of client relationships, partnership identity, business continuity, and avoidance of startup costs and cash flow limitations. It is . . . Assam's view that these circumstances require that "fair market value" be understood as the fair value of the partner interest in the context of the market created by the [Partnership] Agreement itself. This is, we think, the same as "fair value" in model corporate and business entity statutes.

In their reports, Flanagan and Fullerton used an income approach which utilized FPM's average normalized annual pretax revenue over a 4-year period. Eide Bailly also upwardly adjusted the value of the partnership due to its having a passthrough entity tax status. Flanagan testified that passthrough tax status is, in effect, a capitalization of taxes saved because FPM, as a limited liability partnership, is not subject to corporate taxation.

According to Flanagan's testimony, Eide Bailly's calculation engagement in 2014 concluded the value of Assam's interest in FPM to be $3,420,000. Eide Bailly's valuation engagement in 2016, using more recent revenue streams, concluded the value of Assam's interest to be $3,120,000. Eide Bailly's valuation accounted for FPM's nonoperating assets, such as an interest in real estate and dormant accounts receivable.

(c) Stadler

Stadler was engaged by Assam to review and compare the fair market value opinions of Brennan, Eide Bailly, and Assam. Stadler is a certified public accountant who holds a juris doctorate and a master's degree in professional accountancy. Stadler also has an accreditation in business valuation. Stadler has never worked in a law firm and has valued only one other law firm.

At Assam's request, Stadler examined only Brennan's valuation report, Eide Bailly's calculation report, and Assam's calculation report, and no other evidence. In doing so, Stadler did not develop an opinion as to value. Stadler identified deficiencies in each of the reports he reviewed. In the Eide Bailly report, Stadler opined that the failure to include 2010 data was a concern, that long-term growth rate was too high, and that the capitalization rate was too low. In regard to Brennan's report, Stadler found fault in the capitalization rate as being too high and the discount for lack of control and lack of marketability as being too high. Ultimately, Stadler concluded

that Brennan's opinion was understated by $1,235,000 and that Eide Bailly's opinion was overstated by $1,275,000. Stadler fundamentally disagreed with Assam's approach and described Assam's valuation as not being credible "in any respect" and "ridiculous."

(d) Assam

Assam is a financial attorney whose practice includes business valuation matters. Assam valued his interest in FPM at $4,877,850. Assam testified his valuation included his 23.25-percent share of the $10 million in written-off accounts receivable. Assam encouraged the court to reject his experts' valuations and adopt his own.

3. Trial Court Judgment

In its written order, the court found the proper remedy was declaratory judgment; it dismissed Assam's counterclaim and declined to award attorney fees. In doing so, the court found FPM's decision to write off approximately $10 million in old accounts receivable was not done in bad faith or with an intent to harm Assam, because the writeoff equally affected all equity partners and was set on the agenda for the partners' meeting prior to Assam's notice of resignation.

The court also determined, based on the language of the Partnership Agreement, that Assam's interest was the fair market value of his equity partnership interest in FPM as of the date of his notice of voluntary withdrawal, October 2, 2014.

The court further found Assam's valuation opinion was "unreliable and not credible." The court accepted Assam's testimony that the court should not adopt the opinions offered by Eide Bailly or Stadler and found that Assam attempted to "influence in an upward manner" Eide Bailly's conclusion as to the fair market value of Assam's interest. The court concluded that the April 28, 2016, letter from Assam's counsel to Eide Bailly showed that Eide Bailly's "calculation engagement" report included an incorrect assumption that FPM must be

the hypothetical buyer of Assam's interest under a fair market value analysis.

The court declined to adopt Eide Bailly's opinion, because Flanagan and Fullerton collectively had valued a law firm on only one other occasion; neither had ever worked at a law firm, been a chief financial officer for a law firm, or provided financial consulting services to a law firm; and neither had published any scholarly articles in the area of law firm valuation. The court noted that Stadler also lacked comparable expertise in law firm valuation for these same reasons.

The court found that the testimony of Brennan was credible; Brennan's 60-percent lack-of-control and marketability discount was credible; Brennan's discounts were appropriate as part of a "fair market value" analysis, because they helped replicate a public marketplace for a private entity; Brennan's discount analysis was consistent with the fair market value standard of a hypothetical buyer's ability to convert the ownership interest to cash and control the investment; and Brennan was the only expert to weigh risk factors which were credible and relevant to determining the fair market value test of a fully informed hypothetical willing buyer's desire to maximize his economic interest.

The court found that the Partnership Agreement was not ambiguous; the Partnership Agreement did not contain a choice-of-law provision; there was no conflict with Nebraska law and District of Columbia law with regard to interpretation of a contract; if there were a conflict, Nebraska law would control due to Nebraska's interest in and contacts with the dispute; and neither party had breached the Partnership Agreement.

The court found and declared that the fair market value of Assam's equity partner interest in FPM is $590,000; pursuant to the Partnership Agreement, FPM may pay Assam this amount; and Assam was not entitled to a money judgment or attorney fees.

Assam appealed, and we moved the case to our docket.

II. ASSIGNMENTS OF ERROR

Assam assigns, restated, that the district court erred by (1) failing to apply District of Columbia law; (2) finding FPM did not breach the Partnership Agreement; (3) adopting the opinion of FPM's expert, Brennan, whose valuation opinion excluded approximately $10 million in old accounts receivable, as well as the value of real estate, automobiles, tenant improvements, and equipment; and (4) failing to award Assam a money judgment and attorney fees.

III. STANDARD OF REVIEW

[1-3] 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.[1] An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record.[2] In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[3]

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[1] *Christiansen v. County of Douglas*, 288 Neb. 564, 849 N.W.2d 493 (2014); *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013); *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994).

[2] *Robertson v. Jacobs Cattle Co.*, 288 Neb. 846, 852 N.W.2d 325 (2014); *In re Dissolution & Winding Up of KeyTronics*, 274 Neb. 936, 744 N.W.2d 425 (2008); *Bass v. Dalton*, 213 Neb. 360, 329 N.W.2d 115 (1983). See *Darr v. D.R.S. Investments*, 232 Neb. 507, 441 N.W.2d 197 (1989).

[3] *Gast v. Peters*, 267 Neb. 18, 671 N.W.2d 758 (2003); *Lake Arrowhead v. Jolliffe*, 263 Neb. 354, 639 N.W.2d 905 (2002). See *Badran v. Bertrand*, 214 Neb. 413, 334 N.W.2d 184 (1983).

[4,5] The interpretation of a partnership agreement presents a question of law.[4] An appellate court independently reviews a lower court's rulings on questions of law.[5]

IV. ANALYSIS

1. No Conflict of Laws

In Assam's first assignment of error, he claims that the district court erred by determining that no conflict in substantive law existed between District of Columbia law and Nebraska law, as pertaining to the governing effect of the Partnership Agreement. Assam argues the district court erred when it concluded that if there were a conflict of laws, Nebraska law would control over District of Columbia law, because of Nebraska's pertinent interest in the subject matter. Assam further argues that the choice of law impacts three legal issues, including what constitutes a breach of duty by FPM to Assam, what is "fair market value," and attorney fees.

As we will discuss in more detail later, Assam did not properly raise a claim for breach of contract; as a result, any claim that the laws of the District of Columbia differ from the laws of the State of Nebraska on breach of contract is without merit. In addition, since we find that Assam was not entitled to attorney fees, any difference of law on that issue is irrelevant.

The only remaining issue is the determination of fair market value of Assam's partnership interest. The record indicates that FPM was organized as a Washington, D.C., limited liability partnership. In addition, the Partnership Agreement does not contain a specific choice-of-law provision, and District of Columbia law does not allow for such a provision.[6]

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[4] *Robertson, supra* note 2; *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008).

[5] *Id*.

[6] D.C. Code Ann. § 29-701.07(b)(2) (West, Westlaw through 2013 legislation).

As our analysis will show, the determination of fair market value is controlled by the Partnership Agreement and no real conflict exists between the laws of the District of Columbia and the laws of the State of Nebraska with respect to the controlling effect of partnership agreements.

[6,7] In answering any choice-of-law question, a court first asks whether there is any real conflict between the laws of the states.[7] An actual conflict exists when a legal issue is resolved differently under the law of two states.[8] We agree with the district court when it found there was no conflict between District of Columbia and Nebraska substantive law governing the determination of Assam's equity interest.

Under Nebraska's Uniform Partnership Act of 1998,[9] FPM is a "foreign limited liability partnership," because FPM was formed under the laws of the District of Columbia.[10] Section 67-457 provides that the law under which a foreign limited liability partnership is formed governs relations among the partners and between the partners and the partnership.

Under the laws of the District of Columbia, relations among the partners and between the partners and the partnership are governed under the controlling partnership agreement.[11] In addition, under Nebraska law, relations among the partners and between the partners and the partnership are also governed by the partnership agreement.[12] Thus, whether the laws of the District of Columbia or the laws of the State of Nebraska are applied, the terms of the partnership agreement are controlling. As a result, no actual conflict of laws exists.

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[7] *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 903 N.W.2d 432 (2017).

[8] *Id.*

[9] Neb. Rev. Stat. §§ 67-401 to 67-467 (Reissue 2009 & Cum. Supp. 2014).

[10] See, § 67-402(4); D.C. Code Ann. § 29-701.06 (West, Westlaw through 2013 legislation).

[11] D.C. Code Ann. § 29-701.07(a).

[12] § 67-404.

Assuming without deciding that the district court erred when it determined that if there were a difference in the law of the State of Nebraska and the law of the District of Columbia, Nebraska law would apply exclusively, any such error was harmless.

[8] The Partnership Agreement is clear and unambiguous. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[13] Therefore, the terms of the Partnership Agreement provide the legal framework for our analysis.

2. No Breach of Contract

In Assam's second assignment of error, he claims that the district court erred by failing to find FPM breached the Partnership Agreement. We find no merit to this assignment of error.

[9,10] Assam did not assert an independent claim for breach of contract, but merely asserted a breach of contract claim as an affirmative defense to FPM's amended complaint. At the commencement of trial, Assam clarified that he was seeking only an accounting and a fair valuation of his interest in FPM. We determine the nature of an action from the relief sought.[14] Even though Assam's first two assignments of error advance breach of contract arguments, at oral argument, Assam emphasized to this court that this is a proceeding in equity. A suit for damages arising from breach of a contract presents an action at law.[15]

We agree with the district court that this is a declaration of rights proceeding. The Partnership Agreement does not specify a particular amount due to Assam or a time period for payment.

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[13] *Frohberg Elec. Co. v. Grossenburg Implement*, 297 Neb. 356, 900 N.W.2d 32 (2017).

[14] See *Elting v. Elting*, 288 Neb. 404, 849 N.W.2d 444 (2014).

[15] *Id.*

Instead, the Partnership Agreement requires that FPM pay Assam "an amount equal to 100% of the fair market value" of his 23.25-percent interest. The relief sought by both parties is the determination of the "fair market value" of Assam's interest. Consistent with Assam's view, we find the nature of the dispute to be one in equity, and as a result, this assignment of error is without merit.

3. District Court Did Not Err In Determining Assam's Equity Interest

In Assam's third assignment of error, he claims the district court erred when it adopted the opinion of Brennan, because Brennan's opinion did not account for FPM's nonoperating assets. Assam claims the court erred by assigning no value to approximately $10 million in uncollectable accounts receivable and FPM's real estate investments. We find no merit to this assignment of error.

(a) Conclusions of Law

[11,12] The trier of fact is not bound to accept expert opinion testimony.[16] The determination of the weight that should be given expert testimony is uniquely the province of the fact finder.[17] Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.[18]

[13] 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

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[16] *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012). See *Lewison v. Renner*, 298 Neb. 654, 905 N.W.2d 540 (2018).

[17] *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012).

[18] *Marston v. Drobny*, 166 Neb. 747, 90 N.W.2d 408 (1958). See *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985).

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.[19]

[14-16] Under the laws of the District of Columbia, "fair market value" is the price that a willing buyer would pay a willing seller, both persons having reasonable knowledge of all relevant facts and neither person being under compulsion to buy or to sell.[20] The willing buyer-willing seller rule presumes that a potential transaction is to be analyzed from the viewpoint of a hypothetical buyer whose only goal is to maximize his or her advantage.[21] The willing buyer-willing seller rule is applied using the viewpoint of an objective hypothetical buyer, rather than a subjective buyer.[22]

(b) Analysis

The evidence of fair market value included the opinions of Brennan, Assam, Flanagan, Fullerton, and Stadler. Each expert posited a different fair market value, and each based his opinion on different factors. Just as the trial court did, we too find that there is evidence in conflict on material issues of fact concerning the appropriate considerations in valuing Assam's fair market value interest. As a result, under our de novo review, we consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[23]

In reaching his opinion that the fair market value of his ownership interest was $4,877,850, Assam used the asset approach, the income approach, and the market approach. Assam testified

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[19] *General Fiberglass Supply v. Roemer*, 256 Neb. 810, 594 N.W.2d 283 (1999); *In re Estate of Ross*, 19 Neb. App. 355, 810 N.W.2d 435 (2011).

[20] *Adkins Ltd. Ptp. v. O Street Management*, 56 A.3d 1159 (D.C. 2012).

[21] *Eisenberg v. C.I.R.*, 155 F.3d 50 (2d Cir. 1998); *Estate of Curry v. United States*, 706 F.2d 1424 (7th Cir. 1983).

[22] See *Estate of Bright v. United States*, 658 F.2d 999 (5th Cir. 1981).

[23] See cases cited *supra* note 3.

that in his practice, he routinely used business valuations to assist his clients in obtaining financing and would retain individuals to perform the business valuations. In determining how to prepare his valuation, Assam testified that he relied upon "some articles" that he read, including one by the American Bar Association and one from "Inc. Magazine."

In preparing his valuation, Assam included in the asset approach real estate, automobiles, tenant improvements, equipment, and $10 million of old accounts receivable. For the income approach, he simply added 2013 income figures together with estimated 2014 income figures and divided the sum by two. For the market approach, he determined an average annual gross revenue (the amount determined in the income approach) and multiplied it by two. Ultimately, he determined amounts for each valuation method, added the values together, divided the total by three, and multiplied the amount by his partnership interest. Nothing in the record supports the valuation process used by Assam. In fact, Assam's own expert, Stadler, testified that Assam's valuation was "ridiculous."

In regard to Eide Bailly's opinion as to fair market value, both Flanagan and Fullerton testified that it was premised upon FPM's being the hypothetical buyer. However, as mentioned above, fair market value is the price that a willing buyer would pay a willing seller. A willing buyer is presumed to be a hypothetical buyer whose only goal is to maximize his or her advantage. The willing buyer is considered from the viewpoint of an objective hypothetical buyer, rather than a subjective buyer. In using FPM as the willing buyer, Eide Bailly's opinion failed to fully consider discounts for lack of control and lack of marketability.

In addition, Eide Bailly employed 4 years of income instead of 5 years of income. In doing so, Eide Bailly disregarded 2010 income based on the determination that 2010 income was lower than the other years and was nonrepresentative of FPM's regular annual income. However, both Brennan and Stadler testified that using the income figures over a 5-year

period was preferred over using income figures over a 4-year period. Even Flanagan testified that, typically, they use a sample of 5 years of income. Additionally, Eide Bailly annualized 2014 income, because they did not have final figures for that year when preparing the report in May 2016. However, the record indicates that the 2014 income figures were finalized in March 2015.

Eide Bailly also adjusted the value of FPM due to having a "pass-through entity tax status." However, Flanagan testified that this passthrough status had not been accepted by the U.S. Tax Court.

Further, though Flanagan and Fullerton are in the profession of preparing business valuation, neither had significant experience in valuating law firms. Prior to their engagement with Assam, Flanagan had performed only one law firm valuation and Fullerton had performed no law firm valuations.

Each of these decisions by Eide Bailly upwardly impacted its valuation. As a result, we agree with the district court that the valuation determined by Eide Bailly of $3,120,000 does not accurately reflect the value of FPM as of October 2, 2014. Albeit for different reasons, Assam also testified that Eide Bailly's opinion should not be followed by the court.

In regard to Stadler's testimony that Brennan's opinion was understated by $1,235,000 and that Eide Bailly's opinion was overstated by $1,275,000, Assam testified that the court should not adopt Stadler's analysis. In addition, the record indicates that Stadler has limited experience in valuating law firms, Stadler testified that Brennan was more experienced in that particular field, and Stadler examined only the reports of the other experts and no other evidence. Further, Stadler used an industry risk premium for companies having much larger revenues than FPM; he used a lower specific company risk premium without reviewing the Partnership Agreement or any financial documents of FPM; and he used the passthrough entity tax status, which has not been widely adopted by the U.S. Tax Court. All of these decisions increased his "opinion"

of FPM's fair market value. Lastly, Stadler included approximately $2.5 million of goodwill, which from the evidence is attributable to personal goodwill of the remaining partners as opposed to goodwill of FPM, resulting in an overstating of the fair market value by $573,000. As a result, we agree that Stadler's determination of value was not accurate.

In regard to Brennan's opinion, the trial court noted his vast experience in valuating law firms, including working for a law firm management consulting group dealing with over 500 law firms, working as an accountant and auditor, and serving as chief financial officer and executive director for two law firms. At the time of trial, Brennan had also performed approximately 25 law firm valuations and had testified in court seven times as an expert in law firm valuation. Ultimately, the trial court expressly based its findings on a credibility determination which accepted Brennan's version of the facts over Assam's and Eide Bailly's. The court found Brennan's testimony credible and controlling, because he implemented an approach which valued Assam's interest in the context of a market. The court therefore found the 60-percent discount for lack of control and marketability assigned by Brennan to be credible, because of the limitations presented by Assam's minority interest in a law firm with a specialized practice area and equity partnership makeup such as FPM. The court found that Assam and Eide Bailly sought to remove the need for a market from the fair market value analysis dictated by the Partnership Agreement and that, therefore, their small discounts for lack of control and marketability were not credible.

The record indicates that Brennan considered several different business valuation approaches for comparison, including market-based, asset-based, and income-based approaches. Brennan was able to articulate why the income approach was the most suitable valuation method. Brennan used income figures for 5 years as opposed to 4 years, and he did not apply the passthrough entity tax status calculation. Brennan employed

the "Ibbotson Build-Up Method" to determine an appropriate discount rate, and his analysis considered economic environment risks, government regulation risks, and risks specific to FPM such as sustainability, infrastructure, and technological and data security risks. Though Brennan's capitalization and discount rates were significantly higher than those propounded by the other experts, Brennan was able to articulate why law firms should be valued differently from other professional services industries. We therefore agree with the district court that Brennan's opinion of value as to FPM is the most appropriate value.

In regard to FPM's decision to write off approximately $10 million in old accounts receivable, the trial court found that it was not done in bad faith or with an intent to harm Assam. Specifically, the court noted that the writeoff equally affected all equity partners.

At trial, Peebles testified that the accounts receivable were "years old" and that the decision to write off the receivables was not made suddenly but was part of an ongoing analysis of compensation, partner continuity, personnel, and finances. He further testified that each of the partners was charged with the responsibility to review the accounts he was associated with and to make a determination as to collectability. Morgan testified that FPM's collection rate was close to 70 percent. Assam testified that the aggregate of the accounts receivable was in excess of $15 million, of which $10.8 million was over 120 days old.

Assam also testified that he was not part of any decision to write off the accounts receivable. Brennan testified that the longer a receivable ages, the less likely it will be collected in full, and that as they continue to age, especially beyond a year, it is unlikely that a firm would collect any such receivable. Brennan also testified that the partners made a specific determination for each of the receivables to be written off, that some of the accounts were 4 to 5 years old, and that the partners determined that nothing more could be done to

collect the accounts. As a result, Brennan opined that the uncollectable accounts receivable were appropriately written off, because that was a correct reflection of the "net realizable value" of the assets. Even Eide Bailly's valuation report indicated that nearly $9 million in accounts receivable was likely uncollectable.

Despite Assam's testimony that the writing off of accounts receivable was not discussed in 2014, he also testified that the subject of the writeoff was on the agenda for the partners' meeting prior to the night he sent his notice of withdrawal. In addition, the majority of FPM's clients were Native American tribes and therefore entitled to sovereign immunity, preventing FPM from bringing suit to collect on unpaid legal fees. As a result, we agree with the district court that the writeoff of accounts receivable was not improper.

Finally, Assam contends that the trial court failed to apply any value for the assets of FPM, including the building and the vehicles. However, all of the experts, with the exception of Assam, testified that the asset approach was not the best method to value FPM, due to the absence of significant capital. The income approach adopted by the trial court took into consideration FPM's past and present revenue stream and determined an appropriate fair market value for it.

We agree with the trial court that Brennan's testimony is persuasive and controlling. Based upon our de novo review, we find no merit to this assignment of error.

4. Failure to Award Money Judgment and Attorney Fees

Because we find no error in the district court's ruling that FPM did not breach the Partnership Agreement, Assam is not entitled to a money judgment. Though a court may grant a money judgment as consequential relief in a declaratory judgment action,[24] FPM was the entity seeking the declaratory

[24] See *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

relief. In its pleadings, FPM did not seek a money judgment. Only Assam sought a money judgment, which was part of his claim for breach of contract. Having failed to prove the elements of a breach of contract, Assam is not entitled to a money judgment. Consequently, the district court did not err in declining to award him a money judgment.

In regard to Assam's request for attorney fees, the Partnership Agreement allows for attorney fees for any prevailing party who was required to institute an action or proceeding to enforce any term or provision of the Partnership Agreement. However, because we find no merit to Assam's claim that FPM breached the Partnership Agreement or that the district court erred by adopting the valuation opinion of Brennan, Assam was not a prevailing party. The district court did not err in refusing to award Assam attorney fees.

V. CONCLUSION

For the foregoing reasons, we affirm the order of the district court which declared Assam's interest in FPM to be $590,000, and that FPM should pay Assam such sum according to the terms of the Partnership Agreement.

Affirmed.

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. Marco E. Torres, Jr., appellant.

915 N.W.2d 596

Filed August 3, 2018. No. S-17-740.

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. **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.
3. **Postconviction: Limitations of Actions.** If, as part of its preliminary review, the trial court finds the postconviction motion affirmatively shows—either on its face or in combination with the files and records before the court—that it is time barred under Neb. Rev. Stat. § 29-3001(4) (Reissue 2016), the court is permitted, but not obliged, to sua sponte consider and rule upon the timeliness of the motion.
4. **Postconviction: Limitations of Actions: Appeal and Error.** A district court has discretion to adopt reasonable procedures for determining what the postconviction motion and the files and records show, and whether the defendant has raised any substantial issues, before granting a full evidentiary hearing. District courts also have discretion to adopt reasonable procedures for determining whether to rule sua sponte on the timeliness of a postconviction motion. An appellate court will examine these procedures for an abuse of discretion, which exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
5. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.

6. **Appeal and Error.** An appellate court always reserves the right to note plain error that was not complained of at trial or on appeal.
7. ____. Plain error may be found on appeal when an error, 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.

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

Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

Brian William Stull, of American Civil Liberties Union Foundation, and Amy A. Miller, of American Civil Liberties Union of Nebraska Foundation, for amici curiae American Civil Liberties Union Capital Punishment Project and American Civil Liberties Union of Nebraska Foundation.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Harder and Noakes, District Judges.

Stacy, J.

This is an appeal from the denial of postconviction relief. The district court, sua sponte, found Marco E. Torres, Jr.'s, successive motion for postconviction relief was time barred under the 1-year limitations period of Neb. Rev. Stat. § 29-3001(4) (Reissue 2016) and denied relief without conducting an evidentiary hearing. On appeal, Torres argues the procedure used by the district court was improper. We find no abuse of discretion in the procedure followed, and affirm.

FACTS

In 2009, a jury found Torres guilty of two counts of first degree murder and other felony offenses. He was sentenced to

death for each of the murders and sentenced to prison terms for the other felonies. We affirmed his convictions and sentences on direct appeal.[1]

Torres moved for postconviction relief in 2013, raising claims of prosecutorial misconduct and ineffective assistance of counsel. After various delays, the district court conducted an evidentiary hearing and then denied postconviction relief. We affirmed the denial of postconviction relief in February 2017.[2]

In June 2017, Torres filed this successive motion for postconviction relief. His successive motion alleges two claims, each premised on a U.S. Supreme Court case. Specifically, Torres alleges his death sentences are unconstitutional under *Hurst v. Florida*[3] and *Johnson v. United States*[4] He alleges that *Hurst* and *Johnson* both announced newly recognized constitutional claims and that both should be applied retroactively to cases on collateral review.

The district court did not reach the merits of either of the claims alleged in Torres' successive motion because it determined, sua sponte, the motion was time barred under the 1-year limitations period in § 29-3001(4). Section 29-3001(4) applies to successive postconviction motions[5] and provides:

> (4) A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:

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[1] *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[2] *State v. Torres*, 295 Neb. 830, 894 N.W.2d 191 (2017).

[3] *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) (holding Florida's capital sentencing scheme unconstitutional because judge, not jury, made critical findings needed for imposition of death sentence).

[4] *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (holding "violent felony" enhancer in Armed Career Criminal Act of 1984 unconstitutionally vague).

[5] See *State v. Amaya*, 298 Neb. 70, 902 N.W.2d 675 (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.

In its order, the district court found Torres' successive motion was time barred under § 29-3001(4)(d). The court reasoned that Torres' claims were based exclusively on *Hurst* (decided in January 2016) and *Johnson* (decided in June 2015), and both cases had been decided more than 1 year before the date Torres filed his successive postconviction motion. The court did not expressly rule on the applicability of the other subsections of § 29-3001(4).

After concluding the successive motion was time barred under § 29-3001(4)(d), the court denied postconviction relief and overruled Torres' motion for appointment of counsel. Torres timely appealed. He filed a motion for appointment of counsel on appeal, which this court granted.

ASSIGNMENTS OF ERROR

Torres assigns, restated and consolidated, that the district court erred in (1) failing to hold a records hearing or certify the record pursuant to *State v. Glover*,[6] (2) determining sua

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

sponte that his successive motion was barred by the 1-year limitations period without giving Torres notice and an opportunity to be heard, and (3) determining his successive motion failed to allege sufficient facts to support claims under *Hurst* and *Johnson*.

Torres also assigns that this court committed plain error when it determined, in an earlier opinion resolving his direct appeal, that Torres' convictions for kidnapping, robbery, and two weapons charges satisfied the first prong of the aggravator in Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 2008).[7]

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.[8]

[2] 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.[9]

ANALYSIS

As a threshold matter, we observe that Torres does not assign error to the district court's finding that his successive motion is time barred under § 29-3001(4)(d). Nor does Torres argue that his successive motion is actually timely under any of the subsections in § 29-3001(4). Instead, he primarily challenges the procedure followed by the district court when it reviewed and dismissed sua sponte his successive postconviction motion.

Before we address his procedural arguments, our de novo standard of review requires that we determine whether the files and records affirmatively show Torres is entitled to no relief

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[7] See *Torres, supra* note 1.

[8] *State v. Johnson*, 298 Neb. 491, 904 N.W.2d 714 (2017).

[9] *State v. Epp*, 299 Neb. 703, 910 N.W.2d 91 (2018).

on his successive postconviction motion.[10] That necessarily requires us to determine whether the district court correctly concluded his successive motion is time barred.[11]

Motion Is Time Barred

The Nebraska Postconviction Act contains a 1-year time limit for filing verified motions.[12] Generally speaking, that 1-year period runs from one of four triggering events or from August 27, 2011, whichever is later.[13] Summarized, those triggering events are: (a) the date the judgment of conviction became final,[14] (b) the date the factual predicate of the alleged constitutional claim could have been discovered through due diligence,[15] (c) the date an impediment created by state action was removed,[16] or (d) the date on which a new constitutional claim was recognized by either the Supreme Court of the United States or the Nebraska Supreme Court.[17]

In *State in Harrison*,[18] we looked to the allegations of the verified postconviction motion and the files and records of the case to determine which of the triggering events applied to our determination of timeliness under § 29-3001(4). We follow the same procedure here, and conclude none of the triggering events apply to make Torres' successive motion timely.

Torres' convictions became final on February 3, 2012,[19] and he filed his successive motion on June 14, 2017. His successive motion is not timely under § 29-3001(4)(a), because it was

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[10] See *Johnson, supra* note 8.

[11] See *State v. Harrison*, 293 Neb. 1000, 881 N.W.2d 860 (2016).

[12] See § 29-3001(4).

[13] See *Harrison, supra* note 11 (citing § 29-3001(4)).

[14] § 29-3001(4)(a).

[15] § 29-3001(4)(b).

[16] § 29-3001(4)(c).

[17] § 29-3001(4)(d).

[18] *Harrison, supra* note 11.

[19] See *Torres, supra* note 1.

filed more than 1 year after his conviction became final. His successive motion is not timely under § 29-3001(4)(b), because the factual predicates for the claims he asserts occurred during his trial and are found in the trial record. The triggering event in § 29-3001(4)(c) does not apply, because Torres has not alleged any facts suggesting the State created an impediment that prevented him from filing his postconviction motion.[20] Torres' successive motion is not timely under § 29-3001(4)(d), because he filed his motion more than 1 year after the release of the opinions in *Hurst* and *Johnson*—the U.S. Supreme Court cases that Torres contends announced a "newly recognized right." And finally, Torres' successive motion is not timely under § 29-3001(4)(e), because it was filed more than 1 year after the default date of August 27, 2011.

We thus conclude on de novo review that the verified motion and the files and records affirmatively show that Torres' successive postconviction motion is barred by the 1-year limitations period of § 29-3001(4). Having concluded the district court was correct that the successive motion is time barred, we proceed to address Torres' arguments that the district court erred in the procedure it followed.

Identification of Files and Records Was Adequate

Torres argues the district court violated *State v. Glover*,[21] because it did not hold a records hearing or otherwise identify the files and records on which it relied in denying postconviction relief without an evidentiary hearing. He asks that we reverse the order and remand the matter with directions to comply with *Glover*.

In *Glover*, the defendant filed a motion for postconviction relief alleging ineffective assistance of counsel. The State filed a motion asking the court to deny relief without conducting an

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[20] See, *Amaya, supra* note 5; *Harrison, supra* note 11.

[21] *Glover, supra* note 6.

evidentiary hearing. The postconviction court held a hearing on the State's motion. At that hearing, it received a copy of trial counsel's deposition which had been taken after the postconviction motion was filed. The court then relied on the deposition to conclude the files and records affirmatively showed the defendant was not entitled to relief.

The defendant in *Glover* appealed, and we disapproved of the procedure used by the district court. We explained that the "files and records of the case"[22] upon which a postconviction court should rely in denying an evidentiary hearing are the files and records existing before the postconviction motion is filed.[23] We recognized that a district court has discretion to adopt reasonable procedures for determining which files and records to review, but we stated that if the relevant case records and files are not received at a formal "records" hearing, the court should certify and include in the transcript the files and records it considered in denying relief.[24] We have since explained that the "obvious" reason for the *Glover* procedure is to facilitate appellate review.[25]

Torres argues the district court erred because it did not hold a formal records hearing or certify the files and records it considered in denying postconviction relief. We find no error in the procedure followed here.

The district court's order made express findings regarding the history of Torres' case and based those findings on its "review of the files and records" in this case. The court's order made specific findings regarding: (1) the date of Torres' convictions, (2) the date his direct appeal became final, (3) the date he filed his prior postconviction motion and the date on which the denial of that motion was affirmed by this court, (4) the date he filed his successive postconviction motion, and (5)

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[22] § 29-3001(2).

[23] *Glover, supra* note 6, 276 Neb. at 628, 756 N.W.2d at 162.

[24] *Id.*

[25] *State v. Lee*, 282 Neb. 652, 665, 807 N.W.2d 96, 107 (2011).

the dates both *Hurst* and *Johnson* were decided by the U.S. Supreme Court.

It was plainly evident from the court's order which files and records it relied upon, and all such records existed before the successive motion was filed and are contained in the transcript. We find no merit to Torres' first assignment of error, and there is no need to remand this matter for a formal records hearing under *Glover*.

Sua Sponte Consideration of Statute of Limitations

Next, Torres argues the sua sponte procedure utilized by the postconviction court did not afford him sufficient notice or opportunity to be heard on the question of whether his successive postconviction motion was time barred. He asks us to either overrule or modify our recent decision in *State v. Amaya*,[26] which expressly authorized such sua sponte review.

In *Amaya*, we held a postconviction court could, but was not required to, raise the statute of limitations issue sua sponte as part of its preliminary review under § 29-3001(2).[27] The successive postconviction motion at issue in *Amaya* expressly acknowledged the 1-year limitations period of § 29-3001(4), but affirmatively alleged it was "not time barred"[28] for two reasons: (1) because the limitations period could not be retroactively applied to the inmate and (2) because an impediment created by state action prevented the inmate from filing sooner.[29] The district court found no merit to either allegation, and denied relief without an evidentiary hearing after finding the motion was time barred.

[3] On appeal, we affirmed the procedure followed by the district court. We acknowledged our prior holding that the

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[26] *Amaya, supra* note 5.

[27] *Id.*

[28] *Id.* at 72, 902 N.W.2d at 678.

[29] *Amaya, supra* note 5. See § 29-3001(4)(c).

statute of limitations under § 29-3001(4) is an affirmative defense and not a jurisdictional requirement,[30] so a district court is under no obligation to raise a time bar sua sponte. But we held that a postconviction court is permitted to raise a time bar as part of its preliminary review, and we announced the following rule:

> [I]f, as part of its preliminary review, the trial court finds the postconviction motion affirmatively shows—either on its face or in combination with the files and records before the court—that it is time barred under § 29-3001(4), the court is permitted, but not obliged, to sua sponte consider and rule upon the timeliness of the motion.[31]

Torres notes that in *Amaya*, this court found "'instructive'"[32] the U.S. Supreme Court's reasoning in *Day v. McDonough*.[33] And although Torres concedes that the federal procedural requirements imposed in *Day* are not binding in Nebraska postconviction proceedings, he nevertheless urges us to adopt that procedure.

Day involved a federal petition for a writ of habeas corpus. The government's answer had admitted the petition was timely filed, but several months later, the federal court found a mathematical error and concluded the petition was untimely. The court then dismissed the petition as time barred.

The issue in *Day* was whether the court could raise the statute of limitations issue sua sponte after the government had answered the petition. Notably, the parties and the Court generally conceded that the district court could have sua sponte raised the issue of timeliness during its preliminary, pre-answer review.[34] The parties disputed only whether the

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

[31] *Amaya, supra* note 5, 298 Neb. at 77, 902 N.W.2d at 681. See § 29-3001(2).

[32] Brief for appellant at 17.

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

[34] *Id.*

court lost that authority once the government had answered the petition and admitted timeliness.

The statute of limitations for federal habeas cases is similar to the statute of limitations in § 29-3001(4).[35] And like § 29-3001(4), the federal habeas limitations period is considered a nonjurisdictional, affirmative defense that can be waived by the government.[36] The U.S. Supreme Court in *Day* suggested it would generally be an abuse of discretion for a trial court to override a State's deliberate waiver of the limitations defense, but it nevertheless concluded the government's mathematical error had not amounted to a deliberate waiver. *Day* ultimately held that "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition."[37] The Court reasoned that it made "scant sense" to distinguish the statutory time bar from other "threshold constraints" federal district courts are routinely permitted to address sua sponte in habeas actions, including failure to exhaust state remedies, procedural bars, and nonretroactivity.[38]

Torres emphasizes that while *Day* permitted sua sponte consideration of limitations issues, it also imposed a specific procedure on federal courts undertaking such consideration:

> [B]efore acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions. . . . Further, the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and "determine whether the interests of justice would be better served" by addressing the merits or by dismissing the petition as time barred.[39]

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[35] Compare § 29-3001(4), with 28 U.S.C. § 2244(d)(1) (2012).

[36] *Day, supra* note 33.

[37] *Id.*, 547 U.S. at 209.

[38] *Id.*

[39] *Id.*, 547 U.S. at 210 (citations omitted).

Torres urges us to either overrule *Amaya* altogether and preclude district courts from raising timeliness sua sponte, or modify *Amaya* by requiring district courts to follow the federal habeas procedure set out in *Day*. We decline both invitations.

In *Amaya*, we recognized that the plain language of § 29-3001 both authorizes and requires a district court to conduct a preliminary review of a postconviction motion to determine whether "'the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief.'"[40] And we adhere to our holding that if, as part of its preliminary review, the district court finds the postconviction motion affirmatively shows—either on its face or in combination with the files and records before the court—that it is time barred under § 29-3001(4), the court is permitted, but not obliged, to sua sponte consider and rule upon the timeliness of the motion.[41]

In connection with such review, we are not persuaded it is necessary to endorse or require any particular procedure for a district court to follow. Instead, we leave such procedural matters to the discretion of the district court.

[4] We have long recognized that a district court has discretion to adopt reasonable procedures for determining what the postconviction motion and the files and records show, and whether the defendant has raised any substantial issues, before granting a full evidentiary hearing.[42] District courts also have discretion to adopt reasonable procedures for determining whether to rule sua sponte on the timeliness of a postconviction motion, and that necessarily includes discretion to provide the parties an opportunity to present their positions before acting sua sponte to dismiss a postconviction motion as time

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[40] *Amaya, supra* note 5, 298 Neb. at 76, 902 N.W.2d at 680 (quoting § 29-3001(2)).

[41] *Amaya, supra* note 5.

[42] See, e.g., *Lee, supra* note 25; *Glover, supra* note 6; *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

barred. An appellate court will examine such procedures for an abuse of discretion, which exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[43]

We find no abuse of discretion in the procedure followed by the district court in this case. Torres presents no argument that his successive motion was timely filed under any subsection of § 29-3001(4), and he points to nothing he might have argued or offered, if provided such an opportunity, that would have changed the court's conclusion his claim was time barred. Under these circumstances, we cannot find the procedure followed by the district court unfairly deprived Torres of a substantial right or a just result, and thus we find no abuse of discretion.

District Court Did Not Reach Merits of Torres' Claims Under *Hurst* and *Johnson*

Torres assigns that the district court erred in finding his successive motion failed to allege sufficient factual allegations to support his postconviction claims under *Hurst* and *Johnson*. This assignment misconstrues the nature of the dismissal in this case.

The postconviction court did not rule on the merits of Torres' postconviction claims under *Hurst* and *Johnson*, because it never reached the merits. Instead, the court dismissed the successive postconviction motion as time barred. Because of this, the district court did not address the sufficiency of the factual allegations under *Hurst* and *Johnson,* and this assignment of error lacks merit.

Plain Error

In Torres' final assignment of error, he asserts this court committed plain error when it determined, in his direct appeal,

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[43] *Lee, supra* note 25.

that his convictions for kidnapping, robbery, and weapons charges satisfied the first prong of the aggravator under § 29-2523(1)(a).[44] He asks this court to recognize the plain error and remand the matter for resentencing.

[5] The State argues, correctly, that Torres did not allege this claim in his successive motion for postconviction relief. We have held that an appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.[45] We adhere to this proposition of law and express no opinion on how Torres might properly present such a claim.

[6,7] And although an appellate court always reserves the right to note plain error that was not complained of at trial or on appeal,[46] we decline to exercise that right in this instance. Plain error may be found on appeal when an error, 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.[47] But the error about which Torres complains was dicta expressed in an alternative holding, and thus could not prejudicially affect his substantial right or result in damage to the integrity, reputation, and fairness of the judicial process.[48]

CONCLUSION

For the foregoing reasons, we affirm the district court's order dismissing Torres' successive postconviction motion as time barred.

Affirmed.

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[44] See *Torres, supra* note 1.

[45] *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015); *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010).

[46] *State v. Kantaras*, 294 Neb. 960, 885 N.W.2d 558 (2016).

[47] *Id.*

[48] See *id*.

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

Shelley R. Gimple, appellee and cross-appellant, v. Student Transportation of America and National Interstate Ins. Co., appellants and cross-appellees.

915 N.W.2d 606

Filed August 3, 2018. No. S-17-985.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. **Workers' Compensation: Subrogation.** Neb. Rev. Stat. § 48-118 (Reissue 2010) grants an employer who has paid workers' compensation benefits to an employee injured as a result of the actions of a third party a subrogation interest against payments made by the third party.
4. **Workers' Compensation: Statutes: Appeal and Error.** In workers' compensation cases, appellate courts give statutory language its plain and ordinary meaning.
5. **Words and Phrases.** The plain and ordinary meaning of "any" is "all" or "every."
6. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
7. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact made by the

> Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Affirmed in part, and in part reversed and remanded with directions.

Abigail A. Wenninghoff and Jocelyn J. Brasher, of Larson, Kuper & Wenninghoff, P.C., L.L.O., for appellants.

Caroline M. Westerhold and Zachary W. Anderson, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Vaughan, District Judge.

Papik, J.

A vehicle driven by a drunk driver struck the school bus Shelly R. Gimple was driving and injured her. For a time, Gimple's employer, Student Transportation of America (Student Transportation), paid workers' compensation benefits to Gimple. When Gimple later asserted that she was permanently disabled as a result of her injuries and Student Transportation refused to pay benefits to which Gimple claimed she was entitled, Gimple brought suit in the Workers' Compensation Court. The compensation court found that Gimple was entitled to additional benefits and that it did not have jurisdiction to grant relief requested by Student Transportation concerning a settlement Gimple entered into with the driver who caused her injuries. The compensation court denied Gimple's request that she be awarded penalties, attorney fees, and interest because of Student Transportation's failure to pay the benefits she requested.

The parties have now appealed and cross-appealed. We affirm the compensation court's findings that Gimple was entitled to benefits and that it did not have jurisdiction to resolve

issues regarding the third-party settlement, but we reverse its determination that Gimple was not entitled to penalties, attorney fees, and interest.

BACKGROUND

Gimple's Claim for Benefits.

On April 22, 2014, a vehicle driven by a drunk driver struck the school bus Gimple was driving for Student Transportation. After being taken by ambulance to a hospital, doctors diagnosed her with a left distal radius intra-articular fracture dislocation. Gimple underwent multiple surgeries and treatments over the next few years as a result of her injury.

While Student Transportation initially paid some workers' compensation benefits to Gimple as she incurred medical costs, a dispute eventually arose between the parties as to whether Gimple was entitled to additional benefits. Gimple claimed that she was permanently disabled as a result of her injuries and was entitled to permanent partial disability benefits (PPD benefits). After Student Transportation refused to pay such benefits, Gimple filed an action in the compensation court against Student Transportation and its workers' compensation insurer.

Student Transportation admitted that Gimple suffered an injury arising out of and in the scope of her employment, but denied the remainder of the allegations. Student Transportation also alleged that Gimple had failed to comply with the Nebraska Workers' Compensation Act by settling a claim against the third party who injured her for $25,000 without providing notice or reimbursement to Student Transportation. Student Transportation requested that the compensation court declare either that the settlement was void or that Student Transportation was entitled to a credit against past and future workers' compensation benefits because of Gimple's receipt of the settlement funds.

The compensation court conducted a trial. Importantly for purposes of this appeal, the parties stipulated that Gimple

suffered an injury arising out of and in the course and scope of her employment, that the past medical treatment Gimple received was reasonable and necessary, and that Gimple suffered a single scheduled member injury to her left upper extremity. In addition, both parties presented evidence. Among the evidence introduced by Gimple was a letter containing an opinion as to Gimple's permanent impairment from Dr. Ian Crabb, an orthopedic doctor who had treated Gimple. In his letter, Dr. Crabb opined on the extent of Gimple's permanent impairment as a result of the injury.

Initial Award.

The compensation court issued its initial award on August 23, 2017. In the initial award, the compensation court determined that Gimple was entitled to some temporary total disability benefits, but was not entitled to PPD benefits. The compensation court's stated reason for not awarding PPD benefits was that Gimple failed to offer evidence of permanent impairment. Despite the parties' stipulation that the injury was to her left arm, the compensation court found that the injury was actually to Gimple's left wrist and that Gimple failed to offer evidence of permanent impairment to her wrist.

The compensation court also found it was without jurisdiction to grant the relief Student Transportation sought with respect to the third-party settlement. It relied on *Miller v. M.F.S. York/Stormor*, 257 Neb. 100, 595 N.W.2d 878 (1999), in which this court held that the compensation court did not have jurisdiction to determine the amount of credit to which an employer was entitled on an employee's workers' compensation benefits as a result of the previous settlement of a suit against a third party.

Modified Award.

Gimple later filed a motion to modify the initial award. She asserted that the compensation court erred in rejecting the parties' stipulation that her injury was to her left arm, because the

parties had relied upon that stipulation when presenting evidence and defining the issues for the court to decide. She sought modification of the compensation court's award to accept the parties' stipulation and award PPD benefits in accordance with Dr. Crabb's medical opinion that she suffered a 13-percent permanent partial impairment to her left upper extremity. She further sought penalties, attorney fees, and interest for Student Transportation's nonpayment of those benefits.

Following a hearing on the motion to modify, the compensation court sustained Gimple's motion and issued a modified award finding that Gimple was entitled to PPD benefits in the amount of $12,721.70. It found that it had erred in rejecting the parties' stipulation that Gimple injured her left arm. It noted that both parties tried the case based upon the stipulation that Gimple injured her left arm and that there was no good cause to reject that stipulation. In reliance on the report of Dr. Crabb, the compensation court found that Gimple's left arm was permanently and partially disabled. Although the last sentence of Dr. Crabb's report assigned the impairment rating to Gimple's right arm, the compensation court found that to be a scrivener's error. Finally, the compensation court denied Gimple's request for penalties, attorney fees, and interest for Student Transportation's nonpayment of PPD benefits. It found that there was a reasonable controversy in light of "the 'hand vs. arm' PPD [benefits] debate" and the scrivener's error in Dr. Crabb's report.

ASSIGNMENTS OF ERROR

On appeal, Student Transportation assigns that the compensation court erred (1) in finding that it lacked jurisdiction to determine the issues regarding the third-party settlement and (2) in finding that Gimple was entitled to PPD benefits for an impairment to her left upper extremity.

On cross-appeal, Gimple assigns that the compensation court erred in failing to award penalties, attorney fees, and interest for Student Transportation's nonpayment of PPD benefits.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Greenwood v. J.J. Hooligan's*, 297 Neb. 435, 899 N.W.2d 905 (2017). Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence. *Id.*

ANALYSIS

Jurisdiction to Resolve Dispute Regarding Third-Party Settlement.

We begin with Student Transportation's contention that the compensation court incorrectly concluded it lacked jurisdiction to resolve disputes related to Gimple's settlement with the third party who caused her injuries. For reasons we will explain below, we conclude that the compensation court did not have jurisdiction to decide these issues and that, therefore, neither does this court.

Student Transportation argues the compensation court should have found that the settlement was void because Gimple did not comply with statutory requirements governing third-party settlements or, alternatively, that Student Transportation was entitled to a credit with respect to its obligations to Gimple. Student Transportation contends that the compensation court has authority to resolve these issues by virtue of Neb. Rev. Stat. §§ 48-152 and 48-161 (Reissue 2010), two general jurisdictional statutes that authorize the Workers' Compensation Court to administer the Nebraska Workers' Compensation Act and to decide issues "ancillary to the resolution of an employee's right

to workers' compensation benefits." But a different provision of the Nebraska Workers' Compensation Act speaks directly to the issues Student Transportation sought to raise, and so our analysis must start there.

[3] Neb. Rev. Stat. § 48-118 (Reissue 2010) grants an employer who has paid workers' compensation benefits to an employee injured as a result of the actions of a third party a subrogation interest against payments made by the third party. *Kroemer v. Omaha Track Equip.*, 296 Neb. 972, 898 N.W.2d 661 (2017). The next section, Neb. Rev. Stat. § 48-118.01 (Reissue 2010), discusses claims or suits the injured employee or subrogated employer might pursue against third parties. That section requires that the employer and employee, before making such a claim or bringing such a suit, provide notice to the other of the opportunity to join in such claim or action. Section 48-118.01 goes on to provide as follows:

> Each party shall have an equal voice in the claim and the prosecution of such suit, and *any dispute arising shall be passed upon by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought.*

(Emphasis supplied.)

We have previously found the above-quoted language controlling when a party sought a credit against benefits it owed as a result of the employee's receiving funds in settlement of a claim against a third party. In *Miller v. M.F.S. York/Stormor*, 257 Neb. 100, 595 N.W.2d 878 (1999), an employee was injured when the safety equipment on machinery he was repairing failed. The corporation alleged to have installed the safety equipment agreed to settle a personal injury suit against it. The federal district court in which the suit was brought subsequently allocated the settlement between the injured employee and the subrogated employer. The federal court did not, however, address the amount of credit to which the employer would be entitled for any disability benefits accruing thereafter.

When the employee in *Miller* later sought additional workers' compensation benefits, the compensation court found it lacked authority to determine the credit to which the employer was entitled. On appeal to this court, we agreed. We determined that the language of what is now § 48-118.01 quoted above precluded the compensation court from determining the amount of any credit, because the compensation court was neither, in the words of § 48-118.01, "the court before which the case [against the third party] is pending" nor "the district court in which such action could be brought."

Faced with our holding in *Miller* that the compensation court does not have jurisdiction to determine the amount of credit to which an employer is entitled when an employee receives settlement funds from a third party, Student Transportation attempts, in various ways, to distinguish the relief it is seeking from the relief sought in *Miller*. It contends that *Miller* held only that the compensation court cannot determine the *amount* of a credit, but that it asked the compensation court only to find an *entitlement* to a credit. It also contends that it asked the compensation court to find the settlement was void and that *Miller* did not determine whether the compensation court could reach that question.

[4,5] We find Student Transportation's attempts to distinguish *Miller* unpersuasive. The specific issue we decided in *Miller* was whether the compensation court could determine the amount of a credit, but, in concluding that it could not, we relied upon statutory language that is not limited to disputes regarding the amount of a credit. Rather, § 48-118.01 provides that "any dispute" between employer and employee concerning a claim or suit against a third party must be brought in the district court in which an action against a third party is pending or the district court in which such action could be brought. We give statutory language its plain and ordinary meaning. See, e.g., *Interiano-Lopez v. Tyson Fresh Meats*, 294 Neb. 586, 883 N.W.2d 676 (2016). The plain and ordinary meaning of "any" is "all" or "every." See, e.g., *In re Interest of Powers*, 242 Neb.

19, 493 N.W.2d 166 (1992). Section 48-118.01 thus applies to *every* possible dispute that might arise between a subrogated employer and an injured employee regarding a claim against a third party, including the issues Student Transportation attempts to raise in this case.

Disputes governed by § 48-118.01 must be decided by the "court before which the case [against the third party] is pending and if no action is pending then by the district court in which such action could be brought." Because there is no action pending against the driver who injured Gimple, Student Transportation's contentions regarding the third-party settlement must be presented to "the district court in which such action could be brought." And since an action against the third party who injured Gimple could not have been brought in the compensation court, the compensation court correctly concluded it did not have authority to grant the relief Student Transportation requested regarding the third-party settlement.

PPD Benefits.

We now turn to the parties' remaining assignments of error, which are related and which we will address together. Both parties argue that the compensation court erred in its disposition of Gimple's claim for PPD benefits. Student Transportation contends that the compensation court erred by finding that Gimple was entitled to such benefits, and Gimple claims that the compensation court erred by not finding that she was entitled to penalties, attorney fees, and interest for Student Transportation's failure to pay them. We conclude that the compensation court correctly found that Gimple was entitled to PPD benefits, but erred by denying her penalties, attorney fees, and interest.

Student Transportation correctly points out that before PPD benefits can be awarded, the workers' compensation claimant must prove not only that he or she suffered an injury arising out of and in the scope of his or employment, but also that his or her injury caused permanent impairment. See *Gardner*

v. International Paper Destr. & Recycl., 291 Neb. 415, 865 N.W.2d 371 (2015). Student Transportation does not dispute that Gimple was injured: it acknowledges the parties' stipulation that Gimple suffered an injury to her left upper extremity and disavows any argument that the stipulation should not be given effect. Rather, Student Transportation argues that Gimple introduced no evidence that she was permanently disabled as a result of the injury to which the parties stipulated.

Gimple counters that the letter of Dr. Crabb mentioned above contains a medical opinion that Gimple was permanently impaired. Dr. Crabb's letter states in relevant part:

> [Gimple's] current diagnosis is status post *left* distal radius fracture with open reduction and internal fixation accompanied by carpal instability. This condition is certainly related to her previous work accident dated April 22, 2014. . . . Gimple has reached Maximum Medical Improvement as of November 3, 2015. She has been released to full duty and has no permanent restrictions.
>
> . . . Gimple has suffered a permanent partial impairment rating related to her injury. Based off her limitations in motion, she receives nine percent (9%) of the upper extremity and due to additional unpredicted mechanical symptoms she receives an additional four percent (4%) of the upper extremity. This results in a total of thirteen percent (13%) permanent partial impairment rating of the *right* upper extremity.

(Emphasis supplied.)

Student Transportation cannot and does not dispute that Dr. Crabb's letter expresses an opinion that Gimple suffered permanent impairment. Instead, it claims that Dr. Crabb's letter cannot support an award of PPD benefits, because he refers to Gimple's *right* arm being impaired despite there being no evidence of an injury to her right arm. In other words, Student Transportation seems to argue that Gimple was incorrectly awarded PPD benefits because of a mismatch between the injury and the evidence of impairment—the parties stipulated

to a left arm injury, but Gimple presented evidence of right arm impairment.

Student Transportation's argument might present a problem for Gimple if we were obligated to look at bits and pieces of Dr. Crabb's letter in isolation. It does, after all, refer to an impairment rating to Gimple's right arm. But, as with any medical opinion, we must view that reference in the context of the expert's entire statement. See *Renne v. Moser*, 241 Neb. 623, 490 N.W.2d 193 (1992).

Viewed in context, it is obvious to us that it was Dr. Crabb's intention to assign a 13-percent impairment rating of the *left* arm and that his reference to the right arm was a scrivener's error. Dr. Crabb initially refers to Gimple's injury as an injury to her left arm. When he later discusses his impairment rating, he refers to "her injury," an unmistakable reference to the injury to the left side mentioned earlier. Furthermore, all of the evidence in the record of Gimple's injury depicts an injury on the left side of her body, and Student Transportation stipulated to an injury to the left upper extremity. Given these facts, it would seem that everyone involved understood that Dr. Crabb had merely made a mistake by referencing the right arm. At oral argument, Student Transportation's counsel conceded as much, admitting that she knew at the time that Dr. Crabb's reference to the right arm was nothing more than a mistake.

[6,7] Because we find that Dr. Crabb's letter, when viewed in context, expressed an opinion that Gimple's left arm was permanently impaired as a result of her injury, Student Transportation's challenge to the award of PPD benefits must fail. Findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Hintz v. Farmers Co-op Assn.*, 297 Neb. 903, 902 N.W.2d 131 (2017). When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable

to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Id.* Given the medical evidence supporting Gimple's permanent impairment, we cannot say that the compensation court clearly erred by awarding PPD benefits.

This leaves only the question of whether Gimple should have received penalties, attorney fees, and interest as a result of Student Transportation's failure to pay PPD benefits. Under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2016), an employee is entitled to a 50-percent waiting-time penalty as well as attorney fees and interest if (1) the employer fails to pay compensation within 30 days of the employee's notice of disability and (2) no reasonable controversy existed regarding the employee's claim for benefits. See *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015).

Because Student Transportation did not pay Gimple PPD benefits within 30 days of Gimple's providing notice of her disability, she is entitled to penalties, attorney fees, and interest if there was no reasonable controversy regarding her entitlement to benefits. We have said that a reasonable controversy exists if (1) there is a question of law previously unanswered by the Nebraska Supreme Court, which question must be answered to determine a right or liability for disposition of a claim, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court about an aspect of an employee's claim and those conclusions would affect allowance or rejection of an employee's claim, in whole or in part. See *id.*

In affirming the compensation court's award of PPD benefits, we have already determined that there was sufficient medical evidence to justify awarding PPD benefits. In order to determine whether there was a reasonable controversy, we must now revisit that same issue, this time to determine whether the evidence was so one-sided that the only reasonable conclusion that could be drawn therefrom was that Gimple was entitled to such benefits.

It is here that we diverge from the compensation court for the first time. It stated that a reasonable controversy existed "in light of the 'hand vs. arm' PPD [benefits] debate and by virtue of Dr. Crabb's report in which he ostensibly assigned permanent impairment to [Gimple's] right arm rather than her left." We do not believe either of the issues mentioned by the compensation court creates a reasonable controversy as to Gimple's entitlement to PPD benefits.

The compensation court's reference to the "hand vs. arm" debate presumably refers to the compensation court's having some question as to whether the injury was actually to Gimple's arm and not her wrist. It was this issue that caused the compensation court to initially reject the parties' stipulation and deny Gimple PPD benefits. This court has said, however, that voluntary stipulations are to be enforced "'unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo.'" *In re Estate of Mithofer*, 243 Neb. 722, 727, 502 N.W.2d 454, 457-58 (1993), quoting *Martin v. Martin*, 188 Neb. 393, 197 N.W.2d 388 (1972). Student Transportation presents no argument that there was good cause for rejecting the parties' stipulation, and we cannot discern any in the record. Because we do not see a basis to reject the stipulation of a left arm injury, we find that the issue did not amount to a reasonable controversy as to whether Gimple was entitled to PPD benefits.

Neither do we believe that Dr. Crabb's scrivener's error created a reasonable controversy. For all the reasons explained above, we find that despite the mistaken reference to Gimple's right arm, it was quite clear from the context that it was Dr. Crabb's intention to assign an impairment rating to Gimple's left arm. As evidenced by the concession of Student Transportation's counsel at oral argument, this was not a case in which a scrivener's error led to confusion as to the substance of the testimony. Everyone involved knew the reference to the right arm was just a mistake. Under those circumstances,

we do not believe the scrivener's error created a reasonable controversy.

Having set to the side the grounds upon which the compensation court found a reasonable controversy existed, we are left with a stipulation that Gimple injured her left arm and an undisputed medical opinion that she was permanently disabled as a result of that injury. In light of these facts, we do not believe there was a reasonable controversy as to whether Gimple was entitled to PPD benefits.

We are aware that whether a reasonable controversy exists under § 48-125 is a question of fact and that we will reverse the factual findings of the Workers' Compensation Court only if we find them to be clearly wrong. See *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015). In this case, however, we find that the compensation court was clearly wrong. We therefore reverse the court's finding that a reasonable controversy existed and remand this matter with directions to award Gimple relief in accordance with § 48-125 and consistent with this opinion.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the compensation court in part, and in part reverse, and remand the matter with directions to award Gimple relief in accordance with § 48-125 and consistent 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

Bloedorn Lumber Company of North Platte, a Nebraska corporation, appellee, v. Jarrod M. Nielson, appellee, and David A. Schilke and Candace Schilke, appellants.

915 N.W.2d 786

Filed August 10, 2018. No. S-16-329.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Contracts: Restitution.** Any quasi-contract claim for restitution is an action at law.
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 will not be disturbed on appeal unless clearly wrong.
4. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
5. **Venue: Appeal and Error.** Where the record does not show an abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal.
6. **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.
7. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
8. **Judgments: Final Orders: Words and Phrases.** A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant.

9. **Contracts: Unjust Enrichment: Quantum Meruit.** A claim that a court should imply a promise or obligation to prevent unjust enrichment goes by a number of names—"quasi-contract," "implied-in-law contract," or "quantum meruit."
10. **Contracts.** An express contract claim will supersede a quasi-contract claim arising out of the same transaction to the extent that the contract covers the subject matter underlying the requested relief.
11. **Contracts: Liens.** A party may pursue and recover on an unjust enrichment or a quasi-contract claim, notwithstanding a construction lien.
12. **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.

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

Patrick M. Heng and Kortnei N. Hoeft, of Waite, McWha & Heng, for appellants.

George E. Clough, and, on brief, Andrea Finegan McChesney, of McChesney & Farrell, for appellee Bloedorn Lumber Company of North Platte.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Daugherty, District Judge.

Papik, J.

Jarrod M. Nielson alleged that David A. Schilke and Candace Schilke failed to pay him for work he performed on their residence. Following a bench trial, the district court entered judgment in favor of Nielson and against the Schilkes. The Schilkes raise various assignments of error regarding that judgment on appeal, but we find no merit to those assignments of error and, consequently, affirm the judgment of the district court.

BACKGROUND

Project.

This dispute arises out of a home improvement project. In 2013 and 2014, Nielson worked on an addition to the

Schilkes' home. The project included the installation of granite countertops. Nielson obtained the countertops and accompanying materials from Bloedorn Lumber Company of North Platte (Bloedorn).

After the countertops were installed in May 2014, Nielson stopped working on the Schilkes' home. The parties dispute the reason Nielson stopped working. The Schilkes say they fired Nielson because they were unhappy with his work. In particular, Candace Schilke testified that the countertops Nielson had installed contained a type of sink other than the one she requested and had seams that were "sticking up and out." Nielson says he stopped working because he was not being paid.

Both Nielson and Bloedorn eventually filed construction liens on the Schilkes' home. Neither Nielson nor Bloedorn instituted legal proceedings to enforce the liens.

Parties' Claims.

In February 2015, Bloedorn filed a complaint against Nielson and the Schilkes in the district court for Lincoln County. Bloedorn alleged that Nielson had ordered and received the countertops and accompanying materials from Bloedorn for installation in the Schilkes' home, but had not paid Bloedorn.

Nielson and the Schilkes answered Bloedorn's lawsuit, but also filed cross-claims against each other. Nielson alleged that the parties entered into an oral agreement in which Nielson would build an addition onto the Schilkes' home in exchange for payment and that the Schilkes breached that agreement by failing to pay him for his time and the materials. Nielson also alleged that the Schilkes had been unjustly enriched as a result of the countertops' being installed without payment. The Schilkes alleged that they contracted with Nielson to complete construction work on their residence and that they had paid Nielson all he was owed, but that Nielson had failed to pay Bloedorn for the construction materials. On the basis of these facts, the Schilkes asserted that Nielson was liable to them for fraud and unjust enrichment.

Motion to Transfer Venue.

Early in the case, the Schilkes filed a motion to transfer venue from the district court for Lincoln County to the district court for Chase County. They argued that transfer was appropriate because their residence is in Chase County. The district court overruled the motion, finding that venue was present in Lincoln County on the basis of Nielson's residence there. It added that any inconvenience suffered by the Schilkes was offset by the inconvenience Nielson and Bloedorn would endure if the case were transferred to Chase County.

District Court's Resolution of Parties' Claims.

A bench trial was held in January 2016. Bloedorn presented evidence that it provided Nielson with the countertops and accompanying materials for installation in the Schilkes' residence. Nielson testified that the Schilkes were to pay him for the cost of materials plus a markup. Nielson acknowledged his debt to Bloedorn for the countertops and accompanying materials. The testimony conflicted, however, as to whether the Schilkes had paid Nielson for the installation of the countertops. Candace Schilke testified that she paid Nielson for the installation of the countertops via a $30,000 check before they were installed. Nielson disagreed, taking the position that the $30,000 check was in payment for other work and materials.

After the trial, the district court issued a judgment, styled as a journal entry and order, disposing of the parties' various claims. With respect to Bloedorn's claim against Nielson, the court entered judgment in favor of Bloedorn in the amount of $11,551.89 (the cost of the countertops and accompanying materials), plus statutory interest. The court dismissed Bloedorn's claim against the Schilkes, explaining that there was no agreement between the Schilkes and Bloedorn which would support a breach of contract claim and that the Schilkes were not unjustly enriched at Bloedorn's expense. The district

court also dismissed the Schilkes' cross-claim against Nielson on the grounds that Nielson was not unjustly enriched and that there was no evidence Nielson had committed actual or constructive fraud.

Finally, the district court found that Nielson's claim against the Schilkes "ha[d] merit." It explained that Nielson installed the countertops in the Schilkes' residence and that Candace Schilke admitted that the countertops increased the value of the residence. The court added that while the Schilkes had complaints about the quality of Nielson's work, no evidence had been introduced as to the cost of remedying alleged defects or that the defects decreased the value of the home. The district court awarded Nielson $11,551.89, which the court found was the "fair and reasonable amount that the Schilkes have been unjustly enriched." The district court made no reference to Nielson's allegation that the Schilkes breached their agreement with him.

The Schilkes later filed a motion for a new trial. The district court overruled the motion, and the Schilkes appealed.

ASSIGNMENTS OF ERROR

The Schilkes assign, consolidated and reordered, that the district court erred (1) in finding that Nielson was entitled to recover under the theory of unjust enrichment when a contract existed between the parties, (2) in finding that Nielson was entitled to recover under the theory of unjust enrichment when Nielson had a statutory remedy of foreclosure on his construction lien, (3) in finding that Nielson was entitled to recover under the theory of unjust enrichment when the evidence did not show the Schilkes were unjustly enriched, and (4) in denying the motion to transfer venue.

STANDARD OF REVIEW

[1,2] A suit for damages arising from breach of a contract presents an action at law. *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004). The same is true for any

action asserting a quasi-contract claim for restitution. *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

[3,4] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Id.* In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010).

[5] Where the record does not show an abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal. *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998).

ANALYSIS

Appellate Jurisdiction.

[6] 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. *In re Estate of Abbot-Ochsner*, 299 Neb. 596, 910 N.W.2d 504 (2018). While not raised by either of the parties, we stop to address our jurisdiction because, at first blush, it could appear that the district court did not resolve all claims presented. Although Nielson referred to both breach of contract and unjust enrichment in his cross-claim against the Schilkes, the district court made no reference to Nielson's breach of contract theory of recovery.

[7,8] For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken. *Ginger Cove Common Area Co. v. Wiekhorst*, 296 Neb. 416, 893 N.W.2d 467 (2017). A final judgment is one that disposes of the case either by dismissing it before hearing is had upon

the merits, or after trial by rendition of judgment for the plaintiff or defendant. *Boyd v. Cook*, 298 Neb. 819, 906 N.W.2d 31 (2018).

While the district court's judgment did not reference Nielson's allegation that the Schilkes breached their contract with him, it does not automatically follow that the judgment was not final. Nielson's cross-claim asserted two separate theories of recovery—unjust enrichment and breach of contract. Because those theories of recovery are based on the same operative facts, however, Nielson asserted one cause of action. See *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008). The district court awarded judgment in favor of Nielson on his one cause of action against the Schilkes and also resolved all claims raised by other parties in the action. Nothing further was left for the court's consideration. The judgment was thus final and appealable.

Effect of Express Contract on Unjust Enrichment Recovery.

We begin our analysis of the merits of the Schilkes' appeal with their contention that the district court erred by granting Nielsen a recovery on the basis of unjust enrichment when the parties had an express contract covering the same subject matter. As noted above, the district court entered judgment in favor of Nielson on unjust enrichment grounds without explicitly referring to Nielson's allegation that the Schilkes had breached their contract with him.

[9] Before addressing this argument, we pause briefly to review the nature of unjust enrichment claims and their relationship to claims for breach of contract. A claim that a court should imply a promise or obligation to prevent unjust enrichment goes by a number of names—"quasi-contract," "implied-in-law contract," or "quantum meruit." See, *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011); *Associated Wrecking v. Wiekhorst Bros.*, 228 Neb. 764, 424 N.W.2d 343 (1988). Such claims do not arise from

an express or implied agreement between the parties; rather, they are imposed by law "when justice and equity require the defendant to disgorge a benefit that he or she has unjustifiably obtained at the plaintiff's expense." *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. at 857, 809 N.W.2d at 738.

[10] Unjust enrichment or quasi-contract claims are viable only in limited circumstances. For example, as the Schilkes correctly point out, "'[t]he terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach.'" *Id*. at 860, 809 N.W.2d at 740, quoting Restatement (Third) of Restitution and Unjust Enrichment § 2, comment *c*. (2011). Put another way, an express contract claim will supersede a quasi-contract claim arising out of the same transaction to the extent that the contract covers the subject matter underlying the requested relief. See *City of Scottsbluff v. Waste Connections of Neb., supra.*

Although contract claims supersede unjust enrichment or quasi-contract claims, a plaintiff is permitted to allege both. See *Professional Recruiters v. Oliver*, 235 Neb. 508, 456 N.W.2d 103 (1990). When a plaintiff does so, we have said that a court should address the contract claim first. See *City of Scottsbluff v. Waste Connections of Neb., supra*. But if recovery on an express contract theory proves not to be viable, there are circumstances in which recovery may still be had on an unjust enrichment or a quasi-contract basis.

One such circumstance is when a party seeking payment only partially (but not substantially) performs a contract and is thus precluded from a breach of contract recovery. See *RM Campbell Indus. v. Midwest Renewable Energy*, 294 Neb. 326, 886 N.W.2d 240 (2016) (explaining that to successfully bring breach of contract action, plaintiff must establish substantial performance of contract). We have held that if a party only partially performs a contract and the other party has accepted and retained the benefits thereof, the party seeking payment may recover "the reasonable or fair value of such performance, subject to the reciprocal right of the other party to recoup such

damages as he or she has suffered" from the failure to perform. *Id.* at 342, 866 N.W.2d at 255. See, also, *Peters v. Halligan*, 182 Neb. 51, 60, 152 N.W.2d 103, 109 (1967) (characterizing recovery that is available for party who partially performs contract when other party has retained benefits thereof as being on "a quantum meruit basis").

The foregoing discussion is relevant because there is evidence in the record that this very scenario occurred here. Both Nielson and the Schilkes alleged and introduced evidence of an oral agreement that Nielson would have granite countertops installed in exchange for payment, which, according to Nielson, was to include a markup for materials. And while Candace Schilke testified that the countertops had visible seams "sticking up and out" and contained a type of sink other than the one she requested, she also admitted that Nielson had the countertops installed and that they increased the value of the residence.

This evidence would allow the district court to reasonably conclude that Nielson had partially performed the parties' agreement and was thus entitled to receive the reasonable value of the benefits he conferred on the Schilkes. Because we find that the district court's judgment in favor of Nielson on unjust enrichment grounds is supported by the evidence, the Schilkes' assignment of error fails.

Effect of Construction Lien on Unjust Enrichment Recovery.

The Schilkes fare no better with their argument that the trial court erred by awarding Nielson an unjust enrichment recovery when he could have foreclosed on his construction lien. Here, the Schilkes contend that because Nielson had the option to pursue foreclosure of his construction lien, he could not validly recover on an unjust enrichment or a quasi-contract basis. We disagree.

In *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001), it was argued that the Nebraska

Construction Lien Act precluded a construction lienholder from pursuing an action for breach of contract. We rejected the argument, relying on a rule recognized in many other jurisdictions that unless otherwise provided by statute, the remedy for a mechanic's lien and the remedy for the underlying debt may be pursued at the same time or in succession. We pointed out that this rule is consistent with the principle that a statute will not be interpreted to restrict or remove a common-law right unless plainly compelled by the language, because the Nebraska Construction Lien Act does not indicate that it precludes a breach of contract action.

[11] While *Tilt-Up Concrete* held that a party may pursue a breach of contract action notwithstanding a construction lien, its reasoning indicates that a party may also pursue and recover on an unjust enrichment or a quasi-contract claim, notwithstanding a construction lien. The right to an unjust enrichment or a quasi-contract recovery also existed at common law, see Restatement (First) of Contracts § 5, comment *a*. (1932), and the Nebraska Construction Lien Act does not indicate that it was meant to preclude such claims. We thus join other courts that have held that the existence of a construction lien does not preclude an unjust enrichment or a quasi-contract recovery for work or materials covered by the lien. See, e.g., *Brown Sprinkler Corp. v. Somerset-Pulaski*, 335 S.W.3d 455 (Ky. App. 2010); *Morris Pumps v. Centerline Piping*, 273 Mich. App. 187, 729 N.W.2d 898 (2006); *A-Tech Concrete Co. v. West Orange Public Schools*, No. L-6044-05, 2008 WL 4057750 (N.J. Super. Sept. 3, 2008) (unpublished opinion).

Because Nielson's filing of a construction lien does not preclude an unjust enrichment recovery, the Schilkes' assignment of error lacks merit.

Evidence to Support Unjust Enrichment Recovery.

We must also disagree with the Schilkes' contention that Nielson failed to show that the Schilkes had been unjustly

enriched. The Schilkes contend that they were not unjustly enriched for two reasons: because Nielson did not transfer any benefit to them and because they paid Nielson for the countertops.

With respect to the Schilkes' first contention, the evidence shows that Nielson acted as the Schilkes' contractor, arranged for the installation of the countertops, and incurred a debt to Bloedorn for the cost of the countertops. The evidence also shows that the countertops increased the value of the Schilkes' residence. The Schilkes are mistaken that Nielson did not transfer any benefit to them.

With respect to the Schilkes' argument that they paid Nielson for the countertops, the Schilkes point to Candace Schilke's testimony that she intended to pay for the countertops with the $30,000 check referenced above. At most, however, this merely establishes a conflict in the evidence. Nielson testified that he was not paid for the countertops. We must resolve any such conflicts in favor of Nielson and give Nielson every reasonable inference deducible from the evidence. See *Henton v. Nokes*, 258 Neb. 230, 603 N.W.2d 1 (1999). Under this standard, we cannot say that the trial court clearly erred by finding that Nielson was not paid for the countertops.

Motion to Transfer Venue.

This leaves only the Schilkes' assignment that the district court erred in denying their motion to transfer venue to Chase County. We find that it did not.

[12] As noted above, a ruling on a motion to transfer venue will not be disturbed on appeal unless the record shows an abuse of discretion. *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998). 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. *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

Here, the district court overruled the Schilkes' motion to transfer venue on the ground that any inconvenience suffered by the Schilkes by allowing the case to proceed in Lincoln County was offset by the inconvenience that would be caused to Nielson and Bloedorn if the case were transferred to Chase County. We find the court's reasoning sound and certainly not an abuse of discretion.

CONCLUSION

Finding no merit in any of the assignments of error raised by the Schilkes, we affirm.

Affirmed.

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

State of Nebraska, appellee, v. Anthony L. Swindle, appellant.

915 N.W.2d 795

Filed August 10, 2018. No. S-17-761.

1. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
2. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **Judges: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.
5. ____: ____: ____. An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on the sufficiency of a party's foundation for admitting evidence.
6. **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.
7. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
8. **Jury Instructions: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.

9. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
10. **Jury Instructions.** In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
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: Legislature: Intent.** In determining the meaning of statutory language, its ordinary and grammatical construction is to be followed, unless an intent appears to the contrary or unless, by following such construction, the intended effect of the provisions would apparently be impaired.
13. **Sexual Misconduct: Evidence: Proof.** Subject to several exceptions, Neb. Rev. Stat. § 27-412(1) (Reissue 2016) bars evidence offered to prove that any victim engaged in other sexual behavior and evidence offered to prove any victim's sexual predisposition in civil or criminal proceedings involving alleged sexual misconduct.
14. **Sexual Assault: Evidence.** The rape shield statute is not meant to prevent defendants from presenting relevant evidence, but to deprive them of the opportunity to harass and humiliate the complaining witness and divert the jury's attention to irrelevant matters.
15. **Sexual Assault: Trial: Witnesses.** In limited circumstances, a defendant's right to confrontation can require the admission of evidence that would be inadmissible under the rape shield statute.
16. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.
17. **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.
18. **Courts: Motions for Mistrial.** A trial court is vested with considerable discretion in passing on a motion for mistrial in order to more nearly effectuate the ends of justice.

19. **Trial: Prosecuting Attorneys.** When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct.
20. ____: ____. A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.
21. **Trial: Prosecuting Attorneys: Jury Instructions: Appeal and Error.** Not every variance between a prosecutor's advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given and the remarks are not crucial to the State's case.
22. **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.
23. **Trial: Appeal and Error.** On appeal, a defendant may not assert a different ground for his or her objection than was offered at trial.
24. **Trial: Evidence: Appeal and Error.** Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objections and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal.
25. **Rules of Evidence: Hearsay.** It is a fundamental rule of evidence that a statement is not hearsay if it is offered against a party and is the party's own statement.
26. **Trial: Hearsay.** Where the reason for a trial court's overruling of a hearsay objection is left at large, arguably, it is the opponent's burden to demand an explanatory ruling.
27. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
28. **Trial: Witnesses: Hearsay.** A witness who hears an oral admission by a party may testify as to that admission.
29. **Sentences: Appeal and Error.** An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

James J. Regan for appellant.

Douglas J. Peterson, Attorney General, and Glen Th. Parks for appellee.

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

Funke, J.

Anthony L. Swindle was convicted by a jury of two counts of sexual assault of a child in the first degree, one count of sex trafficking of a victim under 16 years of age, and one count of sex trafficking by inflicting or threatening serious personal injury. The district court for Douglas County sentenced Swindle to consecutive terms totaling between 180 years' to life imprisonment, and Swindle filed this appeal. We affirm.

I. BACKGROUND

Swindle was the "pimp" of Lisa Villanova-White. Swindle and Villanova-White used the website "backpage.com" to receive calls and texts to perform sex acts for money. Villanova-White testified she had the telephone numbers of 406 men saved in her cell phone. The soliciting included both "incalls," where the client or "john" arrived at Villanova-White's house in Omaha, Nebraska, and "outcalls" at hotel rooms or casinos. Villanova-White estimated that Swindle drove her to 50 outcalls to anywhere from Omaha to Norfolk, Nebraska, to Woodbine, Iowa. She testified about an outcall at a motel in Fremont, Nebraska. The client refused to pay for the full hour, so Swindle went up to the room, "knocked him out," and took his money.

Swindle's involvement in Villanova-White's online prostitution business expanded over time. At first, Villanova-White thought that Swindle was her business partner and that she was just loaning him money, but he soon began to take and keep half or more of her money from clients. He had a key to her house and would take money from her purse or money that she kept hidden in books or clothes. Villanova-White said Swindle threatened her indirectly by constantly mentioning that he had physically harmed people, sometimes with the use of guns. Swindle once joked while Villanova-White was in his

car about killing someone, and he showed her a handgun he kept hidden underneath his seat.

Within the first few months, Swindle asked Villanova-White to be a "madam" and started bringing other women to her house, including a homeless woman, A.R., age 21.

1. A.R.

A.R. had a long history of physical and sexual abuse. She was abused by her stepfather from ages 6 to 12, until she left her home and went under the care of Lutheran Family Services. At age 18, A.R.'s mother, in exchange for payment, took her to a party and left her there to be gang raped by 10 men. During that same time period, A.R. had a boyfriend who was convicted for abusing her after she testified against him.

Swindle met A.R. in March 2015 when he drove up to her while she was walking down a North Omaha street. A.R. testified that she and Swindle began dating. A.R. had been living with her mother and grandmother, but when her mother moved, A.R. was not welcome to go with them and found herself homeless. Swindle told her that she could stay at his friend's house, but that she would need to have sex with clients to pay for rent. Swindle first brought A.R. to his "brother's" house so that she would have sex in exchange for money that he had already been paid. He then brought A.R. to Villanova-White's house and had Villanova-White set up an online account for her. Villanova-White took photographs of A.R. wearing Villanova-White's lingerie and posted them online.

Swindle told A.R. about the house "rules." He provided her with condoms and marijuana, and instructed her to leave money from clients on the edge of the dresser so that when she walked them out, Swindle would take the money.

Swindle instructed Villanova-White that A.R. was never allowed to leave without his knowledge and to report to him if A.R. left, because "she's not gonna give [sex] away for free." Villanova-White used an alarm system in the house and did not give A.R. the code. The alarm signaled when there was activity downstairs and at the front door.

A.R. stayed at the house for the next 2 to 3 months and had sex with clients from the online website, but was never given any of the money. During her stay, Swindle impregnated A.R. and she had a miscarriage while with a client. On one occasion, Swindle drove A.R. to an "outcall" in Omaha, where the client refused to pay and stabbed A.R. in the wrist. She contacted the 911 emergency dispatch service and went to the hospital. Law enforcement officials suspected that A.R. was involved in prostitution, but did not intervene because she was unwilling to provide information.

A.R. testified that on the first day at the house, she told Swindle that she did not want to be a prostitute. Swindle told her to "just get it over and done with." A.R. testified that she repeated to Swindle that she did not want to be a prostitute many times thereafter. She testified she had never engaged in prostitution before, but that she stayed with Swindle because she had feelings for him, felt intimidated by him, and felt she had no choice but to stay. A.R. knew that Swindle kept a handgun underneath his driver's seat, and he told her that he had used the handgun to kill someone. On one occasion, A.R. tried to keep $42 she received from a client to pay her cell phone bill. Swindle demanded the money, and when she refused, he choked her using both his hands.

A.R. later saved $200 to "try to get away." She messaged a friend on social media to come and pick her up. When she got into her friend's car, she realized she had forgotten her cell phone and went to retrieve it from the house. By then, Villanova-White had informed Swindle that A.R. was leaving with money. Swindle was waiting for A.R. at the front door. He said, "bitch, I told you not to leave," and "[p]unched her in the face"; she fell to the ground on the front lawn, and he then took the money.

In July 2015, Villanova-White was evicted from her home. She moved to a hotel in Omaha, and Swindle ensured that she took A.R. with her. The day of the move, A.R. convinced her mother to pick her up at the hotel and she escaped.

2. M.M.

Swindle met the minor victim, M.M., between 4 and 5 a.m. on September 15, 2015, when she was walking alone down the street after she had run away from home. M.M. had been diagnosed with schizoaffective disorder and disruptive mood dysregulation disorder. She was assessed to be low functioning and needed assistance with all aspects of daily living.

Swindle pulled up next to her and asked her if she wanted to earn some money. She said "sure" and got into his car, and he drove to an empty street and pulled over. He asked her to take off her shirt, and she said no. Swindle yelled at her, "I told you[,] you have to do what I say." He then took off her shirt, had her remove her pants, and had sexual intercourse with her.

Swindle then called Villanova-White while in the car and said, "I have another girl to help you pay for the hotel." He took M.M. to the hotel and had Villanova-White advertise M.M. online. M.M. performed sex acts with men for money over the course of a few days. In the early morning hours between September 15 and 16, 2015, while Villanova-White was out, Swindle confronted M.M. in the hotel room and forced her to have sexual intercourse with him a second time. M.M. testified that she tried to get away but that Swindle held her down with "one hand on my chest and the other on my arm, so I couldn't, like, flail."

On September 18, 2015, a police officer determined that M.M.'s photograph from an online escort advertisement matched a missing person's report of a 15-year-old. Law enforcement acted immediately; M.M. was removed from the hotel, and Swindle and Villanova-White were subsequently arrested. Villanova-White entered into a proffer agreement to testify, without any promises of leniency. At the time of trial, she faced charges of pandering, with a possible penalty of between 1 and 50 years' imprisonment.

3. Trial and Sentences

After a 7-day trial, the jury found Swindle guilty on counts 1 and 2: sexual assault of a child in the first degree, in violation of Neb. Rev. Stat. §§ 28-319.01(1)(b) and (2) (Reissue 2016), each a Class IB felony; count 3: sex trafficking of a victim under 16 years of age, in violation of Neb. Rev. Stat. § 28-831(1) (Reissue 2016), a Class II felony; and count 4: sex trafficking by inflicting or threatening serious personal injury, in violation of § 28-831(2), a Class IIA felony. The district court determined Swindle was a habitual criminal and sentenced him to consecutive sentences of imprisonment of between 60 years to life on count 1, between 60 years to life on count 2, between 40 to 60 years on count 3, and between 20 to 60 years on count 4.

Swindle appeals.

II. ASSIGNMENTS OF ERROR

Swindle assigns, restated, that the district court erred by (1) failing to instruct the jury that a defendant's knowledge of the victim's age is an essential element of the offense of sex trafficking of a minor, (2) refusing to allow Swindle to question the minor victim about her history of making false claims of rape when she got in trouble for running away, (3) admitting statements made by the defendant without adequate foundation, (4) refusing to grant a mistrial based upon claims of prosecutorial misconduct, and (5) imposing excessive sentences.

III. STANDARD OF REVIEW

[1] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[1]

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[1] *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017).

[2] Whether to grant a mistrial is within the trial court's discretion, and we will not disturb its ruling unless the court abused its discretion.[2]

[3-5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[3] The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.[4] We review for abuse of discretion a trial court's evidentiary rulings on the sufficiency of a party's foundation for admitting evidence.[5]

[6] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[6]

IV. ANALYSIS

1. Court Did Not Err in Instructing Jury

Swindle argues that the district court erred when it refused his proposed jury instruction. He contends that a defendant's knowledge of the victim's age is an essential element of the offense of sex trafficking of a minor. At the jury instruction conference, Swindle offered the following proposed instruction, which he fashioned from NJI2d Civ. 7.62, Negligent Entrustment:

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[2] *State v. Castillo-Zamora*, 289 Neb. 382, 855 N.W.2d 14 (2014); *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

[3] *State v. Hill*, 298 Neb. 675, 905 N.W.2d 668 (2018). See *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999).

[4] *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012); *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

[5] See *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

[6] See *State v. Brown, ante* p. 57, 912 N.W.2d 241 (2018).

> In your deliberations with regard to Count III of the Information/Amended Information, in order for you to determine that [Swindle] is guilty of Trafficking of a person who has not attained the age of 16 years, you must find that [Swindle] *knew or should have known* that the victim i[n] question had not attained the age of 16 years.

(Emphasis supplied.)

The court refused the proposed instruction and gave an instruction which recited the elements of the offense as (1) that on the relevant dates the defendant engaged in sex trafficking of a minor and (2) that at that time, M.M. was less than 16 years of age. The court provided a definitional instruction which stated:

> "Sex trafficking of a minor" means knowingly recruiting, enticing, harboring, transporting, providing, or obtaining by any means or knowingly attempting to recruit, entice, harbor, transport, provide, or obtain by any means a minor for the purpose of having such minor engage in commercial sexual activity, sexually explicit performance, or the production of pornography or to cause or attempt to cause a minor to engage in commercial sexual activity, sexually explicit performance, or the production of pornography.[7]

Swindle argues the statutory definition of sex trafficking of a minor supports his proposed instruction, because the definition contains the word "knowingly." Swindle contends that "knowingly" commonly requires a defendant's perception of facts which make up the crime. Swindle claims the prosecution failed to prove that he knew M.M. was 15 years old, because M.M. admitted that she lied about her age and told Swindle that she was 20 years old.

Swindle claims that he received a greater sentence as a result of the court's denial of his proposed instruction. Putting

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[7] See Neb. Rev. Stat. § 28-830(14) (Reissue 2016) (now found at § 28-830(12) (Supp. 2017)).

aside Swindle's habitual criminal status, sex trafficking of a minor is a Class IB felony,[8] with a minimum penalty of 20 years' imprisonment and a maximum of life imprisonment; whereas sex trafficking of an adult is a Class II felony,[9] with a minimum penalty of 1 year's imprisonment and a maximum of 50 years' imprisonment.[10]

[7,8] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[11] All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[12]

[9] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[13] We conclude that the court did not err in refusing Swindle's proposed instruction.

[10] In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.[14] Although the law does not require that a jury instruction track the exact language of the statute,[15] using the specific language of a statute is an effective means of implementing the intent of

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[8] See § 28-831(1).

[9] See § 28-831(2).

[10] See Neb. Rev. Stat. § 28-105(1) (Supp. 2017).

[11] *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

[12] *Id.*

[13] *Id.*

[14] *State v. Duncan*, 293 Neb. 359, 878 N.W.2d 363 (2016); *State v. Armagost*, 291 Neb. 117, 864 N.W.2d 417 (2015).

[15] *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015).

the Legislature.[16] This practice provides the added benefits of easing the process of preparing jury instructions and creating certainty for trial courts that the jury has been provided the essential elements of an offense.[17]

[11] Swindle's proposed instruction, borrowed from the civil context of negligent entrustment of a motor vehicle, assumes conduct, liability, and consequences distinct from the charged offense of sex trafficking of a minor, and therefore cannot be a correct statement of the law in this case. To provide one example, the instruction introduces the mens rea element of "should have known," which is absent from the statutory definition of sex trafficking of a minor. For that reason alone, Swindle's instruction goes beyond the plain reading of the statute. 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.[18]

We agree with the State that the better analogy is the crime of sex trafficking of an adult. The Legislature used identical language to define the crimes of sex trafficking of a minor and sex trafficking of an adult, except sex trafficking of a minor applies to victims under the age of 18.[19] If Swindle's argument is accepted, then by parity of reasoning, the State would be unable to sustain a conviction of sex trafficking of an adult unless it proved that a defendant knew that the victim was 18 years of age or older. We agree with the State that this is an absurd result. Instead, the natural reading of these offenses is that the victim's age is intended to classify sex trafficking of a minor as a more serious offense and that the victim's age does not relate to the defendant's mens rea. This reasoning is further strengthened by the Legislature's decision to increase the penalty for sex trafficking of a minor who is under 16 years

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[16] *Armagost, supra* note 14.

[17] See *id.*

[18] *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018).

[19] See § 28-830(10), (13), and (14).

of age.[20] The plain language of the criminal statutes supports this conclusion.

[12] In determining the meaning of statutory language, its ordinary and grammatical construction is to be followed, unless an intent appears to the contrary or unless, by following such construction, the intended effect of the provisions would apparently be impaired.[21] The language of § 28-830(14), as it existed at the time of the offense, does not define the word knowingly. However, it is clear that "'knowingly' . . . is an adverb, and common usage makes clear that an adverb modifies the verbs that come after it," and not the noun "a minor" that follows.[22] Under this interpretation, the prosecution was required to prove that Swindle knew that he recruited, enticed, harbored, transported, or provided a minor for the purpose of sex trafficking, or knew that he attempted to do so. Thus, even if we accept Swindle's argument that there was no evidence that he knew M.M.'s age, an ordinary reading of § 28-830(14) shows that the term "knowingly" requires only that a defendant had knowledge that he or she engaged in conduct for the purpose of sex trafficking and does not require a defendant to have knowledge that the victim was a minor. Dispensing with the knowledge requirement is appropriate where the underlying conduct is illegal, irrespective of a defendant's knowledge of the victim's age.[23]

Yet, another analogy is to the crime of first degree sexual assault of a child.[24] Under § 28-319.01(1), a person commits sexual assault of a child (a) when he or she subjects another person under 12 years of age to sexual penetration and the actor is at least 19 years of age or older or (b) when the victim

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[20] See § 28-831.

[21] *Placek v. Edstrom*, 148 Neb. 79, 26 N.W.2d 489 (1947); *Nebraska State Railway Commission v. Alfalfa Butter Co.*, 104 Neb. 797, 178 N.W. 766 (1920).

[22] See *State v. Sims*, 195 So. 3d 441, 446 (La. 2016).

[23] See *Sims, supra* note 22.

[24] See § 28-319.01.

is at least 12 years of age but less than 16 years of age and the actor is 25 years of age or older. In regard to the age of the victim, our case law provides that reasonable mistake as to the age of the victim is not a defense.[25]

When the Legislature has intended to make age an essential element of the offense of sexual assault upon a child, it has used plain language.[26] Section 28-319.01(4) states that "[i]n any prosecution under this section, the age of the actor shall be an essential element of the offense that must be proved beyond a reasonable doubt." Indeed, following Swindle's trial, the Legislature used plain language when it codified the rule that "[i]t is not a defense in a prosecution [of the offense of sex trafficking of a minor] that the defendant believed that the minor victim was an adult."[27]

Similarly, in construing the Mann Act, 18 U.S.C. § 2421 et seq. (2012 & Supp. IV 2016), federal courts have considered and rejected the claim that knowledge of the age of the victim is an element of sex trafficking of a minor.[28] "It would be nonsensical to require proof of knowledge of the victim's age when the statute exists to provide special protection for all minors, including, if not especially, those who could too easily be mistaken for adults."[29]

The trial court correctly instructed the jury that to obtain a conviction under § 28-831(1), the prosecution needed to prove

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[25] See, *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001); *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991); *State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8 (1985).

[26] See § 28-319.01(4).

[27] See 2017 Neb. Laws, L.B. 289, § 9 (codified at § 28-831(4)(c) (Supp. 2017)).

[28] See, *U.S. v. Cox*, 577 F.3d 833 (7th Cir. 2009); *U.S. v. Jones*, 471 F.3d 535 (4th Cir. 2006); *U.S. v. Griffith*, 284 F.3d 338 (2d Cir. 2002); *U.S. v. Taylor*, 239 F.3d 994 (9th Cir. 2001); *United States v. Hamilton*, 456 F.2d 171 (3d Cir. 1972).

[29] *Jones, supra* note 28, 471 F.3d at 540.

only that Swindle engaged in sex trafficking of M.M. and that at the time, M.M. was less than 16 years of age. Swindle's proposed instruction was an incorrect statement of the law, and the court appropriately gave an instruction which used statutory language to define the offense. Swindle was not prejudiced by the court's refusal of his instruction. Swindle's first assignment of error is without merit.

2. Court Did Not Err in Determining Swindle's Line of Questioning of M.M. Was Impermissible

Swindle argues the district court erred in refusing to allow him to question M.M. about her history of making false claims of rape. Swindle argues his questioning went to M.M.'s credibility and was not precluded by Nebraska's rape shield statute, Neb. Rev. Stat. § 27-412 (Reissue 2016), and that the district court's ruling violated Swindle's right to confront his accuser.

(a) Additional Background

Prior to trial, Swindle filed a notice of intent to present § 27-412 evidence. He sought to adduce evidence that M.M. had on multiple prior occasions run away from home and, when caught, falsely claimed that she had been raped. At a hearing on the issue, Swindle's counsel made an offer of proof that, if called to testify, M.M.'s mother would testify that she told healthcare providers that M.M. "is hypersexual and seeks out sexual behaviors with older men." Swindle's counsel stated M.M.'s mother would testify that on multiple occasions, M.M. has run away, lied about her age, had intercourse, and then stated that it was rape and "yell out for help." Swindle said the mother would state this is part of M.M.'s mental illness.

The court entered a pretrial order which stated:

> [T]his Court may allow [Swindle] to question M.M. about prior false assertions of rape. The Court, however, will not allow [Swindle] to venture into M.M.'s sexual history. . . .

. . . .

> [Swindle's] own Motion concedes that the evidence he hopes to elicit "is relevant to a determination of the credibility of [M.M.]." [Swindle] may not undermine M.M.'s credibility by drudging up her sexual behavior or sexual predisposition.

At trial, the following exchange took place during direct examination of M.M. by the prosecution:

> Q And how old did you tell [Swindle] you were?
>
> A Twenty.
>
> Q Okay. Was that true?
>
> A No.
>
> Q Okay. And why did you give him — why did you say you were 20 as opposed to 15?
>
> A Because when I usually ran away, I would have an older male take me somewhere or back to their [sic] place.

During cross-examination, Swindle's counsel asked M.M. what she meant by her answer. The prosecution objected based on relevance and § 27-412. At a sidebar, Swindle's counsel stated that he intended to establish that M.M. had run away on multiple occasions and that he would end the line of questioning at that point. The court ruled that it would permit Swindle's counsel to ask M.M. about lying about her age, but found that testimony about running away was not relevant. Cross-examination of M.M. continued, and Swindle's counsel asked the following questions, and M.M. gave the following answers:

> Q So it was getting caught for running away that got you into the frame of mind that you had to blow it out of proportion?
>
> A Yes.
>
> Q You'd been in that situation before on multiple occasions; right?
>
> A Yes.
>
> Q And on those occasions have you responded by telling people that you've been raped?

The prosecution objected based on § 27-412 and relevance, and argued that there was no evidence that M.M. had falsified claims of rape. The court asked for an offer of proof from Swindle's counsel. Receiving no offer of proof at that time, the court sustained the prosecution's relevance objection.

The following morning of trial, Swindle's counsel moved for a mistrial and argued that he intended to question M.M. about prior false allegations of rape that she made following running away. Swindle's counsel stated:

> [M]y proffer and offer of proof was that [M.M] will admit, if I would have been allowed to question her, that she had run away on multiple prior occasions — and I would not have inquired with regard to her promiscuity or sexual activity during those runaways, but that she then, upon being taken back into custody following the runaway, saw medical providers or saw — talked to other people in a therapeutic setting and basically admitted that she falsified her claims of being raped when — after she ran away and got caught.

Swindle's counsel offered a portion of M.M.'s medical records. The records provide a background of events leading up to a suicide attempt by M.M following her assault by Swindle. The records include statements from M.M.'s mother, consistent with Swindle's pretrial proffer, that M.M. had run away multiple times in the past year and that each time, M.M. sought out sex with older men. Her mother stated that in each instance, M.M. lied about her age, had sex, and later claimed that it was rape.

Swindle's counsel claimed that based on the court's pretrial ruling, he anticipated he would be able to ask M.M. about these events. He claimed that had he known he would not be permitted to pursue this line of questioning, he would have called M.M.'s mother as a witness. He argues the court's refusal to allow cross-examination of M.M. regarding her credibility denied Swindle his right to a fair trial.

(b) Disposition

We consider the application of § 27-412 to the facts of this case and whether the questions posed to M.M. were so relevant that Swindle's right of confrontation required the admission of M.M.'s testimony regarding her prior false claims of rape. We note that while Swindle's brief included separate assignments of error regarding these two issues, he consolidated them into a single argument and, thus, we discuss the issues together.

[13] Subject to several exceptions, § 27-412(1) bars "[e]vidence offered to prove that any victim engaged in other sexual behavior" and "[e]vidence offered to prove any victim's sexual predisposition" in civil or criminal proceedings involving alleged sexual misconduct.[30]

[14] Nebraska's rape shield statute serves two purposes. First, the statute protects rape victims from grueling cross-examination about their past sexual behavior or sexual predisposition that too often yields testimony of questionable relevance.[31] Second, the rape shield statute prevents the use of evidence of the complaining witness' past sexual conduct with third parties or sexual predisposition from which to infer consent or undermine the witness' credibility.[32] The rape shield statute is not meant to prevent defendants from presenting relevant evidence, but to deprive them of the opportunity to harass and humiliate the complaining witness and divert the jury's attention to irrelevant matters.[33]

Section 27-412 is subject to three enumerated exceptions, generally stated: (1) evidence offered to prove a person other than the accused was the source of physical evidence;

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[30] § 27-412(a) and (b).

[31] *State v. Lavalleur*, 289 Neb. 102, 853 N.W.2d 203 (2014), *disapproved in part* 292 Neb. 424, 873 N.W.2d 155 (2016); *Lessley, supra* note 3.

[32] *Lavalleur, supra* note 31; *State v. Sanchez-Lahora*, 261 Neb. 192, 622 N.W.2d 612 (2001).

[33] *Lavalleur, supra* note 31.

(2) evidence relevant to the issue of consent; and (3) evidence which, if excluded, would violate the accused's constitutional rights.[34] Swindle's stated purpose of the cross-examination was not to show another source of physical evidence or that M.M. consented to sex with Swindle. Rather, Swindle contends that evidence of M.M.'s prior false claims of rape went to M.M.'s credibility.

Although there is no Nebraska case directly on point, we agree with the majority of jurisdictions which hold that a false accusation of rape where no sexual activity is involved, is itself not "sexual behavior" involving the victim, and that such statements fall outside of the rape shield law.[35] However, before defense counsel launches into cross-examination about false allegations of sexual assault, a defendant must establish, outside of the presence of the jury, by a greater weight of the evidence, that (1) the accusation or accusations were in fact made, (2) the accusation or accusations were in fact false, and (3) the evidence is more probative than prejudicial.[36] If the defendant satisfies these three conditions, the trial court will authorize cross-examination of the complaining witness concerning the alleged false accusations.[37] The defendant may thereafter present extrinsic evidence of the false accusations only if the complaining witness denies or fails to recall having made such accusations.[38]

In this case, we find Swindle failed to satisfy the necessary conditions. While the evidence relied upon by Swindle did indicate that M.M. had previously alleged that she had been raped, Swindle did not demonstrate those claims were false.[39]

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[34] § 27-412(2)(a)(i) through (iii).

[35] See, *State v. Boggs*, 63 Ohio St. 3d 418, 588 N.E.2d 813 (1992); *Miller v. State*, 105 Nev. 497, 779 P.2d 87 (1989); *Clinebell v. Commonwealth*, 235 Va. 319, 368 S.E.2d 263 (1988).

[36] See *State v. Daffin*, 387 Mont. 154, 392 P.3d 150 (2017).

[37] *Id.*

[38] *Id.*

[39] See *State v. Welch*, 241 Neb. 699, 490 N.W.2d 216 (1992).

The evidence relied upon by Swindle indicates that M.M. did in fact have sexual relations with other men prior to making the accusations. The evidence also indicates that M.M. was 14 years of age at the time of these other encounters. Section 28-319(1)(c) provides that a person under 16 years of age may not legally consent to sexual penetration by an actor over 19 years of age.[40] As the evidence indicates that at least one of the men with whom M.M. had sexual relations was 24 years of age and that Swindle did not demonstrate the age of any of the others or that M.M. recanted any of the allegations, Swindle failed to show M.M.'s accusation that she was raped was false.

We must continue our analysis, however, to consider whether the exclusion of the evidence in question violated Swindle's constitutional right to confront his accuser.

[15,16] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ."[41] We have recognized that in limited circumstances, a defendant's right to confrontation can require the admission of evidence that would be inadmissible under the rape shield statute.[42] This court has held that an accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.[43]

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[40] See *In Interest of J.M.*, 223 Neb. 609, 391 N.W.2d 146 (1986).

[41] U.S. Const. amend. VI.

[42] See, *Ford*, *supra* note 4; *Lessley, supra* note 3; *State v. Johnson*, 9 Neb. App. 140, 609 N.W.2d 48 (2000).

[43] *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996).

In this case, Swindle was not absolutely prohibited from impeaching M.M. on cross-examination. Swindle was permitted to ask M.M. whether she had run away on multiple occasions and whether she was trying to "blow it out of proportion" when she was caught. The court's exclusion of evidence concerning M.M.'s prior false claims of rape would not have given the jury a significantly different impression of her credibility. M.M. had already admitted on direct examination that she lied about her age and that "when [she] usually ran away, [she] would have an older male take [her] somewhere or back to their [sic] place." She also admitted that when she was first interviewed by a detective, she falsely stated that the defendant had a gun, and said that she was scared of the defendant and "was trying to blow the story out of proportion." There was evidence before the jury upon which Swindle could have argued that M.M.'s version of the events was not to be believed.

We also find the excluded evidence was not so relevant and probative that it triggered Swindle's constitutional right to confrontation.[44] The excluded evidence was limited to prior sexual contact with people other than Swindle. This evidence concerned a collateral issue that did not have any relevance as to whether Swindle had assaulted M.M. As discussed above, consent is not a defense to sexual assault of a child. And even if M.M. were not a child, Nebraska's rape shield statute recognizes that consent to sex with one person is not consent to sex with all people. There is simply no relevant connection between M.M.'s alleged prior false claims of rape and the crimes at issue. Swindle sought to discuss M.M.'s past sexual conduct in order to undermine her credibility for the improper purpose of arguing that Swindle's assault of M.M. did not take place. There is no indication that Swindle was prevented from asking M.M. directly whether she falsified her claims of

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[44] See *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

assault in this case. Swindle had a full and fair opportunity to confront his accuser.

We determine that the district court did not abuse its discretion when it determined that Swindle's questions about M.M.'s prior sexual conduct were irrelevant.

3. Court Did Not Err in Overruling Swindle's Motion for Mistrial Based on Prosecutorial Misconduct

(a) Additional Background

Swindle's counsel also moved for a mistrial based on the argument that the prosecution engaged in an improper presentation of the evidence. In its opening statement, the prosecution stated that "[M.M.] will tell you that [Swindle] didn't ejaculate inside of her vagina. Instead, he pulled out and ejaculated into 15-year-old [M.M.'s] mouth." The prosecution also stated that "[s]he'll be able to tell you that [Swindle] had a gun. She can describe that gun to you. It was a handgun. She was terrified of what would happen if she tried to leave that hotel room." These two predictions of M.M.'s testimony were not borne out at trial and were not repeated by the State in its closing argument.

Swindle argues the State knew or should have known that these aspects of its opening statement were inaccurate and that its actions constituted prosecutorial misconduct. As discussed above, contrary to the State's opening statement, M.M. admitted on direct examination that she lied to police when she first reported that Swindle had threatened her with a gun. With respect to the State's comment about ejaculation, Swindle argues that a nurse's forensic examination report indicated there had been no ejaculation. He claims the State intended to inflame the jury with its opening statement, and later acted unfairly by calling the nurse to testify before M.M., hear the nurse tell the jury there was no evidence of ejaculation, and then decline to ask M.M. about ejaculation during her testimony. Swindle argues the references to ejaculation and the gun

during the State's opening statement were the "most dramatic" and "fundamental" and the "most offensive" aspects of the State's case.

(b) Disposition

[17,18] 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.[45] A trial court is vested with considerable discretion in passing on a motion for mistrial in order to more nearly effectuate the ends of justice.[46]

[19,20] When considering a claim of prosecutorial misconduct, we first consider whether the prosecutor's acts constitute misconduct.[47] A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.[48] Though Swindle identified two contradictions between the State's preview of the evidence and M.M.'s testimony, there was no misconduct.

During its opening statement, the State previewed evidence that Swindle sexually assaulted M.M. and had her perform sexual acts with other men for financial gain. These claims were supported through testimony at trial. Neither ejaculation nor use of force are elements of the crime of sexual assault of a minor or sex trafficking of a minor.[49] Swindle's argument regarding the State's incorrect predictions of the evidence ignores the nature of the crimes at issue in this case.

The pretrial investigation of M.M.'s assaults yielded conflicting evidence concerning whether Swindle had ejaculated.

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[45] *State v. Hernandez*, 299 Neb. 896, 911 N.W.2d 524 (2018); *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018).

[46] See *Castillo-Zamora, supra* note 2.

[47] See *Cotton, supra* note 45.

[48] See *id*.

[49] §§ 28-319.01 and 28-831(1).

A police report described that "it took [Swindle] a while to ejaculate and when he finally did, he ejaculated in her mouth." Yet, the nurse's report concerning multiple sexual assaults of M.M. marked that there had been no ejaculation associated with penetration of the mouth. These facts and M.M.'s diagnosed mental state created some uncertainty about what her testimony would be. Swindle's own counsel recognized this in his opening statement when he said, "I don't think I've ever been in a situation in a courtroom where I'm less certain of what someone's gonna say. I don't know what these people are gonna say."

In the context of the trial, the State's comment that M.M. would testify that Swindle threatened her with a gun was not imperative given that both A.R. and Villanova-White testified Swindle had indirectly threatened them with his handgun. Because M.M. admitted that her statements about the gun were not true and that the State's incorrect claims during its opening statement were not later repeated, we cannot conclude there was any effort to mislead the jury. Swindle's claim of prosecutorial conduct is without merit.

[21,22] Even if there were misconduct, there is no evidence that Swindle was prejudiced. Not every variance between a prosecutor's advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given and the remarks are not crucial to the State's case.[50] Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.[51]

The court instructed the jury that "[s]tatements and arguments by the lawyers for the State and for [Swindle] are not evidence," and there is no indication the jury did not follow this instruction. We determine that the district court did not abuse its discretion in overruling Swindle's motion for mistrial.

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[50] *State v. Hill*, 298 Neb. 675, 905 N.W.2d 668 (2018).

[51] *Id.*

4. Court Did Not Err in Admitting Statements by Swindle

In his next assignment of error, Swindle argues the court erred by admitting statements that he made. Swindle argues that Villanova-White was permitted to paraphrase his words and that his out-of-court statements cannot be admitted unless a witness is able to recite the specific words that he used rather than relay the "general tenor" of his comments.[52]

[23,24] Based on our discussion of the record below, we agree with the State that Swindle did not articulate this objection to the trial court. On appeal, a defendant may not assert a different ground for his or her objection than was offered at trial.[53] Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objections and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal.[54]

In explaining his assignment of error, Swindle points to four portions of Villanova-White's testimony that where admitted over his objection. Swindle's objections included hearsay, form of the question, and foundation.

[25] "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[55] It is a fundamental rule of evidence that a statement is not hearsay if it is offered against a party and is the party's own statement.[56]

[26] The first objection came as a hearsay objection to Villanova-White's testimony that Swindle "had his way of

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[52] Brief for appellant at 23.

[53] *Schwaderer, supra* note 1.

[54] *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016).

[55] Neb. Rev. Stat. § 27-801(3) (Reissue 2016).

[56] See § 27-801(4)(b)(i).

threatening without really threatening, but he would mention all the time about how many people he would beat up and gun activity and things like that." The court presumably overruled the objection, because Villanova-White's testimony concerned nonhearsay statements made by a party opponent. Where the reason for a trial court's overruling of a hearsay objection is left at large, arguably, it is the opponent's burden to demand an explanatory ruling.[57] Swindle did not then argue that § 27-801(4)(b)(i) did not apply absent the recital of his precise statement. Therefore, Swindle failed to meet his burden to show that Villanova-White's testimony was inadmissible. The court did not abuse its discretion in overruling Swindle's hearsay objection.

[27] The second objection was a form and foundation objection when the prosecution asked Villanova-White, "Based on conversations that you had with [Swindle], do you know if [A.R.] was ever able to keep any of the money that she made from the business?" Swindle objected as to the form of the question and that it called for a narrative. The court overruled the objection and allowed Villanova-White to answer. The question permitted Villanova-White to answer yes or no as to whether she had knowledge regarding A.R.'s being allowed to keep any money. In response to the question, Villanova-White stated, "No, she was never able to keep the money." After the answer was given, Swindle did not object to the answer on the ground that the answer was a voluntary statement or for some specific reason such as hearsay or a conclusion of the witness.[58] Failure to make a timely objection waives the right to assert prejudicial error on appeal.[59] As a result, Swindle waived any error which may have occurred.

The third objection was an "[a]sked and answered objection" when the prosecution asked Villanova-White why

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[57] *Henry, supra* note 54.

[58] *Ford, supra* note 4.

[59] *Schwaderer, supra* note 1.

Swindle called A.R. a "bitch." The court sustained the objection as to being a compound question. The prosecution then asked Villanova-White why Swindle was angry, to which Swindle objected on the ground that the question had been asked and answered. The court overruled the objection, and Villanova-White answered, "I know that it was always about money. It was always having to do with money." Villanova-White's answer was based on her recollection. It did not include hearsay evidence and, according to the record, was not cumulative. The court did not err in overruling Swindle's objection.

Finally, Swindle made a foundation objection to a line of questioning about why Swindle did not want A.R. to leave the house. Swindle asked that the State lay in its questions to Villanova-White "the typical foundational requirements" of specific times, dates, and places. The court then required the State to lay foundation. The State asked whether Villanova-White had conversations with Swindle between March and July 2015 about why he did not want A.R. to leave. Villanova-White responded that she did, and the State asked her what Swindle said in those conversations. Swindle objected based on foundation, and the court overruled his objection. Villanova-White answered, "He didn't want her to leave because he was making — she was making him money and that he could keep track of her."

[28] Swindle did not object that Villanova-White's answer did not contain his exact statement. In addition, Swindle has not cited any authority to suggest that if he had made that objection, the State would have been required to lay additional foundation. A witness who hears an oral admission by a party may testify as to that admission.[60] Swindle has not argued that Villanova-White did not hear his admissions or that she lacked personal knowledge as to why he wanted A.R.

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[60] See *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995).

to stay at the house. The trial court did not abuse its discretion in overruling Swindle's evidentiary objections. Swindle's assignment of error is without merit.

5. Court Did Not Impose Excessive Sentences

Swindle argues that his sentences, which amounted to 180 years' to life imprisonment, were disproportionate, because he had no prior similar criminal history and his sentences exceed those imposed even in certain cases of homicide. The State claims the sentences imposed were all within the statutory limits and that Swindle does not argue otherwise.

The jury found Swindle guilty of four felonies, and the court determined Swindle to be a habitual criminal. Upon conviction of a felony, a habitual criminal shall be sentenced to a mandatory minimum of 10 years' imprisonment and a maximum of up to 60 years' imprisonment.[61] The court sentenced Swindle to consecutive sentences of imprisonment of between 60 years to life on count 1, between 60 years to life on count 2, between 40 to 60 years on count 3, and between 20 to 60 years on count 4.

[29] An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.[62]

The court's sentencing of Swindle was not inappropriate in this case. Swindle's guilt was largely uncontested. Swindle's theory of defense at trial was that Villanova-White was primarily responsible for the online business and that A.R.'s and M.M.'s prostitutions were voluntary on their part. The evidence left little question, however, that Swindle sexually assaulted M.M. on two separate occasions and that he engaged in sex trafficking of both A.R. and M.M. The

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[61] Neb. Rev. Stat. § 29-2221 (Reissue 2016).

[62] *Brown, supra* note 6.

court's sentencing is not clearly untenable, given that the State proved that Swindle repeatedly sought out vulnerable victims and used violence and manipulation to force them into his sex trafficking business. The court was within its discretion to impose sentences on the high end of the statutory range. We conclude the court did not abuse its discretion in sentencing Swindle.

V. CONCLUSION

We conclude that the court's refusal of Swindle's proposed jury instruction was not in error. We further conclude that the district court did not abuse its discretion in overruling Swindle's motions for mistrial and in overruling his evidentiary objections. We conclude the court did not abuse its discretion in sentencing Swindle. We therefore affirm Swindle's convictions and sentences.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Martin J. Troshynski, respondent.

916 N.W.2d 57

Filed August 17, 2018. No. S-17-269.

Original action. Judgment of suspension.

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

Per Curiam.

INTRODUCTION

On March 15, 2017, formal charges containing one count were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Martin J. Troshynski. Respondent filed an answer to the charges on July 19. A referee was appointed on September 5. On November 8, relator filed amended formal charges after obtaining leave of this court to do so. The referee conducted a hearing on December 19.

The referee filed a report on January 9, 2018. With respect to the charges, the referee concluded that through respondent's conduct, he had breached the following provisions of the Nebraska Court Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence), 3-501.4(a)(3) and (4) (communication), 3-503.4 (fairness to opposing party and counsel), 3-508.1(b) (responding to bar admission and disciplinary matters), and 3-508.4(a) and (d) (conduct prejudicial to administration of justice) (rev. 2016). The referee further

found that respondent had violated his oath of office as an attorney licensed to practice law in the State of Nebraska. See Neb. Rev. Stat. § 7-104 (Reissue 2012). With respect to the discipline to be imposed, the referee recommended suspension of respondent's license to practice law for a period of 45 days, with a period of supervision of 2 years upon readmission. Respondent agreed to the proposed sanction. Neither relator nor respondent filed exceptions to the referee's report. Relator filed a motion for judgment on the pleadings under Neb. Ct. R. § 3-310(L) (rev. 2014) of the disciplinary rules. Respondent did not respond to the motion. We grant the motion for judgment on the pleadings and impose discipline as indicated below.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 14, 1990. At all times relevant to these proceedings, he has practiced in North Platte, Nebraska.

The substance of the referee's findings may be summarized as follows: respondent has been practicing for 27 years, is currently a solo practitioner, and his current law practice involves criminal defense and general practice. The violations arise from respondent's conduct with respect to two cases.

T.W. and G.D.'s Case.

In April 2010, T.W. and G.D. retained respondent to represent them in matters arising from their injuries from an automobile collision, and in 2013, respondent filed a complaint in the district court for Lincoln County on their behalf. In the course of that suit, the defendants served discovery requests to respondent in December 2013, but respondent did not provide the requested documents in 2014 or most of 2015, despite three motions to compel discovery relating to that 2013 request. On August 13, 2015, respondent failed to appear at a hearing and the district court ordered him to provide the requested documents or the case would be dismissed. Respondent failed to comply with the court's order, and the case was dismissed

without prejudice on September 3, 2015. Respondent did not notify his clients. T.W. and G.D. learned of the dismissal from another source and not from respondent. After respondent filed a series of motions attempting to reinstate the case, T.W. and G.D.'s lawsuit was ultimately dismissed.

When relator twice requested respondent's client files regarding T.W. and G.D, respondent failed to respond for approximately 4 months.

W.N.'s Case.

W.N. retained respondent to represent her in a personal injury case arising out of a 2006 automobile collision. Respondent filed a complaint in the case in the district court for Lincoln County in January 2010. On October 21, the defendants sent a discovery request to respondent. On July 16, 2012, respondent filed a stipulation to continue the matter in which the parties agreed that additional time was needed to conduct discovery. On February 5, 2013, the court dismissed the case for lack of prosecution. Respondent was able to reinstate the case, but continued to fail to respond to discovery. The case was dismissed again without prejudice after respondent failed to file a response to the court's order to show cause. Respondent failed to communicate with W.N. in 2015 and 2016. On June 28, 2017, respondent notified W.N. that the matter had been dismissed by the court 2 years prior thereto.

In the referee's report filed January 9, 2018, the referee found that respondent violated the Nebraska Court Rules of Professional Conduct: §§ 3-501.3 (diligence), 3-501.4(a)(3) and (4) (communication), 3-503.4 (fairness to opposing party and counsel), 3-508.1(b) (responding to bar admission and disciplinary matters), and 3-508.4(a) and (d) (conduct prejudicial to administration of justice), as well as his oath of office as an attorney. The referee noted in his report that respondent agreed with the stipulated facts and accepts full responsibility for failing to respond to discovery requests and for the dismissal of his clients' cases outside of the statute of limitations.

The referee noted that respondent previously had received a private reprimand.

In mitigation, respondent testified that he had stage "IIIA melanoma" and the court received evidence of cancer treatment side effects. The referee noted that numerous attorneys submitted affidavits regarding respondent's honorable character and his work to assist other attorneys and clients. As for the discipline imposed, the referee recommended a 45-day suspension with 2 years of supervision upon reinstatement.

ANALYSIS

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Gast*, 298 Neb. 203, 903 N.W.2d 259 (2017). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Island*, 296 Neb. 624, 894 N.W.2d 804 (2017). Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id*.

Based on the record and the findings of the referee, we find that the above-referenced undisputed facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated §§ 3-501.3, 3-501.4(a)(3) and (4), 3-503.4, 3-508.1(b), and 3-508.4(a) and (d) of the professional conduct rules. We specifically conclude that respondent has violated his oath of office as an attorney, see § 7-104. Accordingly, we grant relator's motion for judgment on the pleadings.

We have stated that the basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline under the circumstances. *State ex rel. Counsel for Dis. v. Island, supra*. Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
>
> (1) Disbarment by the Court; or

(2) Suspension by the Court; or

(3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or

(4) Censure and reprimand by the Court; or

(5) Temporary suspension by the Court; or

(6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.

(B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, § 3-310(N) of the disciplinary rules.

With respect to the imposition of attorney discipline in an individual case, each attorney discipline case must be evaluated in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Island, supra*. For purposes of determining the proper discipline of an attorney, this court considers the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors. *Id.*

To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *Id.* We have considered prior discipline including reprimands as aggravators. *State ex rel. Counsel for Dis. v. Nich*, 279 Neb. 533, 780 N.W.2d 638 (2010).

The evidence in the present case establishes that respondent inexcusably failed to comply with discovery requests, attend hearings, and keep his clients informed. He failed to communicate with clients for long periods of time and failed to keep them informed regarding the dismissal of their matters. When contacted by relator, respondent failed to immediately respond to requests for records. The referee determined that the evidence showed that the clients were distraught and found

it frustrating to deal with respondent and suffered greatly from respondent's negligence.

The referee recommended discipline in the form of a 45-day suspension followed by 2 years of probation with a practice monitor. The referee took into account respondent's prior private reprimand. The referee also considered the fact that respondent had cancer and the showing of support for respondent by members of the legal community and the fact that respondent is a "substantial asset to the bar."

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that the referee's recommendation of a 45-day suspension and, upon successful application for reinstatement, 2 years of monitored probation is appropriate. See *State ex rel. Counsel for Dis. v. Pivovar*, 288 Neb. 186, 846 N.W.2d 655 (2014). No exceptions were taken to the referee's recommendation, and we hereby adopt it.

Having imposed a period of suspension, respondent is ordered to comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, he shall be subject to punishment for contempt of this court. We also direct respondent to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012), § 3-310(P), and Neb. Ct. R. § 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

At the end of the 45-day suspension, respondent may apply to be reinstated to the practice of law, provided that he has demonstrated his compliance with § 3-316 and further provided that relator has not notified this court that respondent has violated any disciplinary rule during his suspension. Upon reinstatement, respondent shall complete 2 years of monitored probation. During the period of probation, respondent will be monitored by an attorney licensed to practice law in the State of Nebraska and approved by relator. The monitoring plan shall include, but not be limited to, the following:

(1) On a monthly basis, respondent shall provide the monitoring attorney with a list of all cases for which respondent is then currently responsible, said list to include the following information for each case: (a) the date the attorney-client relationship began, (b) the type of case (i.e., criminal, dissolution, probate, contract, et cetera), (c) the date of the last contact with the client, (d) the last date and type of work completed on the case, (e) the next type of work and date to be completed on the case, and (f) any applicable statute of limitations and its date;

(2) On a monthly basis, respondent shall meet with the monitoring attorney to discuss respondent's pending cases;

(3) Respondent shall work with the monitoring attorney to develop and implement appropriate office procedures to ensure that client matters are handled in a timely manner; and

(4) If at any time the monitoring attorney believes respondent has violated a disciplinary rule or has failed to comply with the terms of probation, the monitoring attorney shall report the same to relator.

CONCLUSION

The motion for judgment on the pleadings is granted. We find that respondent violated conduct rules §§ 3-501.3, 3-501.4(a)(3) and (4), 3-503.4, 3-508.1(b), and 3-508.4(a) and (d), as well as his oath of office as an attorney, see § 7-104. It is the judgment of this court that respondent is suspended from the practice of law for a period of 45 days, effective immediately. It is the further judgment of this court that upon completion of the period of suspension and upon successful application for reinstatement to the bar, respondent shall be placed on monitored probation for 2 years, subject to the terms set forth above.

Judgment of suspension.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska, appellee, v. Terrell E. Newman, appellant.

916 N.W.2d 393

Filed August 17, 2018. No. S-17-842.

1. **Appeal and Error.** The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief.
2. ____. An assignment of error raised for the first time in a reply brief is untimely and will not be considered by an appellate court.
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: Constitutional Law: Judgments.** Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.
5. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
6. ____: ____: ____. A trial court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
7. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in a case affirmatively show the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.

8. ____: ____. In a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief.
9. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred when (1) the defendant was represented by a different attorney on direct appeal than at trial, (2) an ineffective assistance of trial counsel claim was not brought on direct appeal, and (3) the alleged deficiencies in trial counsel's performance were known to the defendant or apparent from the record.
10. ____: ____: ____. Claims of ineffective assistance of appellate counsel may be raised for the first time on postconviction review.
11. **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 direct appeal of ineffective assistance of trial counsel, an appellate court will first 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). If trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue.
12. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
13. ____: ____. To show that counsel's performance was deficient under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
14. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To show prejudice under the prejudice component of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.

15. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), deficient performance and prejudice, may be addressed in either order.
16. **Attorneys at Law: Effectiveness of Counsel.** A defense attorney has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.
17. **Trial: Effectiveness of Counsel: Evidence.** A reasonable strategic decision to present particular evidence, or not to present particular evidence, will not, without more, sustain a finding of ineffective assistance of counsel. Strategic decisions made by trial counsel will not be second-guessed so long as those decisions are reasonable.
18. **Rules of Evidence.** Neb. Rev. Stat. § 27-901(1) (Reissue 2016) does not impose a high hurdle for authentication or identification.
19. **Rules of Evidence: Proof.** A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all probabilities inconsistent with authenticity. Rather, if the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirements of Neb. Rev. Stat. § 27-901(1) (Reissue 2016).
20. **Sentences.** If there is a discrepancy between the oral pronouncement of a valid sentence and the later written order, the oral pronouncement controls calculation of the prison term.
21. **Rules of Evidence: Juries: Testimony: Affidavits.** Neb. Rev. Stat. § 27-606(2) (Reissue 2016) prohibits a juror from testifying as to any matter or statement occurring during the course of the jury's deliberations. Thus, a juror's affidavit may not be used to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations.
22. **Postconviction: Effectiveness of Counsel: Proof.** A petitioner's postconviction claims that his or her defense counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence the investigation would have procured and how it would have affected the outcome of the case.
23. **Postconviction: Constitutional Law.** A claim of actual innocence may be a sufficient allegation of a constitutional violation under the Nebraska Postconviction Act.
24. **Postconviction: Evidence.** The essence of a claim of actual innocence is that the State's continued incarceration of such a petitioner without an opportunity to present newly discovered evidence is a denial of procedural or substantive due process.

25. **Postconviction: Evidence: Presumptions: Proof.** The threshold to entitle a prisoner to an evidentiary hearing on a postconviction claim of actual innocence is extraordinarily high. Such a petitioner must make a strong demonstration of actual innocence, because after a fair trial and conviction, the presumption of innocence vanishes.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed in part, and in part reversed and remanded with directions.

Stuart J. Dornan and Jason E. Troia, of Dornan, Troia, Howard, Breitkreutz & Conway, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Hall, District Judge.

Stacy, J.

A jury found Terrell E. Newman guilty of two counts of first degree murder, three counts of use of a deadly weapon to commit a felony, attempted intentional manslaughter, and possession of a deadly weapon by a prohibited person.[1] He was sentenced to life imprisonment for the murders and to additional terms of years for the other offenses, the sentences to run consecutively. We affirmed his convictions and sentences on direct appeal.[2]

Newman then moved for postconviction relief, raising claims of ineffective assistance of counsel and a claim of actual innocence. The district court denied relief without conducting an evidentiary hearing. Newman filed this timely appeal. We affirm in part, and in part reverse and remand for an evidentiary hearing.

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[1] *State v. Newman*, 290 Neb. 572, 861 N.W.2d 123 (2015).

[2] *Id.*

I. FACTS

Newman's trial was consolidated with codefendant Derrick U. Stricklin. The underlying facts are fully set forth in our opinion affirming Stricklin's convictions and sentences.[3] Summarized, Newman's convictions arose from the shooting deaths of Carlos Morales and Bernardo Noriega during a drug transaction at an automobile body shop owned by Morales. Jose Herrera-Gutierrez was also present during the drug transaction and the shootings, and he was the State's primary witness at trial. Herrera-Gutierrez identified Newman and Stricklin as the shooters and testified that he recognized both men from prior visits to Morales' shop. He had seen Stricklin approximately four times at the shop, and he had seen Newman approximately three times at the shop.

The State's theory of the case was that Newman and Stricklin committed the crimes together. Newman's cell phone records showed that Newman was in communication with both Morales and Stricklin on the day of the shootings, and also showed that Newman's cell phone was in the area of the murder scene during the relevant timeframe.[4]

A jury found Newman guilty of all the charges. He was sentenced to consecutive sentences of life imprisonment for each murder conviction, 15 to 25 years' imprisonment for each use of a deadly weapon conviction, 20 months' to 5 years' imprisonment for the attempted manslaughter conviction, and 15 to 25 years' imprisonment for the possession of a deadly weapon conviction.[5] The district court denied his motion for new trial, and he filed a direct appeal.

On direct appeal, Newman was represented by different counsel. Appellate counsel raised numerous assignments of error challenging Newman's identification by Herrera-Gutierrez, the sufficiency of the evidence, the admission of certain evidence,

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[3] *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

[4] *Id.*

[5] *Newman, supra* note 1.

the exclusion of other evidence, limitations imposed on the cross-examination of Herrera-Gutierrez, the overruling of a motion for new trial based on juror misconduct, and the overruling of a motion to withdraw his rest.

Newman's appellate counsel also alleged trial counsel had been ineffective in failing to (1) introduce certain testimony at the hearing on the motion for new trial, (2) object to certain jury instructions, and (3) adequately investigate an alibi defense. In the direct appeal, we concluded the files and records affirmatively showed the jury instruction claim lacked merit and we found the record was insufficient to address the other two allegations of ineffective assistance of trial counsel.[6]

After we affirmed his convictions and sentences, Newman filed the instant motion for postconviction relief. He alleges his appellate counsel was ineffective in (1) failing to obtain a complete record prior to Newman's direct appeal and (2) failing to raise on direct appeal claims that his trial counsel was ineffective for (a) failing to investigate certain witnesses, including alibi witnesses; (b) failing to object to certain jury instructions; (c) failing to present evidence of third-party guilt via a motion in limine; (d) failing to object to the authentication of cell phone records; (e) failing to object to the truth-in-sentencing advisement; (f) failing to present certain evidence at the motion for new trial; and (g) failing to hire a crime scene investigator. Newman also alleges in his postconviction motion, and argues in his brief, that he is actually innocent of the crimes. The district court denied the postconviction motion without conducting an evidentiary hearing. Newman filed this appeal.

II. ASSIGNMENTS OF ERROR

Newman assigns the district court erred in (1) denying him an evidentiary hearing on his motion for postconviction relief, (2) finding he did not meet the threshold for actual innocence, and (3) denying his motion for postconviction relief.

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[6] *Id.*

Newman also attempts to raise additional assignments of error in his reply brief, including that he was denied an opportunity to amend his postconviction motion and that additional jury instructions were flawed. The State filed an objection, arguing Newman could not raise new assignments of error in his reply brief. We agree.

[1,2] The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief.[7] An assignment of error raised for the first time in a reply brief is untimely and will not be considered by the court.[8] We therefore limit our analysis to the assignments made and argued in Newman's original appellate brief. We note for the sake of completeness that Stricklin properly raised nearly identical assignments of error in his appeal from the district court's denial of his motion for postconviction relief, and we found those assignments lacked merit.[9]

III. STANDARD OF REVIEW

[3] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[10]

IV. ANALYSIS

1. General Propositions Governing Postconviction

[4,5] Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional

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[7] *Rodriguez v. Surgical Assoc.*, 298 Neb. 573, 905 N.W.2d 247 (2018).

[8] See *id*.

[9] See *State v. Stricklin, post* p. 794, 916 N.W.2d 413 (2018).

[10] *State v. Vela*, 297 Neb. 227, 900 N.W.2d 8 (2017); *State v. Watson*, 295 Neb. 802, 891 N.W.2d 322 (2017).

rights such that the judgment was void or voidable.[11] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.[12]

[6-8] A trial court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.[13] If a postconviction motion alleges only conclusions of fact or law, or if the records and files in a case affirmatively show the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.[14] Thus, in a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief.[15]

[9] Here, Newman alleges he received ineffective assistance of counsel. A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred when (1) the defendant was represented by a different attorney on direct appeal than at trial, (2) an ineffective assistance of trial counsel claim was not brought on direct appeal, and (3) the alleged deficiencies in trial counsel's performance were known to the defendant or apparent from the record.[16] Newman was represented by different counsel on direct appeal

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[11] *Vela, supra* note 10.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

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

than at trial. He therefore cannot raise on postconviction any claims of ineffective assistance of trial counsel that were not preserved on direct appeal, as those claims would be procedurally barred.[17]

[10,11] However, claims of ineffective assistance of appellate counsel may be raised for the first time on postconviction review.[18] 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, an appellate court will first look at whether trial counsel was ineffective under the test in *Strickland v. Washington*.[19] If trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue.[20]

[12-14] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[21] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[22] To show that counsel's performance was deficient, the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[23] To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.[24] A reasonable probability does not require that it be more likely than not that the deficient

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[17] See *id.*

[18] *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016).

[19] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *State v. Glass*, 298 Neb. 598, 905 N.W.2d 265 (2018).

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

[21] *Strickland, supra* note 19.

[22] *Vela, supra* note 10.

[23] See *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018).

[24] *Vela, supra* note 10.

performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.[25]

[15] The two prongs of the ineffective assistance of counsel test under *Strickland*, deficient performance and prejudice, may be addressed in either order.[26] We examine Newman's allegations under this standard.

2. Failure to Investigate

[16,17] A defense attorney has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[27] A reasonable strategic decision to present particular evidence, or not to present particular evidence, will not, without more, sustain a finding of ineffective assistance of counsel.[28] Strategic decisions made by trial counsel will not be second-guessed so long as those decisions are reasonable.[29]

(a) Alibi Defense

Newman's motion for postconviction relief alleges his appellate counsel was ineffective for failing to raise on direct appeal that his trial counsel was ineffective for failing to preserve and submit his alibi defense. But the record shows appellate counsel did raise this claim on direct appeal, and we found the record was insufficient to address it.[30] Thus, Newman's allegation that appellate counsel was ineffective for failing to raise the issue is without merit.

However, Newman's postconviction motion also alleges his trial counsel was ineffective for failing to preserve and submit

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[25] *Id.*

[26] *Haynes, supra* note 23.

[27] *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017).

[28] *Id.*

[29] *Id.*

[30] *Newman, supra* note 1.

his alibi defense. Because he raised this claim in his direct appeal and we found the record was insufficient to consider or rule on that claim, it is not procedurally barred.[31] We therefore consider whether Newman has alleged facts sufficient to warrant an evidentiary hearing on this claim.

Newman's postconviction motion alleges his trial counsel failed to "independently interview, depose, or subpoena" four witnesses whom he alleges would have established an alibi defense. Newman alleges that Kevin Riley and Janet Mariscal would have testified Newman "was either at Clayton's BBQ restaurant or on a run to Chubb[] Foods to purchase supplies at or near the time of the shooting." Newman further alleges that two unnamed "Employees of Chubb[] Foods," one working at the customer service counter and the other at the cash register, would have "confirmed Newman's presence at Chubb[] Foods at or near the time of the shooting."

The district court denied an evidentiary hearing on this claim. It reasoned that because the allegations were vague as to time, they did not "definitively state that [Newman] was not at the murder scene and merely suggest [Newman] may have been at these other places at some point in the day." Moreover, the court found no prejudice could have resulted from counsel's failure to develop this evidence given the overwhelming evidence of Newman's guilt provided by Herrera-Gutierrez' eyewitness testimony and cell phone records placing Newman in the area at or near the time of the murders.

It is true Newman has not alleged a specific time he claims he was at the restaurant or the grocery store. But in his brief, Newman argues he used the general phrase "at or near the time of the shooting" in his postconviction motion, because there was uncertainty at trial about the exact time of the murders.[32] He argues the allegations in his motion are sufficient to show both deficient performance and prejudice, because they show trial counsel failed to present testimony from four

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[31] See *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007).

[32] Brief for appellant at 10.

witnesses who would have testified Newman was somewhere else at the time of the murders. The State, in its response, generally agrees with the district court's conclusion that even if trial counsel was deficient in this regard, there could be no prejudice to Newman in light of the overwhelming evidence of his guilt adduced at trial. Our de novo review persuades us otherwise.

While we agree the eyewitness identification and corroborating cell phone records, in the context of the evidence admitted at trial, provided overwhelming evidence of guilt, we cannot overlook the fact that the alibi evidence Newman alleges his attorney should have investigated could, if proved, have contradicted the eyewitness identification. Newman alleges, summarized, that four witnesses would have testified he was at a specific location other than the crime scene at or near the time of the murders. This testimony could have contradicted Herrera-Gutierrez' eyewitness testimony and, depending on the location of the restaurant and the grocery store, may also have affected the weight of the cell phone record evidence. Thus, depending on the evidence actually presented and found credible, there may be a reasonable probability that if such evidence had been presented at trial, the result of the proceeding could have been different.

In Newman's direct appeal, we found the record was insufficient to evaluate the substance of this particular claim of ineffective assistance. He presents the same claim on postconviction, and because the record is still insufficient to analyze the claim, Newman is entitled to an evidentiary hearing.[33]

(b) Other Witnesses

Newman also alleges his appellate counsel was ineffective for failing to assign as error that trial counsel was ineffective

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[33] See, *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015) (district court erred in failing to grant evidentiary hearing on ineffective assistance claim where claim was raised on direct appeal but record was insufficient to analyze claim, and same claim was raised on postconviction); *State v. Seberger*, 284 Neb. 40, 815 N.W.2d 910 (2012) (same).

for failing to "independently interview, depose, or subpoena" other potential witnesses "despite Newman's request." Newman alleges two of these witnesses would have testified that unnamed "Mexicans" or "Latino's" killed Noriega and Morales; one would have testified to hearing gunshots near the crime scene around 1:15 p.m. on the day of the shootings; one would have testified she observed two men standing in a parking lot near the crime scene around 1 p.m. on the day of the shootings; one would have testified she was afraid of Herrera-Gutierrez and did not think his story "add[ed] up"; two would have testified to observing Herrera-Gutierrez "acting crazy" on the day of the shootings; and one would testify she thought the murders involved drugs.

The district court addressed all of these allegations collectively and concluded Newman had failed to allege how deposing or subpoenaing any of these witnesses would have produced a different outcome at trial. We agree that Newman's allegations regarding these other witnesses did not show a reasonable likelihood that, absent the alleged deficiency, the outcome at trial would have been different.

In *Strickland*, the U.S. Supreme Court addressed how a court should approach the prejudice prong of an ineffective assistance of counsel claim:

> In making [the prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account

> of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.[34]

Considering the alleged testimony of these eight potential witnesses in the context of all the evidence adduced at trial, we conclude the alleged testimony would not have altered the evidentiary picture and would, at best, have had an isolated or trivial effect on the jury's findings. We find no error in the district court's denial of this claim without an evidentiary hearing.

In sum, we conclude Newman is entitled to an evidentiary hearing on his claim relating to his alibi defense, but is not entitled to an evidentiary hearing on any of his other claims of failure to interview, depose, or subpoena potential witnesses.

(c) Cross-Examination

Newman also alleges his appellate counsel was ineffective for failing to raise, on direct appeal, that trial counsel failed to adequately investigate existing files and prepare for the trial testimony of Nelson Martinez-Reyes. This witness testified at trial that he saw a man matching Herrera-Gutierrez' description near the murder location at approximately 11 a.m. on the day of the shootings, but he did not know the race of the male. Newman alleges Herrera-Gutierrez is Hispanic, and claims his trial counsel failed to cross-examine Martinez-Reyes about a prior statement in which he reported seeing a white male near the scene of the crime. We conclude this allegation of failure to cross-examine a witness on a minor credibility issue is not sufficient to demonstrate either deficient performance or resulting prejudice. Newman was not entitled to an evidentiary hearing on this claim.

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[34] *Strickland, supra* note 19, 466 U.S. at 695-96.

3. Jury Instructions

Newman alleges his appellate counsel was ineffective for failing to assert, on direct appeal, that trial counsel was ineffective for not objecting to "flawed" jury instructions Nos. 5, 6, 11, 12, and 18. Newman's motion specifically alleges instructions Nos. 5, 11, and 12 were "flawed" because they did not conform to the pattern Nebraska Jury Instructions.

The district court found the claim that trial counsel was ineffective for failing to object to instructions Nos. 5, 11, and 12 had been raised on direct appeal and rejected by this court. It reasoned the factual allegations as to the other jury instructions failed to specifically allege deficient performance and prejudice. Our de novo review leads us to the same conclusion.

Newman's brief to this court generally concedes that the argument he presents as to instructions Nos. 5, 11, and 12 was resolved on direct appeal. His brief also generally concedes that his postconviction motion did not include sufficient allegations as to instructions Nos. 6 and 18. The district court did not err in denying postconviction relief without an evidentiary hearing on this issue.

4. Confidential Informant

Newman alleges his appellate counsel was ineffective for failing to raise, on direct appeal, that trial counsel was ineffective for not doing more to secure the admission of testimony regarding an out-of-court statement made by a confidential informant. The confidential informant's statement related to the possible involvement of a man known as "Sip" in the crimes.

Admissibility of the testimony regarding the confidential informant's statement was addressed in the direct appeal of Newman's codefendant Stricklin. Before trial, both Newman and Stricklin filed motions in limine seeking a ruling on the admissibility of testimony from a detective about statements a confidential informant made to the detective. The statements made to the detective were essentially that one of the murder

victims, Morales, had attempted to buy two firearms from the informant, telling the informant that he was "having problems with two black males" and that Morales told the informant one of the males was nicknamed "'Sip.'"[35] The detective showed the informant photographs of Newman and Stricklin, and the informant did not identify either as "Sip."

The State objected to this evidence, arguing it contained two levels of hearsay—Morales' statements to the informant and the informant's statements to the detective. The district court excluded the evidence on that basis, and we affirmed on appeal.

Newman's motion for postconviction relief generally alleges that if trial counsel had done more, the statements from the confidential informant would have been admitted. But Newman's motion does not identify any actions that would have removed the hearsay issues we addressed on direct appeal, and thus, we agree with the district court that these allegations are insufficient to show ineffective assistance of counsel. The district court properly found Newman is not entitled to an evidentiary hearing on this claim.

5. Cell Phone Authentication

Evidence at trial showed a cell phone or phones associated with Newman were used to contact Stricklin and Morales on the date of the murders, and evidence showed Newman received six calls between 11:42 a.m. and 12:36 p.m. using a cell tower in the immediate vicinity of Morales' shop. Newman alleges his appellate counsel was ineffective for failing to assign, on direct appeal, that trial counsel was ineffective for failing to require the State to "authenticate" who was actually using the cell phones associated with his name. His postconviction motion alleges that if trial counsel had objected on authentication grounds, the State would have been unable to prove he was actually using the cell phones, and the

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[35] *Stricklin, supra* note 3, 290 Neb. at 553, 861 N.W.2d at 382.

substantial cell phone evidence linking him to the murders would have been inadmissible.

The district court found this allegation was without merit, reasoning that such an objection would not have been successful. We agree.

[18,19] According to Neb. Rev. Stat. § 27-901(1) (Reissue 2016), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Section 27-901 does not impose a high hurdle for authentication or identification.[36] Indeed, a proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all probabilities inconsistent with authenticity.[37] Rather, if the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirements of § 27-901.[38]

The files and records affirmatively show authentication was established. Newman's former girlfriend testified at trial that she bought him a cell phone with a certain number and also called him at a different cell phone number. Law enforcement obtained the cell phone records associated with those two numbers, and the cell phone associated with the second number was found on Newman at the time of his arrest. This cell phone evidence was properly admitted at trial.[39]

The files and records affirmatively show that if Newman's counsel had objected on the ground the State had not "authenticated" who was actually using the cell phones, such an objection would not have been successful. Newman's counsel did not perform deficiently in this regard, and the district court

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[36] *State v. Elseman*, 287 Neb. 134, 841 N.W.2d 225 (2014).

[37] *Id.*

[38] *Id.*

[39] See *Stricklin, supra* note 3.

correctly denied postconviction relief on this claim without an evidentiary hearing.

6. Truth-in-Sentencing Advisement

Newman alleges his appellate counsel was ineffective for failing to assign as error, on direct appeal, that trial counsel was ineffective for failing to object to the truth-in-sentencing advisement given by the trial court. His postconviction motion alleges the truth-in-sentencing advisement, delivered in open court, informed him he would be given credit for time served of 405 days, but the written sentencing order gave him credit for only 403 days. He argues the 2-day difference in the sentences imposed is prejudicial.

[20] The district court found Newman's claim lacked merit, because he suffered no prejudice. It reasoned that in Nebraska, if there is a discrepancy between the oral pronouncement of a valid sentence and the later written order, the oral pronouncement controls calculation of the prison term.[40]

Our de novo review of the record confirms this rule was applied in Newman's case. The commitment order entered after Newman's sentencing awarded him credit for 405 days served. Thus, the files and records thus affirmatively show that Newman has suffered no prejudice, and the district court properly denied Newman an evidentiary hearing on this claim.

7. Motion for New Trial

Newman's postconviction motion includes several allegations that his appellate counsel was ineffective for failing to raise, on direct appeal, the ineffective assistance of trial counsel related to the motion for new trial based on juror misconduct. His brief to this court argues only two of those allegations.

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[40] See *State v. Olbricht*, 294 Neb. 974, 885 N.W.2d 699 (2016).

We thus limit our review to those errors both assigned and argued to this court.[41]

Before addressing these claims, we note that in our opinion on Newman's direct appeal, we found the record was insufficient to address Newman's claim that his trial counsel was ineffective for failing to timely offer an affidavit of a nonjuror during the hearing on Newman's motion for new trial. Newman did not include such an allegation in his postconviction motion. Instead, he alleges his appellate counsel was ineffective for failing to raise other instances of ineffective assistance related to the hearing on his motion for new trial. To understand his claims, we briefly summarize the basis for Newman's motion for new trial.

Newman alleged he was entitled to a new trial because one of the jurors had communicated with the juror's brother, a nonjuror, after the first day of deliberations and before a verdict had been reached. A hearing was held on the motion for new trial, and the juror testified that he telephoned his brother and learned that their father was acquainted with Newman and Stricklin. But the juror testified he did not know either of them personally.

Newman's postconviction motion alleges his appellate counsel was ineffective for failing to raise, on direct appeal, that his trial counsel was ineffective for (1) failing to object to certain remarks by counsel and (2) conceding that portions of the juror's affidavit were inadmissible.

(a) Failure to Object

Newman's postconviction motion alleges his trial counsel should have objected when an attorney appointed to represent the juror accused of misconduct made substantive representations to the trial court instead of eliciting such information

[41] See *State v. Hill*, 298 Neb. 675, 905 N.W.2d 668 (2018) (alleged error must be both specifically assigned and specifically argued to be considered by appellate court).

from the juror in question. Newman alleges his appellate counsel was ineffective for failing to assign, on direct appeal, that his trial counsel was deficient in failing to object to the remarks of the juror's attorney.

At the hearing on the motion for new trial, the parties disputed the admissibility of the juror's affidavit. Portions of that affidavit averred that during trial, the juror

> realized that I recognized people in the audience who were familiar to me, then subsequently realized that I knew both [Newman and Stricklin] and my family has family relationships with them. In fact, at some point I learned that . . . Newman had an altercation with my father . . . and injured [my father's] shoulder[.]

During the hearing, the juror's attorney told the court the juror had not actually learned of the altercation between Newman and the juror's father until after the verdicts were returned. The court then asked the juror's attorney whether the juror recalled knowing Newman and Stricklin prior to returning the verdicts, and the attorney responded, "No."

Newman alleges that due to his counsel's deficient performance in not objecting to this colloquy, the juror's attorney was permitted to testify on behalf of his client and Newman was deprived of the opportunity to cross-examine the juror. The files and records affirmatively refute this claim.

The records shows that contrary to the allegations made in Newman's motion for postconviction relief, Newman's trial counsel did object to counsel's remarks, arguing the juror's attorney should not be permitted to testify for his client. The court agreed. Then both Newman and Stricklin were permitted to call the juror as a witness and ask questions about the timing and substance of the telephone conversation the juror had with his brother.

Because the files and records affirmatively refute Newman's claim that his counsel failed to object to the complained-of statements by the juror's attorney, and also refute any claim that he was denied an opportunity to question the juror directly,

the postconviction court did not err in denying an evidentiary hearing on this issue.

(b) Concession at Hearing

Newman also alleges his appellate counsel was ineffective for failing to raise, on direct appeal, that his trial counsel was ineffective during the motion for new trial, because he improperly conceded that a portion of the juror's affidavit was inadmissible.

The relevant portion of the affidavit averred, "During the deliberations, the other jurors persuaded me to change my vote to guilty primarily because [Newman and Stricklin] did not testify and attempt to clear their names." Newman alleges his trial counsel was ineffective, because even though counsel drafted the juror's affidavit after interviewing the juror, counsel "conceded and became submissive during the hearing on the motion for new trial" and admitted that this paragraph of the affidavit was not admissible under Nebraska law. The State argues that trial counsel was not ineffective, because that portion of the affidavit was plainly inadmissible under Nebraska law and was properly stricken by the trial court.

Neb. Rev. Stat. § 27-606(2) (Reissue 2016) provides:

> Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

[21] Section 27-606(2) prohibits a juror from testifying as to any matter or statement occurring during the course of the

jury's deliberations. Thus, a juror's affidavit may not be used to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations.[42] Because the record shows counsel did not perform deficiently in conceding this point, the district court did not err in denying postconviction relief without an evidentiary hearing on this claim.

8. Crime Scene Investigator

Newman alleges appellate counsel was ineffective in failing to raise, on direct appeal, that trial counsel was ineffective in failing to hire a crime scene investigator. He alleges various items at the crime scene were inconsistent with Herrera-Gutierrez' testimony and that counsel should have hired an investigator to rebut these inconsistencies.

Specifically, Newman alleges only one set of footprints "'with evidentiary value'" was found at the scene, but Herrera-Gutierrez testified five people went in to the shop where the murders occurred and only three came out. He alleges Herrera-Gutierrez testified the victims were tied up and shot "'real fast,'" but blood splatter at the scene was on the ceiling and the outside landing. He alleges Herrera-Gutierrez testified that the victims were shot as they lay face down, but a shell casing was found underneath one of their bodies.

Newman's postconviction motion concedes that trial counsel cross-examined the State's witnesses on this evidence, and the record confirms that Newman's counsel presented evidence regarding each of these issues either on direct examination or through cross-examination at trial. But Newman alleges trial counsel should also have hired a "crime scene investigator or specialist" who "would and could have rebutted" this evidence. Newman's motion presents no allegations regarding what such an investigator or specialist would have testified to if called, or how such testimony would have rebutted the state's evidence or affected the outcome of the case.

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[42] See *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

[22] A petitioner's postconviction claims that his or her defense counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence the investigation would have procured and how it would have affected the outcome of the case.[43] The district court correctly concluded that Newman's conclusory allegations about the failure to hire a crime scene investigator did not warrant an evidentiary hearing.[44]

9. Failure to Obtain Complete Record

Newman's postconviction motion alleges appellate counsel was ineffective for failing to obtain the complete record prior to the direct appeal. He alleges the missing portion of the record was a supplemental jury instruction not included in the final instructions sent to the jury.

Newman's motion does not allege how his lack of access to that instruction affected his appeal or what assignment of error was not raised on appeal due to the lack of access to that record. The district court thus correctly found Newman did not plead sufficient facts to necessitate an evidentiary hearing on this claim.

10. Actual Innocence

Newman's postconviction motion alleges he was actually innocent of the crimes. He supports this allegation by referencing all of his alleged claims of ineffective assistance of counsel, in addition to other unassigned errors during trial. In his brief to this court, Newman contends the errors of appellate counsel in failing to raise such issues on direct appeal "taken as a whole establish that [he] was actually innocent."[45] The trial court found Newman's allegations of

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[43] *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[44] See *id.*

[45] Brief for appellant at 20.

actual innocence were insufficient to show a constitutional violation. We agree.

[23-25] In *State v. Dubray*,[46] we explained:

> A claim of actual innocence may be a sufficient allegation of a constitutional violation under the Nebraska Postconviction Act. The essence of a claim of actual innocence is that the State's continued incarceration of such a petitioner without an opportunity to present newly discovered evidence is a denial of procedural or substantive due process. The threshold to entitle a prisoner to an evidentiary hearing on such a postconviction claim is "'extraordinarily high.'" Such a petitioner must make a strong demonstration of actual innocence because after a fair trial and conviction, the presumption of innocence vanishes.

Newman has not met his extraordinarily high threshold of alleging facts sufficient to show he is actually innocent of the crimes. The district court did not err in denying an evidentiary hearing on this claim.

V. CONCLUSION

For the foregoing reasons, we conclude the district court erred in denying Newman an evidentiary hearing on his claim that trial counsel was ineffective for failing to investigate and present alibi evidence from Riley, Mariscal, and two employees of Chubb Foods, and we reverse the court's decision in part and remand the matter for an evidentiary hearing limited to that claim. In all other respects, we affirm the district court's denial of postconviction relief without an evidentiary hearing.

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

Heavican, C.J., not participating.

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[46] *Dubray, supra* note 18, 294 Neb. at 947-48, 885 N.W.2d at 551, quoting *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013). Accord *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

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

State of Nebraska, appellee, v. Derrick U. Stricklin, appellant.

916 N.W.2d 413

Filed August 17, 2018. No. S-17-914.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Constitutional Law: Judgments.** Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.
3. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
4. ____: ____: ____. A trial court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
5. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in a case affirmatively show the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
6. ____: ____. In a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief.

7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented by the same lawyer both at trial and on direct appeal, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.
8. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
9. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
10. ____: ____. To show that counsel's performance was deficient under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
11. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To show prejudice under the prejudice component of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.
12. **Judges: Recusal.** To demonstrate that a trial judge should have recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
13. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
14. **Effectiveness of Counsel.** Defense counsel is not ineffective for failing to raise an argument that has no merit.
15. **Trial: Attorneys at Law: Presumptions.** Trial counsel is afforded due deference to formulate trial strategy and tactics, and there is a strong presumption that counsel acted reasonably.
16. **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 judgment rather than its own view of the evidence.

17. **Postconviction: Effectiveness of Counsel: Proof.** A petitioner's postconviction claims that his or her defense counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence the investigation would have procured and how it would have affected the outcome of the case.
18. **Attorneys at Law: Effectiveness of Counsel.** A defense attorney has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.
19. **Trial: Effectiveness of Counsel: Evidence.** A reasonable strategic decision to present particular evidence, or not to present particular evidence, will not, without more, sustain a finding of ineffective assistance of counsel. Strategic decisions made by trial counsel will not be second-guessed so long as those decisions are reasonable.
20. **Trial: Attorney and Client: Effectiveness of Counsel: Testimony: Waiver.** Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance of counsel in two instances: (1) if the defendant shows that counsel interfered with his or her freedom to decide to testify or (2) if counsel's tactical advice to waive the right was unreasonable.
21. **Postconviction: Evidence: Presumptions: Proof.** The threshold showing that must be made to entitle a prisoner to an evidentiary hearing on a postconviction claim of actual innocence is extraordinarily high, because after a fair trial and conviction, the presumption of innocence vanishes.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed in part, and in part reversed and remanded with directions.

Stuart J. Dornan and Jason E. Troia, of Dornan, Troia, Howard, Breitkreutz & Conway, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Hall, District Judge.

Stacy, J.

A jury found Derrick U. Stricklin guilty of two counts of first degree murder, three counts of use of a deadly weapon to commit a felony, attempted intentional manslaughter, and possession of a deadly weapon by a prohibited person. He was sentenced to life imprisonment for the murders and to additional terms of years for the other offenses, the sentences to run consecutively. We affirmed his convictions and sentences on direct appeal.[1]

Stricklin now moves for postconviction relief, raising claims of ineffective assistance of counsel and a claim of actual innocence. The district court denied relief without conducting an evidentiary hearing. Stricklin filed this timely appeal. We affirm in part, and in part reverse and remand for an evidentiary hearing.

I. FACTS

Stricklin's trial was consolidated with codefendant Terrell E. Newman. The underlying facts are set forth in our opinion in Stricklin's direct appeal.[2] Summarized, Stricklin's convictions arose from the shooting deaths of Carlos Morales and Bernardo Noriega during a drug transaction at an automobile body shop owned by Morales. Jose Herrera-Gutierrez was also present during the drug transaction and the shootings, and he was the State's primary witness at trial. Herrera-Gutierrez identified Stricklin and Newman as the shooters and testified that he recognized both men from prior visits to Morales' shop. He had seen Stricklin approximately four times at the shop, and he had seen Newman approximately three times at the shop.

The State's theory of the case was that Stricklin and Newman committed the crimes together. Newman's cell phone records showed that Newman was in communication with both Morales and Stricklin on the day of the shootings, and also

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[1] *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

[2] *Id.*

showed that Newman's cell phone was in the area of the murder scene during the relevant timeframe.[3]

A jury found Stricklin guilty of two counts of first degree murder, three counts of use of a deadly weapon to commit a felony, attempted intentional manslaughter, and possession of a deadly weapon by a prohibited person. He was sentenced to consecutive sentences of life imprisonment for each murder conviction, 15 to 25 years' imprisonment for each use of a deadly weapon conviction, 20 months' to 5 years' imprisonment for the attempted manslaughter conviction, and 15 to 25 years' imprisonment for the possession of a deadly weapon conviction.[4] The district court denied his motion for new trial, and he filed a direct appeal.

Stricklin was represented by the same counsel at trial and on direct appeal. In his direct appeal, Stricklin assigned the trial court erred in (1) denying his motion to sever, (2) excluding statements of a confidential informant, (3) limiting his cross-examination of Herrera-Gutierrez, (4) failing to include relevant language in certain jury instructions, (5) overruling his motion for new trial based on juror misconduct, and (6) overruling his motion to reopen the evidence. This court affirmed his convictions and sentences.[5]

Stricklin then filed the instant motion for postconviction relief, along with a motion for appointment of counsel. His postconviction motion alleges counsel was ineffective for (1) not moving to recuse the trial judge; (2) failing to object to jury instructions Nos. 6, 11, 12, and 20; (3) failing to file notice of his alibi defense and present certain alibi evidence; (4) failing to object and move for a mistrial during closing arguments; (5) failing to raise a confrontation objection at a hearing on his motion for new trial; (6) abandoning, during the hearing on the motion for new trial, all arguments except juror misconduct; (7) failing to call a witness at the hearing

[3] *Id.*

[4] *Id.*

[5] *Id.*

on the motion for new trial; (8) failing to obtain a crime scene investigator; (9) failing to object to cell phone record evidence on "authentication" grounds; (10) failing to depose and call certain identified witnesses and investigate certain defenses; (11) failing to file a motion in limine regarding the admissibility of testimony of a confidential informant; (12) unreasonably advising him to waive his right to testify; (13) failing to assign as error on direct appeal the insufficiency of the evidence to support his convictions and the improper identification of Stricklin as one of the perpetrators; and (14) failing to obtain a complete record for appeal. Finally, Stricklin alleges a claim of actual innocence. The district court denied the postconviction motion without conducting an evidentiary hearing. Stricklin filed this appeal.

II. ASSIGNMENTS OF ERROR

Stricklin assigns, restated, that the district court erred in (1) denying him an opportunity to amend his motion for postconviction relief, (2) denying him an evidentiary hearing on his motion for postconviction relief, (3) finding he did not meet the threshold for actual innocence, and (4) denying his motion for postconviction relief.

III. STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[6]

IV. ANALYSIS

1. General Propositions Governing Postconviction

[2,3] Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground

[6] *State v. Vela*, 297 Neb. 227, 900 N.W.2d 8 (2017); *State v. Watson*, 295 Neb. 802, 891 N.W.2d 322 (2017).

that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.[7] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.[8]

[4-6] A trial court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.[9] If a postconviction motion alleges only conclusions of fact or law, or if the records and files in a case affirmatively show the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.[10] Thus, in a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief.[11]

[7] Here, Stricklin was represented by the same counsel at trial and on appeal, and his postconviction motion alleges counsel provided ineffective assistance both at trial and on direct appeal. Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented by the same lawyer both at trial and on direct appeal, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.[12]

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[7] *Vela, supra* note 6.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

[12] *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010).

Recognizing this, the district court addressed all of Stricklin's ineffective assistance of counsel claims.

[8-11] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.[13] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[14] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[15] To show that counsel's performance was deficient, the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[16] To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.[17] A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.[18]

2. Motion to Amend Postconviction Motion

Stricklin assigns error to the district court's "denying [him] an opportunity to amend his motion for postconviction relief." We review the district court's decision in this regard for an abuse of discretion.[19]

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[13] *Thorpe, supra* note 11; *State v. Baker*, 286 Neb. 524, 837 N.W.2d 91 (2013).

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

[15] See *Vela, supra* note 6.

[16] See *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018).

[17] See *Vela, supra* note 6.

[18] *Id.*

[19] *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

Approximately 4 months after filing his verified motion for postconviction relief, Stricklin filed a motion seeking "permission to Amend the Motion for Postconviction after the Court grants appointment of Counsel." Newman filed a similar motion in his postconviction proceeding. At a joint telephonic hearing on the motions, the court asked for clarification:

> THE COURT: Okay. There was a motion filed by both . . . Newman and . . . Stricklin on August 17, 2016, which was a Request for Counsel and a Request to Amend the Postconviction Motion. I need to ask, and I'll start with you, Mr. Newman, are you asking to amend at this time?
>
> MR. NEWMAN: Yes.
>
> THE COURT: What are you asking to amend?
>
> MR. NEWMAN: The motion for postconviction.
>
> THE COURT: How are you asking for that to be amended?
>
> MR. NEWMAN: By way of counsel.
>
> THE COURT: Okay. So — what I want to make clear is, there was a motion asking for counsel, and then if counsel is appointed you want to keep open your ability to amend your Motion for Postconviction. Am I understanding that correctly?
>
> MR. NEWMAN: Yes. Correct.
>
> THE COURT: Okay. But you're not asking to amend here today?
>
> MR. NEWMAN: No.
>
> THE COURT: All right. And I'll ask you the same questions, Mr. Stricklin. Are you asking to amend your postconviction today?
>
> MR. STRICKLIN: No.
>
> THE COURT: Okay. Again, I'll just make it clear with Mr. Stricklin. So you're asking if the Court determines that an evidentiary hearing is warranted, then you're asking for Counsel to be appointed and then the ability to amend at that time; is that correct?
>
> MR. STRICKLIN: Correct.

> THE COURT: All right. So that matter will remain pending until the Court reviews — because I still have to review whether or not the evidentiary hearing will be granted, and then we can go from there.
>
> MR. STRICKLIN: Okay.

The record affirmatively shows Stricklin was not seeking leave to immediately amend his postconviction motion in order to add factual allegations or include additional claims.[20] Instead, he intended the motion to serve as a placeholder of sorts for a possible future motion to amend by appointed counsel. Given the conditional nature of Stricklin's request, we find no abuse of discretion in denying the motion.

3. Failure to Seek Recusal of Trial Judge

Stricklin's postconviction motion alleges his trial counsel was ineffective for not moving to recuse the trial judge and for abandoning an opportunity to have an evidentiary hearing on such a motion. Stricklin alleges that during his trial, "individuals and spectators in the audience" noticed "favoritism" and "deference favoring the state prosecution to the point of no return." Stricklin's postconviction motion alleges these concerns were brought to the attention of his counsel, and he claims counsel was ineffective for failing to pursue recusal based on these concerns. His motion does not explain what gave rise to these concerns nor does he allege any supporting facts.

[12,13] To demonstrate prejudice from counsel's failure to seek recusal, Stricklin must allege facts sufficient to demonstrate there was a reasonable probability such a motion would have been successful.[21] To demonstrate that a trial judge

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[20] Cf. *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010) (defendant requested leave to amend even if counsel was not appointed), *disapproved, Robertson, supra* note 19.

[21] See, e.g., *State v. Nolt*, 298 Neb. 910, 906 N.W.2d 309 (2018) (unless motion to suppress would have been successful, it cannot be said counsel was deficient in failing to file such motion).

should have recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.[22] A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[23]

Here, Stricklin's conclusory allegations of "favoritism" and "deference favoring the state" were insufficient to overcome the presumption of judicial impartiality and, without more, would not have required recusal. Moreover, the record affirmatively shows that when instructing the jury, the court specifically admonished it regarding such issues, explaining:

> I am not permitted to comment on the evidence, and I have not intentionally done so. If it appears to you that I have commented on the evidence, during either the trial or the giving of these instructions, you must disregard such comment entirely.
>
> You must not interpret any of my statements, actions, or rulings, nor any of the inflections of my voice as reflecting an opinion as to how this case should be decided.

[14] Because defense counsel is not ineffective for failing to raise an argument that has no merit,[24] we find no error in the postconviction court's denial of this claim without an evidentiary hearing.

4. Jury Instructions

Stricklin argues his counsel was ineffective for failing to object to jury instructions Nos. 6, 11, 12, and 20. The district court denied Stricklin's motion as to instructions Nos. 5, 11, and 12, because it found errors related to those instructions had been addressed and rejected on direct appeal. The court

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[22] *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[23] *Id.*

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

denied Stricklin's motion as to instruction No. 20, because it found Stricklin failed to allege either what objection trial counsel should have made or what proposed alternative instruction should have been requested.

In his brief on appeal, Stricklin concedes that instruction No. 5 was addressed in his direct appeal and he presents no further argument regarding that instruction or his assigned error for instruction No. 6. Stricklin also concedes instructions Nos. 11 and 12 were addressed in codefendant Newman's direct appeal, but Stricklin contends he is not procedurally barred from raising those claims on postconviction, because he had the same counsel at trial and on direct appeal.[25] While it is true the claims of ineffective assistance premised on instructions Nos. 11 and 12 are not procedurally barred, Stricklin presents the same arguments regarding those instructions that Newman raised on direct appeal. And, in *State v. Newman*,[26] our opinion resolving Newman's direct appeal, we found such claims were meritless:

> Instruction No. 11 provided the jury with definitions. Newman contends that the instruction was erroneous for omitting the phrase "'or intentional manslaughter,'" as stated in the pattern jury instruction. He does not identify the erroneous definition or the relevant pattern jury instruction, but we presume that he refers to the definition of "'[a] felony.'" Notwithstanding any error in that definition, the jury correctly understood that the offense of attempted intentional manslaughter constituted a felony. The jury found Newman guilty of attempted intentional manslaughter and the corresponding charge of use of a deadly weapon to commit a felony.
>
> As to instruction No. 12, Newman contends that the instruction failed to correctly charge the jury on intent. However, instruction No. 12 was modeled on the relevant

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[25] See *McKinney, supra* note 12.

[26] *State v. Newman*, 290 Neb. 572, 585, 861 N.W.2d 123, 135 (2015).

> pattern jury instruction. As such, the instruction was not erroneous.
>
> None of Newman's allegations of error in the instructions given to the jury caused him prejudice. Thus, the record affirmatively establishes that this claim of ineffective assistance of counsel is without merit.

Our reasoning in *Newman* shows that if Stricklin's counsel had challenged jury instructions Nos. 11 and 12, that challenge would likewise have been meritless. Because Stricklin's counsel cannot be ineffective for failing to raise an argument that has no merit,[27] the district court correctly denied postconviction relief on the claim involving instructions Nos. 11 and 12.

With respect to instruction No. 20, Stricklin alleges his counsel should have asked the court for a limiting instruction informing the jury that the records of Newman's cell phone use could not be considered in Stricklin's case. But in Stricklin's direct appeal, we specifically held Newman's cell phone records were admissible evidence against both Stricklin and Newman.[28] And we rejected the suggestion that a limiting instruction was necessary regarding an exhibit showing calls to Newman's cell phone and the location of the cell tower used to service those calls.[29] Because it would not have been error to deny such a limiting instruction if counsel had requested it, Stricklin's allegations of ineffective assistance as to instruction No. 20 were also insufficient to warrant an evidentiary hearing. We find no error in the postconviction court's denial of this claim without an evidentiary hearing.

5. Alibi Defense

Stricklin alleges his counsel was ineffective for failing to file notice of and present an alibi defense. In his postconviction

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[27] See *Vo, supra* note 24.

[28] *Stricklin, supra* note 1, 290 Neb. at 552, 861 N.W.2d at 381 ("the evidence of Newman's cell phone records and exhibit 288 would have been relevant, admissible in a separate trial against Stricklin").

[29] *Id.*

motion, Stricklin alleges that at 10 a.m. on the day of the crimes, he took his stepson to a barber shop in downtown Omaha, Nebraska. He further alleges they left the barber shop around noon and drove to Stricklin's grandmother's house "located on 36th and Himebaugh." He alleges he took the "North freeway" en route to his grandmother's house and that during the drive, he made a call on his cell phone at 12:34 p.m. The postconviction motion does not allege how long Stricklin stayed at his grandmother's house, but it does allege that four named witnesses would corroborate this alibi. The motion further alleges Stricklin's cell phone records would corroborate this alibi.

The district court found these allegations were insufficient to warrant an evidentiary hearing, because they did not "definitively state [Stricklin] was not at the murder scene and merely suggest [Stricklin] may have been at these other places at some point in the day." Stricklin's brief concedes his motion did not affirmatively allege he was not at the crime scene, but he contends it was sufficient to describe that he was somewhere else at the time the State claims the shootings occurred and to allege that numerous alibi witnesses would corroborate that claim.

[15] At trial, the State relied on cell phone evidence linking Stricklin and Newman to the crime scene between 11:42 a.m. and 12:36 p.m. Thus, based on the State's theory of the case, the crimes occurred during the general time period Stricklin has alleged alibi witnesses would confirm he was someplace else. Stricklin alleges his counsel knew of this alibi information and was deficient in failing to present it. Stricklin's brief acknowledges that trial counsel is afforded due deference to formulate trial strategy and tactics and that there is a strong presumption that counsel acted reasonably.[30] But he argues that the reasonableness of trial counsel's strategy in rejecting his alibi defense cannot be determined without an evidentiary hearing. We agree.

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[30] See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

We find Stricklin has alleged facts which, if proved, are sufficient to show both deficient performance and prejudice regarding his alibi defense. Stricklin is entitled to an evidentiary hearing on whether trial counsel was ineffective for failing to file notice of and present evidence of his alibi defense.

6. Closing Arguments/Mistrial

Stricklin alleges his trial counsel was ineffective for failing to move for mistrial based on prosecutorial misconduct. His motion alleges two instances of alleged misconduct, but he argues only one of them on appeal, so we limit our analysis to that instance.[31]

During closing arguments, Stricklin's counsel referred to cell phone records showing Stricklin's cell phone neither made nor received any calls between 11:13 a.m. and 12:34 p.m. During his closing argument, defense counsel suggested the lack of calls during that timeframe was because Stricklin was driving. In the prosecutor's rebuttal, she responded to that argument, stating:

> At 11:13 . . . Stricklin has no more calls. From 11:13 until 12:34, he has no more calls. And the call that he wants you to believe he's traveling while it's being made, that call wasn't answered at 12:34. Why are there no more calls? The two of them are together. And in my mind . . . Stricklin turned his phone off. He had no incoming or outgoing calls at all between 11:13 and 12:34.

In response to this statement, Stricklin's attorney objected, stating, "That's not in evidence." The prosecutor countered that the cell phone records were in evidence, and the trial court overruled the objection.

In Stricklin's direct appeal, he alleged the prosecutor's comments amounted to prosecutorial misconduct. We found Stricklin had not preserved the issue for appellate review

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[31] See *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018) (errors must be both specifically assigned and specifically argued to be considered by appellate court).

because his counsel had not requested a mistrial based on the prosecutor's comments.[32] Now, in his postconviction motion, Stricklin alleges his trial counsel was ineffective for failing to move for a mistrial and thus preserve for appellate review the issue of prosecutorial misconduct.

The district court denied postconviction relief on this claim without an evidentiary hearing, finding the prosecutor's comments did not mislead or unduly influence the jury and further finding that any resulting prejudice was not substantial enough to damage the integrity, reputation, or fairness of the judicial process. We agree.

[16] Prosecutors generally may not give their personal opinions on the veracity of a witness or the guilt or innocence of the accused.[33] 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 judgment rather than its own view of the evidence.[34] We have emphasized the importance of this rule and have admonished prosecutors to avoid using phrases such as "'I believe'" or "'the State believes'"[35] when arguing their case to the jury.

But here, to the extent Stricklin suggests the prosecutor's remark "in my mind" was an attempt to express a personal opinion, it was not one relating to the veracity of a witness or to Stricklin's guilt or innocence. Rather, the prosecutor was responding to an argument advanced by defense counsel on the possible interpretation of cell phone evidence. While prosecutors would be wise to avoid language expressing their personal opinion on any matter, the statement at issue here was not

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[32] *Stricklin, supra* note 1.

[33] *State v. Hernandez*, 299 Neb. 896, 911 N.W.2d 524 (2018). See, also, 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").

[34] *Hernandez, supra* note 33.

[35] *Id*. at 928, 911 N.W.2d at 549.

misconduct. Thus, Stricklin's trial counsel was not deficient for failing to move for a mistrial based on the remark. The district court correctly denied postconviction relief on this claim without an evidentiary hearing.

7. Same Claims as Newman

Stricklin raises several claims of ineffective assistance of counsel that are identical, or nearly identical, to claims raised by Newman in his motion for postconviction relief. These claims relate to: trial counsel's failure to object during the motion for new trial, trial counsel's failure to obtain a crime scene investigator, and trial counsel's failure to challenge the authentication of Newman's cell phone records. These assignments of error are analyzed, and rejected, in *State v. Newman*,[36] our opinion resolving Newman's appeal of his postconviction motion. We briefly address them here as well.

(a) Failure to Object During Motion for New Trial

Stricklin, like codefendant Newman, alleges his trial counsel should have objected when an attorney appointed to represent a juror accused of misconduct made a substantive representation about the juror's knowledge at a particular point in time, instead of eliciting such information from his client. Stricklin alleges that due to his counsel's deficient performance in not objecting to the remark, the juror's attorney was permitted to testify on behalf of his client and Stricklin was deprived of the opportunity to confront and cross-examine the juror. As we concluded in Newman's case, the files and records affirmatively refute this claim.

The record shows Stricklin and Newman both filed motions for new trial on the basis of juror misconduct, and the motions were heard together. Although Stricklin's counsel did not object to the substantive remark make by the juror's attorney, Newman's trial counsel did object, and argued the juror's

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[36] *State v. Newman, ante* p. 770, 916 N.W.2d 393 (2018).

attorney should not be permitted to testify for his client. The court agreed and subsequently allowed both Stricklin and Newman to call the juror as a witness and ask questions about the timing and substance of the telephone conversation the juror had with his brother.

Thus, although Stricklin's counsel did not join in the objection raised by Newman's counsel, Stricklin can show no prejudice resulting from this failure. The files and records affirmatively refute his claim that he was denied an opportunity to question the juror directly, and the postconviction court did not err in denying an evidentiary hearing on this issue.

(b) Crime Scene Investigator

Stricklin alleges his trial counsel was ineffective in failing to hire a crime scene investigator to rebut Herrera-Gutierrez' testimony. Stricklin's allegations are nearly identical to those made by Newman in his motion for postconviction relief. And Stricklin's allegations fail for the same reasons articulated in our opinion analyzing Newman's claims.

Stricklin alleges his trial counsel was "content to cross-examine" the State's witnesses and was deficient for not hiring a crime scene investigator or specialist to refute the evidence regarding footprints and blood splatter, and to do additional DNA testing. But Stricklin's postconviction motion presents no allegations regarding what such an investigator or specialist would have testified to if called or how such testimony would have rebutted the State's evidence or affected the outcome of the case.

[17] A petitioner's postconviction claims that his or her defense counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence the investigation would have procured and how it would have affected the outcome of the case.[37] The district court correctly concluded that Stricklin's conclusory allegations about the failure to

[37] *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

hire a crime scene investigator did not warrant an evidentiary hearing.[38]

(c) Cell Phone Records

Stricklin alleges his counsel was ineffective for failing to object to the authenticity of the cell phone records received into evidence at trial. Stricklin alleges that if his attorney had objected to the cell phone evidence on the ground of "authentication of who was actually using the cellphones in question," the corroborative cell phone evidence would have been excluded. Stricklin's allegations are nearly identical to those made by Newman in his motion for postconviction relief, and they fail for the same reason.

As we discussed in *Newman*, the files and records affirmatively show an authentication objection would not have been successful and, therefore, Stricklin's counsel could not have been ineffective for failing to make such an objection.[39] The district court correctly denied postconviction relief on this claim without an evidentiary hearing.

8. Motion for New Trial

Stricklin alleges his trial counsel was ineffective in handling his motion for new trial. He alleges counsel was deficient in two respects: (1) abandoning certain grounds that had been alleged in the motion and (2) failing to adduce certain evidence at the hearing.

(a) Abandoned Arguments

Stricklin alleges his trial counsel filed a motion for new trial alleging juror misconduct, irregularities in the proceedings, the verdict was not supported by sufficient evidence, the verdict was contrary to law, error in the jury instructions, and failure to sustain his motion for directed verdict. At the hearing on the motion for new trial, counsel argued only the issue of juror

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[38] See *id.*

[39] See, *Newman, supra* note 36; *Vo, supra* note 24.

misconduct. Stricklin alleges his counsel abandoned the other arguments out of "neglect and inattention," and he alleges generally that if the other grounds had been pursued they would have been meritorious.

Stricklin's conclusory allegation that the abandoned arguments would have been meritorious is not supported by any factual allegations and is insufficient to show either deficiency in performance or resulting prejudice. The district court did not err in denying postconviction relief on this claim without an evidentiary hearing.

(b) Failure to Call Additional Witness

As noted, Stricklin's motion for new trial was premised on juror misconduct when, after the first day of deliberation, a juror made a telephone call to his brother and discussed the status of his vote. Stricklin alleges his counsel performed deficiently during the hearing on his motion.

At the hearing on the motion for new trial, portions of an affidavit from the juror were admitted into evidence and the juror was questioned by counsel for both Stricklin and Newman. The juror admitted he had telephoned his brother during an evening recess from deliberations. The juror told his brother, who lives in Georgia, that he was a juror in a murder trial, that he was the only juror wanting to vote "not guilty," and that he did not know what he was going to do. During the conversation with his brother, the juror also learned that his father was an acquaintance of Stricklin and Newman. Eventually, the jury returned a unanimous verdict of guilt.

After this hearing, the district court found the juror had committed misconduct, but that Stricklin had not been prejudiced by the misconduct. On direct appeal, we agreed, reasoning:

> [W]e agree with the district court that Stricklin was not prejudiced by the extraneous information received by the juror during the telephone call to his brother.

> Whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror. The test to determine whether extraneous material was prejudicial looks to the possible effect of the extraneous material on an average juror's deliberative process.
>
> The extraneous information received by the juror would not have affected an average juror's deliberative process. The district court determined that the juror had testified credibly that his brother informed him only that his father and [Stricklin and Newman] had a neutral acquaintance. . . . We agree with the district court that such knowledge of a neutral family acquaintance would not motivate an average juror to change his vote from not guilty to guilty.[40]

In his postconviction motion, Stricklin alleges his counsel was ineffective because he asked objectionable questions about the juror's thought process and he "should have known better." He also alleges his attorney was deficient for not calling the juror's brother as a witness during the hearing. Because Stricklin's brief argues only the latter allegation, we limit our analysis accordingly.[41]

Stricklin alleges that if his attorney had called the juror's brother to testify, the brother would have established that (1) the juror was aware before beginning deliberations that his family knew Stricklin and Newman and (2) the juror's father once injured his shoulder in an altercation with Newman. The district court found this alleged testimony, even if proved, would have been cumulative to similar testimony adduced during the hearing, so any deficiency could not have prejudiced Stricklin. Our de novo review leads us to the same conclusion.

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[40] *Stricklin, supra* note 1, 290 Neb. at 569-70, 861 N.W.2d at 391-92.

[41] See *Fetherkile*, *supra* note 31.

Several individuals testified at the hearing on the motion for new trial, including the juror accused of misconduct and the private investigator hired by the defense. Stricklin and Newman also testified via an offer of proof. The private investigator testified the juror had told him that the day before deliberations began, he started thinking he might know Stricklin and Newman, because he recognized some people in the gallery, and that was one of the reasons he called his brother. Newman testified that he knew the juror's family but had not recognized the juror. Newman also described an altercation with the juror's father: "It was just once. Me and him was wrestling around, and I hip tossed him and threw his shoulder out of a socket."

Because the purported testimony of the juror's brother would have been cumulative to other similar testimony, any deficient performance by trial counsel in not calling the brother did not result in prejudice to Stricklin. The district court did not err in denying this claim without an evidentiary hearing.

9. Failure to Investigate

Stricklin alleges that despite his request, trial counsel failed to "independently interview, depose, subpoena, or contact" various witnesses. In this regard, Stricklin presents some claims which are nearly identical to Newman's, and other claims which Newman did not raise.

[18,19] A defense attorney has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[42] A reasonable strategic decision to present particular evidence, or not to present particular evidence, will not, without more, sustain a finding of ineffective assistance of counsel.[43] Strategic decisions made by trial counsel will not be second-guessed so long as those decisions are reasonable.[44]

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[42] *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017).

[43] *Id.*

[44] *Id.*

(a) Same Witnesses as Newman

Stricklin alleges his counsel failed to "independently interview, depose, subpoena, or contact" many of the same potential witnesses identified in Newman's postconviction motion. Like Newman, Stricklin alleges these witnesses would have testified to hearing that unnamed "Mexicans" or "Latino's" had killed Noriega and Morales; to hearing gunshots near the crime scene around 1:15 p.m. on the day of the shootings; to observing two men standing in a parking lot near the crime scene around 1 p.m. on the day of the shootings; to being scared of Herrera-Gutierrez and not believing his story "add[ed] up"; to observing Herrera-Gutierrez "acting crazy" on the day of the shootings; and to the belief that Noriega and Morales were "killed over drugs."

The district court addressed all of these allegations collectively and concluded Stricklin had failed to allege how deposing or subpoenaing any of these witnesses would have produced a different outcome at trial. For the same reason, we found these allegations insufficient to show prejudice in Newman's postconviction case, we find them insufficient in Stricklin's case.

Considering the alleged testimony of these potential witnesses in the context of all the evidence adduced at trial, we conclude the testimony would not have altered the evidentiary picture and would, at best, have had an isolated or trivial effect on the jury's findings. We find no error in the district court's denial of the claims involving these witnesses without an evidentiary hearing.

(b) Police Investigation

Stricklin's motion alleges his counsel did not investigate "irregularities" in the police investigation. He alleges the lead detective told crime scene technicians not to preserve blood evidence, gave false testimony at the suppression hearing, failed to check Herrera-Gutierrez' fingerprints against

crime scene prints, and would unexpectedly show up at the jail while Stricklin was meeting with his trial counsel, which Stricklin alleged was an attempt to intimidate him.

Stricklin has not alleged which witnesses would have testified to these irregularities, nor has he alleged how his counsel's failure to investigate any of these alleged actions prejudiced his defense. For these reasons, we find no error in the district court's denial of an evidentiary hearing on this claim.

(c) Other Possible Suspects

Stricklin's postconviction motion also alleges his counsel failed to investigate and present evidence of two other potential suspects: Marcus Jefferson and James Moore.

Stricklin alleges that 2 days after the shooting, his half brother, Marcus Jefferson, told him that Morales had been "murdered by a guy named James Moore" because Morales had sold Moore "bad drugs" and refused to correct the problem or refund the money. Stricklin alleges he told his counsel about this discussion but counsel failed to investigate Moore as a potential suspect.

Stricklin also alleges he asked his counsel to investigate Jefferson as a potential suspect. Stricklin alleges he told his counsel that after the shootings, Jefferson seemed to know details of the crime that were not yet public. He also alleges Jefferson had a motive to murder Morales, because Morales owed Jefferson "alot [sic] of money" as a result of a fire in Morales' shop that destroyed Jefferson's "show car."

Stricklin's motion generally suggests that if his counsel had investigated this information, Jefferson and Moore would have been identified as suspects and the result of the trial would have been different. We conclude these allegations are sufficient, if proved, to allege both deficient performance and prejudice. Thus, Stricklin is entitled to an evidentiary hearing on his allegation that counsel was ineffective for failing to investigate the information related to Jefferson and Moore.

10. Motion in Limine and Confidential Informant

Stricklin alleges his trial counsel was ineffective when he failed to "contact, interview, or depose" a confidential informant. Details relating to the confidential informant are set forth in our opinion on Stricklin's direct appeal.[45]

The parties learned, summarized, that a confidential informant had told police that 1 week before the crimes occurred, Morales told the informant he wanted to obtain firearms, because he was "having problems with two black males," one of whom was nicknamed "'Sip.'"[46] The informant told police he was not sure of the origin of Morales' problems with the men but believed it possibly arose from a "'drug tax'" for selling drugs in the neighborhood.[47]

Both Stricklin and Newman filed motions in limine asking the court to allow the police detective to testify about the confidential informant's statements. The district court overruled the motions in limine, finding the evidence was inadmissible hearsay. On Stricklin's direct appeal, we affirmed, reasoning the proffered testimony involved two layers of hearsay and did not fall under any of the exceptions argued to and considered by the trial court.[48]

In his postconviction motion, Stricklin alleges that after learning the identity of the confidential informant, his counsel failed to contact that informant or otherwise investigate what the informant had told police. Stricklin also alleges that he asked his counsel to show the confidential informant a photograph of "Sip" to confirm his identity. Stricklin alleges counsel never did so and, if he had, could have obtained enough corroborating evidence of trustworthiness so that the testimony of

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[45] *Stricklin, supra* note 1.

[46] *Id.* at 553, 861 N.W.2d at 382.

[47] *Id.* at 554, 861 N.W.2d at 382.

[48] *Id.*

the confidential informant would have been admissible under the residual hearsay exception.[49]

Stricklin's argument appears to misunderstand the nature of the hearsay issue presented on direct appeal. In that appeal, we focused on the admissibility of Morales' statements that he was seeking firearms because he was having issues with "Sip." We held that such a statement was not against Morales' penal interest[50] and was not admissible under the residual hearsay exception.[51] With respect to the latter, we reasoned Morales' statements did not necessarily motivate him to speak truthfully, the statements were not made under oath, Morales was not subject to cross-examination, and there was no evidence he subsequently reaffirmed the statements.[52] We also reasoned that Morales' statements established only that Morales was having trouble with other persons—it did not establish that Stricklin and Newman were innocent of the crimes.

None of the allegations Stricklin makes in his motion would affect this analysis. We find the files and records affirmatively show counsel was not ineffective in this regard. Accordingly, the district court did not err in denying postconviction relief without an evidentiary hearing on this issue.

11. Advising Stricklin Not to Testify

[20] Stricklin alleges his counsel was ineffective for advising him not to testify. Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance of counsel in two instances: (1) if the defendant shows that counsel interfered with his or her freedom to decide to

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[49] See, Neb. Rev. Stat. §§ 27-803(23) and 27-804(2)(e) (Reissue 2016); *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[50] See § 27-804(2)(c).

[51] See § 27-804(2)(e).

[52] *Stricklin, supra* note 1.

testify or (2) if counsel's tactical advice to waive the right was unreasonable.[53]

Stricklin waived his right to testify in open court, and he makes no claim that his waiver was not free and voluntary or that counsel interfered with his freedom to decide whether to testify. Instead, he alleges his attorney's advice not to testify was legally unreasonable and thus deficient, because it was incorrect to suggest he could have been asked about details of his prior crimes.

Specifically, Stricklin alleges he chose not to testify based on counsel's advice that if he testified, the State could adduce evidence that he went to prison for "selling drugs" and he would be "'opening up a can of worms.'" He alleges this advisement was inaccurate and suggests his attorney should have advised him that if he testified, the jury could learn he was a convicted felon but that details of his prior crimes would be inadmissible.[54]

Stricklin's postconviction motion does not allege what his testimony would have been at trial or how it would have changed the outcome of the trial. Instead, he alleges he was prejudiced because there was evidence the jury convicted him due to his silence. In support of such a contention, he points to one paragraph in the affidavit of the juror accused of misconduct. In that paragraph, the juror avers he changed his vote to guilty "primarily because [Stricklin and Newman] did not testify and attempt to clear their names." The trial court sustained the State's objection to this paragraph and struck it pursuant to Neb. Rev. Stat. § 27-606(2) (Reissue 2016). We express no opinion on whether an inadmissible averment in a juror's affidavit can ever support a showing of prejudice under *Strickland*, because we conclude, under the first prong of *Strickland*, that counsel's advice was not deficient.

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[53] *State v. Johnson*, 298 Neb. 491, 904 N.W.2d 714 (2017).

[54] See Neb. Rev. Stat. § 27-608(2) (Reissue 2016).

The State points out that at the time of Stricklin's trial, the law was unclear as to whether Stricklin could have been cross-examined under § 27-608(2) about the details of his prior felony drug conviction, and thus, the advice counsel gave him was not unreasonable. In fact, we addressed the interplay between § 27-608 and Neb. Rev. Stat. § 27-609 (Reissue 2016) for the first time in Stricklin's direct appeal, noting it appeared there had been confusion on that issue and we had not previously addressed it.[55]

After analyzing federal court decisions involving the federal equivalent to §§ 27-608(2) and 27-609, we held that when impeaching a witness pursuant to § 27-609, once the conviction is established, the inquiry must end there and it is improper to inquire into the details.[56] And we held that although § 27-608(2) permits questioning during cross-examination on specific instances of prior conduct, those instances are limited to conduct not resulting in a prior conviction.[57]

At the time Stricklin's counsel advised him, this court had not yet addressed the interplay between §§ 27-608(2) and 27-609. Thus, the tactical advice of Stricklin's counsel was, at the time, not unreasonable and the district court did not err in denying this claim of ineffective assistance without an evidentiary hearing.

12. Insufficiency of Evidence and Lack of Identification

Stricklin alleges his counsel was ineffective because, on direct appeal, he failed to include assignments of error that (1) the evidence at trial was insufficient to support his convictions and (2) there was an unduly suggestive identification of him as the perpetrator. Stricklin alleges generally that these claims

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[55] *Stricklin, supra* note 1.

[56] *Id.*

[57] *Id.*

would have been meritorious if raised and further alleges that counsel refused to raise these claims even though Stricklin "beg[ged]" him to. The record and files affirmatively refute these claims.

(a) Identification

Although Stricklin's counsel did not argue on direct appeal that the pretrial identification procedure was unduly suggestive, the procedure was similar for both Stricklin and Newman. Newman did present such a claim on direct appeal, and we concluded it lacked merit.[58] Thus, Stricklin's appellate counsel could not have been ineffective in failing to raise this claim.[59]

(b) Insufficient Evidence

Stricklin alleges his counsel was deficient in failing to assign, on direct appeal, that the evidence was insufficient to prove guilt beyond a reasonable doubt, because Herrera-Gutierrez' testimony was not credible and was uncorroborated by forensic or circumstantial evidence. Newman raised the same claim in his direct appeal, and we found it lacked merit, reasoning:

> Newman's arguments invite us to exceed the scope of our appellate review. We decline to do so. We have repeatedly stated that 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. From the jury's verdicts, it is apparent that the jury found Herrera-Gutierrez to be credible. It is not the province of this court to question that determination. This assignment of error is without merit.[60]

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[58] *Newman, supra* note 26.

[59] See, *Fetherkile, supra* note 31; *State v. McLeod*, 274 Neb. 566, 577, 741 N.W.2d 664, 674 (2007) ("[d]efense counsel is not ineffective for failing to raise an argument that has no merit").

[60] *Newman, supra* note 26, 290 Neb. at 582, 861 N.W.2d at 133-34.

The same analysis applies here. Thus, if Stricklin's counsel had assigned error to the sufficiency of the evidence on direct appeal, the assignment would have been meritless. The district court did not err in denying postconviction relief without an evidentiary hearing on this claim.

13. Failure to Obtain Record for Appeal

Stricklin alleges his counsel was ineffective on direct appeal because he failed to include a complete transcript in the appellate record. Specifically, Stricklin argues his attorney failed to include two items in the appellate transcript: (1) his motion to sever and (2) a supplemental jury instruction.

Stricklin's postconviction motion does not allege how these omissions affected the outcome of his appeal. His allegations are therefore insufficient to allege prejudice and do not warrant an evidentiary hearing. The district court correctly denied postconviction relief on these claims without an evidentiary hearing.

14. Actual Innocence

Stricklin alleges he is entitled to postconviction relief because he is actually innocent. He alleges all of his allegations of ineffective assistance of counsel support this claim, and he also alleges that the evidence adduced was so lacking in credibility that it cannot be used to establish his guilt.

[21] Newman made essentially the same allegations and raised the same argument in his appeal from the district court's denial of an evidentiary hearing on his motion for postconviction relief. As we noted in our resolution of Newman's appeal, the threshold showing that must be made to entitle a prisoner to an evidentiary hearing on a postconviction claim of actual innocence is extraordinarily high, because after a fair trial and conviction, the presumption of innocence vanishes.[61]

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[61] *Newman, supra* note 36, citing *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016).

Stricklin's allegations, like those made by Newman, largely attack the weight of the evidence used against him and do not meet the high threshold. The district court did not err in denying postconviction relief on this claim without an evidentiary hearing.

V. CONCLUSION

The district court properly denied an evidentiary hearing on most of Stricklin's allegations, as Stricklin either failed to make sufficient factual allegations to support his claims or the files and records affirmatively show he is not entitled to relief.

However, Stricklin is entitled to an evidentiary hearing on his claims that trial counsel (1) failed to file notice of and present evidence of his alibi defense and (2) failed to investigate information regarding potential suspects Jefferson and Moore.

We thus affirm in part, and in part reverse and remand for an evidentiary hearing limited to these two claims.

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

Heavican, C.J., not participating.

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

Robin J. Wisner, as Personal Representative of the Estate of Gladys P. Wisner, deceased, appellant, v. Vandelay Investments, L.L.C., a Nebraska limited liability company, et al., appellees.

916 N.W.2d 698

Filed August 24, 2018. No. S-16-451.

1. **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.
2. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
3. **Equity: Quiet Title.** A quiet title action sounds in equity.
4. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
7. **Jurisdiction: Standing.** The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.

8. **Title: Deeds: Tax Sale: Standing.** Neb. Rev. Stat. § 77-1844 (Reissue 2009) sets forth the conditions precedent to questioning title conveyed under a tax deed; to obtain standing to redeem property after the issuance of a tax deed, even if title under a tax deed is void or voidable, a party must satisfy these conditions precedent.
9. **Title: Deeds: Tax Sale: Public Officers and Employees.** To comply with Neb. Rev. Stat. § 77-1844 (Reissue 2009), a party only needs to show that it has tendered the tax payment to the treasurer, not that the taxes have actually been paid.
10. **Pleadings: Evidence: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
11. **Jurisdiction.** While parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties, such does not prevent a party from conclusively admitting the truth of an underlying fact required to establish subject matter jurisdiction by judicial admission.
12. **Pleadings: Evidence.** Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.
13. **Pleadings: Intent.** A judicial admission does not extend beyond the intendment of the admission as clearly disclosed by its context.
14. **Pleadings: Words and Phrases.** Generally, an admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission.
15. **Pleadings: Proof.** It is an elementary rule of pleading that matters admitted by the pleadings need not be proved.
16. **Title: Deeds: Tax Sale: Taxes: Evidence.** A showing pursuant to Neb. Rev. Stat. § 77-1844 (Reissue 2009) of taxes paid must be made by the evidence and not by allegations in the pleadings alone.
17. **Real Estate: Taxes: Tax Sale: Words and Phrases.** Under Neb. Rev. Stat. § 77-1801 et seq. (Reissue 2009, Cum. Supp. 2016 & Supp. 2017), the term "redemption" refers to paying the amount shown on the certificate and all subsequent taxes, along with the interest accrued thereon and any statutory fees.
18. **Pleadings: Evidence: Waiver.** A party may waive its right to rely on an opponent's admission by failing to object to the opponent's offer of contrary evidence or introducing contrary evidence itself.

19. **Pleadings: Evidence: Parties.** A party is bound to its admission absent the court's relieving it, in exercise of the court's judicial discretion, from that consequence.
20. **Appeal and Error.** An argument not presented to or decided by the trial court is not appropriate for consideration on appeal.
21. **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.
22. **Title: Deeds: Tax Sale: Standing: Public Officers and Employees: Case Disapproved.** To satisfy the tax payment requirement in Neb. Rev. Stat. § 77-1844 (Reissue 2009), a party must show the tender or payment of taxes due to the county treasurer; *Hauxwell v. Henning*, 291 Neb. 1, 863 N.W.2d 798 (2015), is disapproved to the extent it can be read to authorize satisfying the standing requirement in § 77-1844 by tender or payment to the tax deed holder.
23. **Title: Deeds: Tax Sale: Statutes.** The statutory prerequisites to defeating title, in Neb. Rev. Stat. § 77-1843 (Reissue 2009), apply only to those tax deeds made after substantial compliance with Neb. Rev. Stat. §§ 77-1831 to 77-1842 (Reissue 2009, Cum. Supp. 2016 & Supp. 2017).
24. **Title: Deeds: Tax Sale: Proof: Presumptions: Evidence.** A county treasurer's tax deed is presumptive evidence that the procedures required by law to make a good and valid tax sale and vest title in the purchaser were done. The presumption is not conclusive and may be rebutted, but the burden is upon the party attacking the validity of such a deed to show by competent evidence some jurisdictional defect voiding the deed.
25. **Tax Sale: Service of Process.** Under Neb. Rev. Stat. § 77-1832 (Reissue 2009), service need only be provided to the owner of record at the address where the property tax statement was mailed and may only be done by certified mail, return receipt requested.
26. **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.
27. **Tax Sale: Notice: Service of Process: Words and Phrases.** Under Neb. Rev. Stat. § 77-1834 (Cum. Supp. 2016), the phrase "diligent inquiry" requires the tax certificate holder to obtain the address where the property tax statement was mailed in order to send notice by certified mail before moving to service by publication.

28. **Statutes: Appeal and Error.** Generally, 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.
29. **Statutes.** A statute can be considered ambiguous when a particular interpretation from the face of the statute could lead to an anomalous, unusual, or absurd result.
30. ____. It is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects a statute's purpose.
31. **Statutes: Intent.** In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.
32. **Real Estate: Taxes: Tax Sale.** The overall objective of the certificate method for delinquent taxes is the recovery of unpaid taxes on real property.
33. **Statutes: Courts: Words and Phrases.** A term of art is a word or phrase having a specific, precise meaning in a given specialty apart from its general meaning in ordinary contexts. The Nebraska Supreme Court has ascribed the term of art meaning to statutory terms when necessitated by the statute's context.
34. **Tax Sale: Notice: Service of Process: Words and Phrases.** The word "found" in Neb. Rev. Stat. § 77-1834 (Cum. Supp. 2016) means "able to be served."
35. **Tax Sale: Notice: Service of Process: Proof.** Under Neb. Rev. Stat. § 77-1834 (Cum. Supp. 2016), a tax certificate holder may provide service by publication to an owner of record who was not able to be served by certified mail at the address where the property tax statement was mailed, upon proof of compliance with Neb. Rev. Stat. § 77-1832 (Reissue 2009) if the owner, in fact, lives at such address.
36. **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.
37. **Tax Sale: Notice: Proof.** Under Neb. Rev. Stat. § 77-1835 (Cum. Supp. 2016), a proof of publication needs to state only that notice was published in the manner provided in Neb. Rev. Stat. § 77-1834 (Cum. Supp. 2016).
38. **Affidavits.** In the absence of a sufficient showing to the contrary, the affidavit of the publisher that a newspaper was one of general circulation in the county must be held sufficient to establish the fact.

39. **Tax Sale: Notice: Words and Phrases.** Under Neb. Rev. Stat. § 77-1834 (Cum. Supp. 2016), the plain meaning of the word "in" shows that a newspaper only need be generally circulated within the county, not throughout the entire county.
40. **Courts: Appeal and Error.** Upon reversing a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
41. **Deeds: Tax Sale.** In order to defeat a tax deed, a party must show that it satisfied the conditions precedent in Neb. Rev. Stat. § 77-1843 (Reissue 2009).
42. **Tax Sale: Mental Health: Time.** Neb. Rev. Stat. § 77-1827 (Reissue 2009) extends the redemption period for a mental disorder only if the owner had a mental disorder at the time of the property's sale.
43. **Statutes: Presumptions: Legislature: Intent.** In interpreting a statute, a court is guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.
44. **Tax Sale: Mental Health: Words and Phrases.** A person with a "mental disorder" under Neb. Rev. Stat. § 77-1827 (Cum. Supp. 2016) is one who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action, and a mental disorder within the meaning of § 77-1827 is an incapacity which disqualifies one from acting for the protection of one's rights.
45. **Equity.** Equity strives to do justice; it is not a rigid concept, but, instead, is determined on a case-by-case basis according to concepts of justice and fairness.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Inbody and Riedmann, Judges, on appeal thereto from the District Court for Lincoln County, Richard A. Birch, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

David W. Pederson, of Pederson & Troshynski, for appellant.

Robert S. Lannin and Chris S. Schmidt, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Vandelay Investments, L.L.C.

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

Funke, J.

Robin J. Wisner, personal representative of the estate of Gladys P. Wisner, deceased, appealed from a district court judgment that quieted title to certain property in favor of Vandelay Investments, L.L.C. (Vandelay), and dismissed his complaint—which requested that the court set aside Vandelay's tax deed and permit him to exercise a right of redemption. The Nebraska Court of Appeals reversed the district court's decision and remanded the cause after finding Vandelay had failed to comply with the statutory notice requirements before applying for the tax deed, which failure rendered Vandelay's deed void.

On further review, we conclude that (1) Robin had standing to question Vandelay's tax deed, (2) Vandelay complied with the statutory notice requirements before applying for the tax deed, and (3) Robin failed to prove that the extension to the statutory redemption period for an owner with a mental disorder applied. Therefore, we reverse the decision of the Court of Appeals and remand the cause with directions that the Court of Appeals affirm the judgment of the district court.

I. BACKGROUND

1. Statutory Framework

This case involves the purchase of real property due to delinquent real estate taxes.[1] The purchaser of any real property sold by the county treasurer for taxes is entitled to a certificate in writing, commonly known as a tax certificate or tax sale certificate.[2] This certificate represents a transfer of the state's lien on the property to the purchaser and describes the property, the amount paid by the purchaser, and the date that the purchaser will be entitled to a deed.[3] Tax certificates can

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[1] See Neb. Rev. Stat. § 77-1801 et seq. (Reissue 2009, Cum. Supp. 2016 & Supp. 2017) and § 77-1901 et seq. (Reissue 2009 & Cum. Supp. 2016).

[2] § 77-1818.

[3] *Coffin v. Old Line Life Ins. Co.*, 138 Neb. 857, 295 N.W. 884 (1941); § 77-1818; Neb. Rev. Stat. § 77-203 (Reissue 2009).

be assigned by endorsement, and the assignee steps into the shoes of the purchaser.[4]

A property owner may redeem his or her property by paying the county treasurer the amount shown on the certificate and all subsequent taxes, along with the interest accrued thereon and any statutory costs.[5] If the property is not redeemed within 3 years, however, the tax certificate holder may pursue either one of two options: (1) apply for a deed of conveyance for the property, commonly known as a tax deed, with the county treasurer[6] or (2) proceed in district court to foreclosure on its lien and compel the sale of the property.[7] Tax sale certificates and the sale of tax certificates are governed by chapter 77, article 18, of the Nebraska Revised Statutes, and the foreclosure of tax certificates is governed by chapter 77, article 19, of the Nebraska Revised Statutes for all tax sale certificates sold and issued between January 1, 2010, and December 31, 2017.[8]

Vandelay elected to pursue the tax deed method. Under this method, the holder of the tax certificate has a 6-month period, commencing 3 years from the date of the sale of the property, to apply for a tax deed from the county treasurer.[9] Upon a county treasurer's delivery of the tax deed to the tax certificate holder, a property owner loses the ability to redeem the property through the county treasurer.[10] If the certificate holder waits longer than 3 years 6 months from the sale to apply for a tax deed, the certificate ceases to be valid and the lien of taxes for which the property was sold is discharged.[11]

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[4] § 77-1822.

[5] §§ 77-1824 and 77-1830.

[6] § 77-1837. See, generally, § 77-1801 et seq.

[7] § 77-1902. See, generally, § 77-1901 et seq.

[8] § 77-1837.01.

[9] § 77-1837.

[10] § 77-1824.

[11] § 77-1856.

However, at least 3 months before applying for the tax deed, the holder of the tax certificate must serve the record owner and encumbrancers of record with sufficient notice that application for a tax deed will be made.[12]

After a tax deed has been issued, the owner of the property may recover the property by proving the tax deed issued to the tax certificate holder is either void or voidable. A tax deed is void if the tax certificate holder did not substantially comply with the notice requirements.[13] A tax deed is voidable if the property owner has a right to redeem the property and has exercised such right.[14] While a property owner's ability to redeem property typically ends upon the delivery of a tax deed, an owner with a mental disorder at the time of the property's sale may redeem the property within 5 years from the date of the sale.[15]

Here, Robin claims that Vandelay did not sufficiently comply with the notice requirements to obtain the tax deed. He further contends that he has a right to redemption under this extended redemption period due to the mental disorder of Gladys, the record owner of the property.

2. Issuance of Tax Deed to Vandelay

The real estate involved in this action consists of 480 acres, containing irrigated cropland, rangeland, and a homestead; is located about 9 miles southeast of North Platte, Nebraska; and has the following legal description: "The North Half (N½) and the North Half of the South Half (N½S½) of Section Twenty-Nine (29), Township Thirteen (13) North, Range Twenty-Nine (29) West of the 6th P.M., in Lincoln County, Nebraska."

Gladys and her husband moved onto the property in 1949 and inherited it upon the passing of Gladys' father in 1971.

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[12] § 77-1831 (Cum. Supp. 2012).

[13] *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007). See §§ 77-1842 and 77-1843.

[14] § 77-1843.

[15] § 77-1827.

They had two sons, Robin and Roger Wisner, and two daughters. After Gladys' husband died in 2007, Roger primarily cared for Gladys and handled her affairs until his own death in 2009. Robin then assisted Gladys in moving from the homestead to a retirement community and arranged for her bills to be paid from her trust by a bank's trust department.

Robin testified he assumed the trust department was paying the real estate taxes, because he thought Roger had probably paid them from the trust previously. While Robin stated that he had access to semiannual records from the trust, he testified that he did not typically check them closely or at all and that he never saw that the real estate taxes were being paid from it.

In 2010, the real estate taxes on the property became delinquent. In March 2011, the Lincoln County treasurer sold a tax sale certificate on the property to Acron Business Services, Inc. In February 2014, Vandelay purchased the tax sale certificate from Acron Business Services. Randy James, one of Vandelay's owners, obtained the address where Gladys received her property tax statements, which was that of the retirement community. In March 2014, Vandelay sent notice of its intent to apply for a tax deed to Gladys at that address by certified mail with a return receipt requested, which was returned as "unclaimed."

Despite the return of the certified mailing, James believed he had Gladys' actual address because it was not returned as sent to a vacant address or not deliverable as addressed. In addition, James had found a newspaper article, dated June 11, 2011, indicating that Gladys, in fact, lived at the retirement community.

Vandelay then published notice of its intent to apply for a tax deed in the Sutherland Courier-Times newspaper (Courier-Times) for 3 consecutive weeks. Evidence was presented that the Courier-Times covers events affecting Lincoln County, Nebraska, and residents in Sutherland, Hershey, and Paxton, Nebraska, and that approximately 1,300 weekly editions are sent to subscribers and distributed to racks in those three

communities. In ZIP codes covering North Platte, there are about 100 Courier-Times subscribers but no distribution racks. Vandelay also sent a copy of the publicized notice to Gladys' address by first-class mail, which was not returned.

In August 2014, Vandelay applied for a tax deed. Included with its application were a copy of the certified mail return receipt, a proof of publication in the Courier-Times, and an affidavit from James attesting that he had complied with the service requirements. The proof of publication attested that the Courier-Times is a legal newspaper in general circulation that is published in Sutherland and that the attached notice was published for 3 consecutive weeks, dates specified. The county treasurer delivered a tax deed to the property to Vandelay in September 2014.

Through the relevant period, the property was under lease, but the lease was not recorded. Shortly after the tax deed was filed, however, the lessee informed Robin that a deed had been issued in Vandelay's favor. Robin, as the holder of a power of attorney for Gladys, attempted to redeem the tax sale certificate with Vandelay, which Vandelay rejected.

3. District Court Proceedings

Gladys, by and through Robin, filed a complaint against Vandelay, requesting to have Vandelay's tax deed voided, have her deed redeemed pursuant to the mental disorder extension, and title quieted in her name. Vandelay filed a counterclaim seeking to quiet title in its favor. Robin was substituted as the party plaintiff after Gladys' death.

The court ruled Vandelay had complied with the statutory requirements for notice and publication. It reasoned that "[i]f Gladys could not be served after compliance by [Vandelay] with [§] 77-1832, she was therefore not found for service within the meaning of [§] 77-1834." The court also found the publication in the Courier-Times complied with the statutory requirement. Further, the court ruled Robin failed to prove Gladys had a mental disorder, and it rejected Robin's

equity argument. Thus, the court dismissed Robin's complaint with prejudice and quieted title in favor of Vandelay.

Robin filed a timely appeal.

4. Court of Appeals Proceedings

Before the Court of Appeals, Robin assigned, restated, that the district court erred in (1) finding Vandelay complied with the statutory notice and publication requirements for obtaining a treasurer's tax deed, (2) finding Robin failed to prove Gladys suffered from a mental disorder, and (3) failing to use its equitable authority to remedy the situation.

The Court of Appeals reversed the district court's decision and remanded the cause for further proceedings after holding that Gladys was entitled to redeem the property because Vandelay had not served Gladys with notice.[16] It reasoned that Vandelay's notice by certified mail was insufficient because it was returned as "'unclaimed.'"[17] Further, the Court of Appeals stated that notice by publication could not be relied on because Vandelay knew Gladys' address, so she had been "found."[18] The Court of Appeals did not reach Robin's second and third assignments of error.

Vandelay filed a timely petition for further review, which this court granted.

II. ASSIGNMENTS OF ERROR

Vandelay assigns, reordered and restated, that the Court of Appeals erred in (1) not determining Robin lacks standing to challenge the tax deed, under § 77-1844; (2) interpreting § 77-1834 not to permit service by publication in this case; (3) not interpreting the term "found" as the equivalent of being "served"; (4) voiding Vandelay's tax deed and determining Gladys was entitled to redeem the property; and (5) failing to

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[16] See *Wisner v. Vandelay Investments*, No. A-16-451, 2017 WL 2399492 (Neb. App. May 30, 2017) (selected for posting to court website).

[17] *Id.* at *4.

[18] *Id.*

acknowledge Vandelay's sending of a copy of the publication notice by first-class mail to Gladys' address of record, which copy was not returned, as accomplishing service.

III. STANDARD OF REVIEW

[1,2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.[19] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.[20]

[3,4] A quiet title action sounds in equity.[21] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[22]

[5] 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.[23]

IV. ANALYSIS

1. Robin Has Standing to Challenge Vandelay's Tax Deed

Vandelay contends Robin lacks standing to challenge its tax deed. It argues Robin did not satisfy a condition precedent

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[19] *Applied Underwriters v. S.E.B. Servs. of New York*, 297 Neb. 246, 898 N.W.2d 366 (2017).

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

[21] *Royal v. McKee*, 298 Neb. 560, 905 N.W.2d 51 (2017).

[22] *Id.*

[23] *J.S., supra* note 20.

to questioning the validity of its tax deed, under § 77-1844, because he failed to offer any evidence that he either paid or tendered payment of the taxes due on the property to the county treasurer. Vandelay further argues that its response to Robin's allegation in his pleading—that he tendered payment to the county treasurer—cannot be considered a judicial admission regarding tender to the county treasurer because its statement was not unequivocal, clear, or deliberate.

Robin argues Vandelay's answer was a judicial admission, which acted as a substitute for such evidence by conclusively admitting the fact's truth in this case. He also argues tendering payment to Vandelay satisfied condition precedent of § 77-1844, citing *Hauxwell v. Henning*.[24]

(a) Statutory Requirements to Obtain Standing to Challenge Tax Deed

[6,7] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.[25] The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.[26] A party invoking a court's or tribunal's jurisdiction bears the burden of establishing the elements of standing.[27]

[8,9] To obtain standing to redeem property after the issuance of a tax deed, even if title under a tax deed is void or voidable, a party must satisfy the requirements of § 77-1844.[28] Section 77-1844 sets forth the conditions precedent to questioning title conveyed under a tax deed.[29] Under § 77-1844,

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[24] *Hauxwell v. Henning*, 291 Neb. 1, 863 N.W.2d 798 (2015).

[25] *Landrum v. City of Omaha Planning Bd.*, 297 Neb. 165, 899 N.W.2d 598 (2017).

[26] *Id.*

[27] *Applied Underwriters, supra* note 19.

[28] See, *Hauxwell, supra* note 24; *Ottaco Acceptance, Inc., supra* note 13.

[29] *Ottaco Acceptance, Inc., supra* note 13.

a party must prove the person under whom he or she claims title (1) had title to the property at the time of the tax sale and (2) paid all taxes due upon the property. To comply with § 77-1844, a party only needs to show that it has tendered the tax payment to the treasurer, not that the taxes have actually been paid.[30] Payment or tender thereof may be made before or during the trial, or before final judgment.[31]

(b) Vandelay's Answer Constituted Judicial Admission That Robin Tendered Payment of Taxes Due to County Treasurer

[10,11] A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.[32] While parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties,[33] such does not prevent a party from conclusively admitting the truth of an underlying fact required to establish subject matter jurisdiction by judicial admission.

This distinction is illustrated by *J.S. v. Grand Island Public Schools*,[34] where we held the district court lacked subject matter jurisdiction because the appellant did not serve the appellee with a copy of the petition after the appellee waived such service. Here, contrariwise, the allegation is that Vandelay admitted the taxes had actually been tendered to the county treasurer, a condition precedent for standing.

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[30] *Hauxwell, supra* note 24.

[31] *Ottaco Acceptance, Inc., supra* note 13.

[32] *Id.*

[33] *J.S., supra* note 20.

[34] *Id.*

[12,13] Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.[35] A judicial admission does not extend beyond the intendment of the admission as clearly disclosed by its context.[36]

(i) Admission in Pleading May Serve as Sufficient Evidence to Satisfy Standing Requirement in § 77-1844

[14,15] We begin by addressing Vandelay's argument that an admission in its answer could not satisfy the standing requirement. Generally, an admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission.[37] It is an elementary rule of pleading that matters admitted by the pleadings need not be proved.[38] Despite these propositions, Vandelay points to *Hauxwell*, where we stated that for the purposes of § 77-1844, "[t]he showing of taxes paid must be made by the evidence and not by the pleadings alone."[39]

Our proposition in *Hauxwell* originated in the modification of our opinion on rehearing of *Cornell v. Maverick Loan & Trust Co.*,[40] which affirmed our opinion with an explanation that we had not referenced the predecessor statute to § 77-1844 because the taxes were clearly not shown to have been paid. While we stated in our opinion on rehearing that the pleadings alone were insufficient to provide such proof, our discussion of the facts in our initial decision reveals that the plaintiff had alleged tender of payment in its complaint but does not state the fact was admitted by the defendant.

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

[36] *Lewison v. Renner*, 298 Neb. 654, 905 N.W.2d 540 (2018).

[37] *Id.*

[38] *Id.*

[39] *Hauxwell, supra* note 24, 291 Neb. at 6, 863 N.W.2d at 802.

[40] *Cornell v. Maverick Loan & Trust Co.*, 95 Neb. 9, 144 N.W. 1072 (1914), *modified on denial of rehearing* 95 Neb. 842, 147 N.W. 697.

Thus, we do not find a conflict between our statement in *Cornell* and our propositions of law concerning admissions in pleadings.

[16] Nevertheless, as a matter of clarity, we amend our proposition from *Cornell* as follows: The showing pursuant to § 77-1844 of taxes paid must be made by the evidence and not by *allegations in* the pleadings alone.

(ii) Vandelay Admitted Robin Tendered Redemption to County Treasurer

Regarding Robin's efforts to pay the taxes due on the property, paragraph 16 of the complaint alleges, "[Robin] presented the redemption to [Vandelay] and to the Lincoln County Treasurer within forty-five (45) days of [Vandelay's] Application for Tax Deed, but the County Treasurer declined to accept the redemption for filing"; Vandelay's answer "[a]dmits that Lincoln County Treasurer declined to accept [Robin's] redemption, but denies the remaining allegations of paragraph 16."

Vandelay asserts that Robin's allegation should be read as two separate allegations: (1) Robin presented redemption to Vandelay and the county treasurer and (2) the county treasurer declined to accept Robin's redemption. It argues its answer admitted only the second allegation and denied the first allegation. It argues that reading its answer to admit that Robin tendered payment to the county treasurer would give no effect to its denial.

We disagree with Vandelay's interpretation. Vandelay's admission that the county treasurer declined to accept Robin's redemption necessarily admits Robin tendered redemption to the county treasurer; redemption cannot be denied if it was never offered. Despite Vandelay's contention, this interpretation gives effect to its general denial because the allegation that Robin tendered payment to Vandelay is completely separate from the allegation concerning the county treasurer.

[17] Further, we find that this admission is clear regarding the tender of all of the taxes due on the property. As stated

above, redemption under § 77-1801 et seq. refers to paying the amount shown on the certificate and all subsequent taxes, along with the interest accrued thereon and any statutory fees.[41] Thus, Vandelay's response conclusively admitted Robin tendered payment of all taxes due on the property to the county treasurer and acted as a substitute for evidence of such, dispensing with Robin's need to produce such evidence for the purpose of this case.

[18] Vandelay's additional arguments that its admission was an inadvertency and that Robin waived its judicial admission are unavailing. In *Robison v. Madsen*,[42] we recognized that a party may waive its right to rely on an opponent's admission by failing to object to the opponent's offer of contrary evidence or introducing contrary evidence itself.[43] Robin's testimony that he tendered payment to Vandelay and that the taxes were unpaid at the time of trial was not contrary to the judicial admission concerning Robin's tender of payment to the county treasurer. Accordingly, Robin did not offer contrary evidence waiving Vandelay's admission.

[19,20] Further, a party is bound to its admission absent the court's relieving it, in exercise of the court's judicial discretion, from that consequence.[44] The requirements of § 77-1844 are clearly stated in the statute and well established in our case law. If Vandelay had not intended to admit that Robin tendered payment to the county treasurer, it should have raised the issue in the district court, where it could have requested to be relieved of the consequence of its admission. An argument not presented to or decided by the trial court is not appropriate for consideration on appeal.[45] Therefore, Vandelay cannot argue

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[41] §§ 77-1824 and 77-1830.

[42] *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994).

[43] *Id.* (citing *Collision Center Paint & Body v. Campbell*, 773 S.W.2d 354 (Tex. App. 1989); *Jenni v. Gamel*, 602 S.W.2d 696 (Mo. App. 1980); and 31A C.J.S. *Evidence* § 381 c. (1964)).

[44] See *Kipf v. Bitner*, 150 Neb. 155, 33 N.W.2d 518 (1948).

[45] *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018).

for the first time on appeal that it should not be bound by the plain meaning of its admission.

The evidence presented at trial also clearly established that Gladys had title to the property at the time of its sale. Therefore, Robin proved that he had standing to question Vandelay's tax deed, under § 77-1844.

(c) Tender of Payment to Tax Deed Holder Is Not Sufficient to Obtain Standing

Robin also argued that we held in *Hauxwell* that payment or tender of payment to a deed holder is sufficient to obtain standing, under § 77-1844.[46] We address this argument to clarify our holding in *Hauxwell*.

In *Hauxwell*, Selma B. Hauxwell filed a complaint seeking to quiet title by claim of adverse possession in certain properties after Ryan R. Hanzlick and his wife acquired tax deeds to the same.[47] We held that the district court erred by not dismissing the complaint for lack of jurisdiction due to Hauxwell's failure to establish standing, under § 77-1844.[48] Robin cites our conclusion that "Hauxwell did not plead or demonstrate through evidence that payment of the past due taxes was ever made or tendered to the treasurer or to the Hanzlicks."[49]

Directly preceding this conclusion, however, we cited our longstanding proposition of law that to satisfy the tax payment requirement of § 77-1844, "the party needs only to show the tender of payment of taxes *to the treasurer*."[50] In concluding that there was also no payment or tender to the Hanzlicks, we provided no support or explanation for the implication that doing so would satisfy the standing requirements of § 77-1844 and expanding our precedent.

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[46] *Hauxwell, supra* note 24.

[47] *Id.*

[48] *Id.*

[49] See *id.* at 7, 863 N.W.2d at 802.

[50] *Id.* at 6, 863 N.W.2d at 802 (emphasis supplied).

When we adopted this longstanding proposition, it was based on our reasoning that when a plaintiff has tendered payment to the county treasurer and such payment is refused, a "plaintiff could not do more" under the tax certificate statutes to satisfy the standing requirement.[51] This reasoning itself necessarily rejects an argument that making payment to the tax deed holder would be an acceptable alternative.

[21] Our statement in *Hauxwell* was also not supported by our tax certificate statutes.[52] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[53] Sections 77-1844 and 77-1843 both provide statutory prerequisites for property owners to recover their property after the issuance of a tax deed.

While § 77-1844 does not specify whom the taxes due on the property must be paid to, § 77-1843 requires the property to have been redeemed pursuant to various statutory sections. Section 77-1843 explicitly references Neb. Rev. Stat. § 77-1701(1) (Reissue 2009), which provides in part: "The county treasurer shall be ex officio county collector of all taxes levied within the county." As we mentioned above, redemption, a term of art in § 77-1801 et seq., includes the payment of all property taxes due.

[22] Thus, we hold that to satisfy the tax payment requirement in § 77-1844, a party must show the tender or payment of taxes due to the county treasurer, and we disapprove of *Hauxwell* to the extent it can be read to authorize satisfying the standing requirement in § 77-1844 by tender or payment to the tax deed holder.[54]

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[51] *Howell v. Jordan*, 94 Neb. 264, 266, 143 N.W. 217, 218 (1913).

[52] *Hauxwell, supra* note 24.

[53] *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018).

[54] *Hauxwell, supra* note 24.

2. Vandelay Substantially Complied With Statutory Notice Requirements Before Applying for Tax Deed

Robin argues Vandelay's tax deed is void because he presented sufficient evidence to overcome the statutory presumption that the notice requirements were complied with before Vandelay applied for the tax deed. Specifically, he argues that Vandelay was not entitled to provide notice by publication and that Vandelay did not comply with the statutory publication requirements.

[23] Section 77-1843 provides the statutory prerequisites to defeating title "[i]n all controversies and suits involving the title to real property claimed and held under and by virtue of a deed made substantially by the treasurer in the manner provided by sections 77-1831 to 77-1842 . . . ."[55] We have interpreted § 77-1843 to apply only to those tax deeds made after substantial compliance with the aforementioned sections.[56] Accordingly, we consider the validity of Vandelay's tax deed.

[24] A county treasurer's tax deed is presumptive evidence that the procedures required by law to make a good and valid tax sale and vest title in the purchaser were done.[57] A tax deed holder is entitled to receive a tax deed from the county treasurer only after it "serves or causes to be served a notice," containing specific information provided therein, at least 3 months before applying for the tax deed.[58] Specifically, § 77-1842 provides that a tax deed is presumptive evidence that "the notice had been served or due publication made as required in sections 77-1831 to 77-1835 before the time of redemption had expired." The presumption is not conclusive and may be

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[55] See *Ottaco Acceptance, Inc., supra* note 13.

[56] *Id.*

[57] *SID No. 424 v. Tristar Mgmt.*, 288 Neb. 425, 850 N.W.2d 745 (2014). See § 77-1842.

[58] § 77-1831.

rebutted, but the burden is upon the party attacking the validity of such a deed to show by competent evidence some jurisdictional defect voiding the deed.[59]

As to proper notice under the tax deed method, § 77-1832, in relevant part, provides: "Service of the notice provided by section 77-1831 shall be made by certified mail, return receipt requested, upon the person in whose name the title to the real property appears of record to the address where the property tax statement was mailed . . . ."

This section, however, has been the subject of significant revision since the turn of the century. The 2009 version resulted from a 2003 amendment to the following language: "Service of the notice provided by section 77-1831 shall be made on every person in actual possession or occupancy of the real property [and] upon the person in whose name the title to the real property appears of record . . . ."[60]

Further, the language of § 77-1832 (Supp. 2017), currently in effect, provides:

> (1) Service of the notice provided by section 77-1831 shall be made by:
>
> (a) Personal, residence, certified mail, or designated delivery service as described in section 25-505.01 upon every person in actual possession or occupancy of the real property who qualifies as an owner-occupant under section 77-1824.01; or
>
> (b) Certified mail service as described in section 25-505.01 upon:
>
> (i) The person in whose name the title to the real property appears of record who does not qualify as an owner-occupant under section 77-1824.01. The notice shall be sent to the name and address to which the property tax statement was mailed[.]

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[59] *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004). See § 77-1842.

[60] § 77-1832 (Reissue 1996). See 2003 Neb. Laws, L.B. 319.

[25] In summary, direct service under the recent versions of § 77-1832 was provided for as follows: Before 2003, service was required both (1) on every person in actual possession or occupancy of the real property and (2) upon the person in whose name the title to the real property appears of record, and service was not limited to certified mail; under § 77-1832 (Reissue 2009), service need only be provided to the owner of record at the address where the property tax statement was mailed and may only be done by certified mail, return receipt requested; for tax certificates issued in 2018, service must be (1) made upon every owner-occupant by the methods authorized in Neb. Rev. Stat. § 25-505.01 (Reissue 2016) and (2) provided to the owner of record, if not an owner-occupant, at the address where the property tax statement was mailed by certified mail.

Besides § 77-1832, the only other section that provides for effectuating the service required by § 77-1831 is § 77-1834. Section 77-1834, in relevant part, has consistently provided:

> If the person in whose name the title to the real property appears of record in the office of the register of deeds in the county . . . cannot, upon diligent inquiry, be found, then such purchaser or his or her assignee shall publish the notice in some newspaper published in the county and having a general circulation in the county . . . .

There is no dispute that Vandelay sent notice to Gladys by certified mail, return receipt requested, and that it was returned as "'unclaimed'" after three attempted deliveries.[61] Because Vandelay was unable to serve Gladys in compliance with § 77-1832, it could comply with § 77-1831 only by causing Gladys to be served under § 77-1834. Accordingly, we consider Robin's arguments that Vandelay was not entitled to provide service under § 77-1834 and that the service it did provide was deficient.

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[61] *Wisner v. Vandelay Investments, supra* note 16, 2017 WL 2399492 at *4.

(a) Vandelay Was Entitled to Serve Gladys by Publication After It Was Unable to Serve Her Notice by Certified Mail

Robin argues we should interpret "found" consistently with its plain meaning of a person's whereabouts' being actually known, as the Court of Appeals held. Under this interpretation, he argues that Vandelay could not serve Gladys by publication because it actually knew her address and that instead, its only course of action was to resend notice by certified mail or initiate foreclosure proceedings. Robin also contends publication was not available because Vandelay did not conduct a "diligent inquiry" by publishing notice after sending only one certified mailing and taking no other actions to provide Gladys notice.[62]

Vandelay contends that because § 77-1801 et seq. allows service only by certified mail and publication, we should construe the statutes harmoniously by interpreting someone to be "'found'" only when he or she has been "[actually] 'served'" by certified mail, not when his or her address of record simply becomes "'known.'" It also argues that its efforts were diligent because it sent the notice of publication to Gladys by first-class mail, which was not returned.

(i) "Diligent Inquiry" Under § 77-1834 Requires Party to Request Address Where Property Tax Statements Are Sent From County Treasurer

We begin by considering the meaning of "diligent inquiry," under § 77-1834. This phrase is not defined in the statutes, and we have not previously interpreted its meaning. Robin argues we should interpret the phrase consistently with "reasonable diligence," from Neb. Rev. Stat. § 25-517.02 (Reissue 2016).

Section 25-517.02 provides: "Upon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute, the court may

[62] Brief for appellant on petition for further review at 20.

permit service to be made . . . (2) by publication . . . .” In *In re Interest of A.W.*,[63] we described a “reasonably diligent” search as

> not requir[ing] the use of all possible or conceivable means of discovery, but [a]s such an inquiry as a reasonably prudent person would make in view of the circumstances [that] must extend to those places where information is likely to be obtained and to those persons who, in the ordinary course of events, would be likely to receive news of or from the absent person.

While the phrases are not identical, the context of both concerns the effort required to determine the location of an individual for the purpose of providing service. As mentioned above, 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.[64] Based on the similar subject matter, an argument could be made to interpret these phrases to have a similar meaning. However, these phrases are not components of a series of statutes. Instead, the context of the statutes for service under § 77-1831 is quite unique in its limitation.

As mentioned above, § 77-1832 (Reissue 2009) authorizes a tax certificate holder to serve the owner of record only *at the address where the property tax statement was mailed*. Unlike the pre-2003 amended statute—which allowed for an owner of record to be served by mail at *any* address—the limitation on service to the address where the property tax statement was mailed remains in effect under the current statutory scheme. As a result, a party’s efforts to discover the actual location of an owner of record are fruitless because the tax certificate holder has no authority to serve him or her at that location.

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[63] *In Interest of A.W.*, 224 Neb. 764, 766, 401 N.W.2d 477, 479 (1987).

[64] *In re Trust of Shire, supra* note 53.

[26,27] Nevertheless, 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.[65] In this case, the Legislature has rendered the phrase "diligent inquiry" largely superfluous through its 2003 amendment to § 77-1834, but we give the phrase effect by acknowledging that it is still incumbent upon the tax certificate holder to obtain the address where the property tax statement was mailed in order to send notice by certified mail before moving to service by publication. Vandelay took this action, and the statutes do not require it to do any more.

The parties' arguments surrounding "diligent inquiry," however, do not concern the efforts required under § 77-1834 to locate the address of the owner of record. It is undisputed that Vandelay did, in fact, discover Gladys' actual address. Instead, the parties' argument, essentially, requests us to read all of the prerequisites to notice by publication, contained in § 25-517.02, into § 77-1834, under the guise of interpreting "diligent inquiry." This we cannot do. A court will not read into a statute a meaning that is not there.[66] While subjecting a tax certificate holder to the same prerequisites for service by publication as are required in § 25-517.02 might be a prudent decision for the Legislature to make, it is solely within the Legislature's purview to do so. Therefore, the parties' arguments concerning whether Vandelay took sufficient steps above those required in § 77-1832 are irrelevant.

(ii) Owner of Record Is "Found" Only if He or She Is "Able to Be Served," Under § 77-1834

We next consider whether Vandelay was entitled to serve Gladys notice by publication after it was unable to serve her by certified mail, despite having actual knowledge of her location.

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[65] *Woodmen of the World v. Nebraska Dept. of Rev.*, 299 Neb. 43, 907 N.W.2d 1 (2018).

[66] *State v. Gill*, 297 Neb. 852, 901 N.W.2d 679 (2017).

Whether Vandelay was able to serve Gladys by publication depends on our interpretation of the term "found."

[28-30] Generally, 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.[67] However, "'[a] statute can . . . be considered ambiguous when a particular interpretation from the face of a statute could lead to an anomalous, unusual or absurd result.'"[68] For "'[i]t is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects the statute's purpose.'"[69]

[31] In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.[70] As mentioned above, 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.[71]

The definition of "found," as the past tense of "find," is "I. To come upon by chance or in the course of events. . . . II. To discover or attain by search or effort."[72] Consistently with this plain meaning, the Court of Appeals interpreted "found" to mean Vandelay actually knew Gladys' address. The implication of ascribing this plain meaning to the term, however, would to a

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[67] *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018).

[68] *U.S. v. E.T.H.*, 833 F.3d 931, 938 (8th Cir. 2016), quoting *Breedlove v. Earthgrains Baking Companies, Inc.*, 140 F.3d 797 (8th Cir. 1998). Accord, e.g., *Dean v. State*, 288 Neb. 530, 849 N.W.2d 138 (2014).

[69] *U.S. v. E.T.H., supra* note 68, 833 F.3d at 938, quoting *Ashley, Drew & Northern Ry. v. United Transp. U.*, 625 F.2d 1357 (8th Cir. 1980).

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

[71] *In re Trust of Shire, supra* note 53.

[72] "Find," Oxford English Dictionary Online, http://www.oed.com/view/Entry/70348 (last visited Aug. 3, 2018).

large extent obviate the utility of the tax deed statutes. It would, based on the narrow service procedure in § 77-1832, preclude the holder of a tax certificate from obtaining a tax deed if an owner of record either refuses to accept a certified mailing of the notice to the address where the property tax statement was sent or lives at any other address and can be found there.

[32] We have stated that the overall objective of the certificate method for delinquent taxes is the recovery of unpaid taxes on real property.[73] As explained above, the Legislature created two separate methods for a tax certificate holder to elect to pursue to recover the taxes he or she paid on behalf of the deficient owner. Neither of these policies supports a construction of the tax deed statutes rewarding an owner, already deficient in paying taxes, by allowing him or her to force the initiation of judicial foreclosure proceedings simply by avoiding the notice, which the tax deed method was designed to provide the owner regarding his or her rights.[74] Therefore, we reject the plain meaning of "found."

[33] Vandelay, contrariwise, argues that we should interpret "found" to mean "'able to be served.'"[75] While this definition is not supported by any plain or ordinary meaning of the word, it does find support in the context of civil procedure as a legal term of art. "A 'term of art' is a word or phrase having a specific, precise meaning in a given specialty apart from its general meaning in ordinary contexts."[76] We have ascribed the term of art meaning to statutory terms when necessitated by the statute's context.[77]

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[73] *SID No. 424, supra* note 57.

[74] *Id.*

[75] Supplemental brief for appellee on petition for further review at 27.

[76] 82 C.J.S. *Statutes* § 418 at 537 (2009).

[77] *In re Estate of Young*, No. A-96-423, 1997 WL 426191 (Neb. App. July 1, 1997) (not designated for permanent publication), citing *In re Estate of Hannan*, 246 Neb. 828, 523 N.W.2d 672 (1994). See, also, e.g., *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012); *ATS Mobile Telephone, Inc. v. General Communications Co., Inc.*, 204 Neb. 141, 282 N.W.2d 16 (1979).

In fact, we long ascribed such a meaning to the word "found" in Neb. Rev. Stat. § 25-408 (Reissue 1985), which has since been repealed.[78] Section 25-408, in relevant part, provided: "An action . . . against a nonresident of this state or a foreign corporation may be brought in any county . . . where said defendant may be found . . . ." Regarding foreign corporations, we had held that "[a] defendant 'may be found' in any county in which proper service can be had upon its agent."[79]

Further, in other states, courts have also determined "found" to mean "'found for legal service'" in the context of civil procedure.[80] These states' venue statutes state the following: "When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found."[81] The Nevada Supreme Court interpreted "found," in this context, as follows:

> It is clear from the statute that the word "found" is used in contradistinction to the word "reside." The action then may be instituted by a resident of the state in a court of a county, regardless of the residence of the defendant, if it is alleged that he can be found within the county where suit is instituted and is actually served with process therein.[82]

This term of art definition of "found" also provides a harmonious construction to the tax deed statutes by giving effect to the dichotomy created by §§ 77-1832 and 77-1834 to accomplish the service requirement of § 77-1831. Under this construction, a tax certificate holder must attempt to serve

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[78] See 1986 Neb. Laws, L.B. 529, § 58.

[79] *Mittelstadt v. Rouzer*, 213 Neb. 178, 181, 328 N.W.2d 467, 469 (1982), quoting *Juckett v. Brennaman*, 99 Neb. 755, 157 N.W. 925 (1916).

[80] *Shields v. Shields*, 115 Mont. 146, 155, 139 P.2d 528, 530 (1943). Accord *State ex rel. Ford Motor Co. v. Manners*, 161 S.W.3d 373 (Mo. 2005).

[81] See, e.g., Mo. Ann. Stat. § 508.010(1) (West Cum. Supp. 2018). Accord Miss. Code Ann. § 93-5-11 (2013).

[82] *Tiedemann v. Tiedemann*, 36 Nev. 494, 500-501, 137 P. 824, 826 (1913).

the owner of record under the requirements of § 77-1832, but, if such service is impossible or unsuccessful, then the tax certificate holder may provide service by publication. Such an interpretation gives effect to the statutory requirements while retaining the overall viability of the tax deed statutes as a whole.

[34,35] Therefore, we hold that the word "found" in § 77-1834 means "able to be served." Accordingly, we hold that § 77-1834 authorizes a tax certificate holder to provide service by publication to an owner of record who was not able to be served by certified mail at the address where the property tax statement was mailed, upon proof of compliance with § 77-1832 if the owner, in fact, lives at such address.

In this case, Vandelay obtained the address where Gladys received the property tax statements for the property. It then sent notice by certified mail, return receipt requested, which notice was returned as "unclaimed" after three failed attempts at delivery. Vandelay submitted this into evidence along with an affidavit of its efforts to comply with § 77-1832, as required by § 77-1833 (Cum. Supp. 2012). This constituted complete compliance with the requirements of § 77-1832, and because Gladys was not able to be served in this manner, Vandelay appropriately proceeded with service by publication. Therefore, we find the Court of Appeals' determination that Vandelay was not entitled to serve Gladys by publication erroneous.

[36] Before we reverse the Court of Appeals' decision, however, we consider Robin's alternative argument before the Court of Appeals that the tax deed was void because Vandelay failed to comply with the publication requirements, which the Court of Appeals did not reach. Upon further review from a judgment of the 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.[83]

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[83] *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

(b) Vandelay Complied With Publication Requirements of § 77-1834

Robin argues Vandelay's proof of publication did not comply with § 77-1835 because it did not say the Courier-Times newspaper was in general circulation *in the county* and because he offered evidence the Courier-Times was not, in fact, in circulation throughout Lincoln County. Further, Robin contends Vandelay did not comply with § 77-1834 because there was another Lincoln County newspaper Gladys was more likely to see.

As mentioned above, § 77-1834, in relevant part, provides that "the purchaser or his or her assignee shall publish the notice in some newspaper published in the county and having a general circulation in the county." Section 77-1835, in relevant part, states:

> Proof of publication shall be made by filing in the county treasurer's office the affidavit of the publisher, manager, or other employee of such newspaper, that to his or her personal knowledge, the notice was published for the time and in the manner provided in this section, setting out a copy of the notice and the date upon which the same was published.

[37] There is no requirement in the preceding sections that specific language must appear in a proof of publication. Instead, the proof of publication needs to state only that notice was published in the manner provided in § 77-1834. In addition, Neb. Rev. Stat. § 25-523 (Reissue 2016) defines a "legal newspaper" for the publication of legal and other official notice as one which has a "bona fide circulation of at least three hundred paid subscriptions weekly, and shall have been published within the county for fifty-two successive weeks prior to the publication of such notice, and be printed, either in whole or in part, in an office maintained at the place of publication."

The proof of publication sufficiently stated that the Courier-Times is a legal newspaper having a bona fide circulation of at

least 300 paid weekly subscriptions and that it had been published within the county for 52 consecutive weeks prior to the publication of such notice.

[38] Robin also failed to produce sufficient evidence the Courier-Times was not, in fact, in general circulation in Lincoln County. In the absence of a sufficient showing to the contrary, the affidavit of the publisher that a newspaper was one of general circulation in the county must be held sufficient to establish the fact.[84]

[39] Robin submitted evidence that the Courier-Times had only 1,300 weekly subscriptions among three villages within Lincoln County. However, 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.[85] The plain meaning of the word "in," in § 77-1834, shows that the newspaper only needed to be generally circulated within Lincoln County, not throughout the entire county, as Robin argues.

Robin's evidence does not constitute sufficient evidence that the Courier-Times was not a legal newspaper in general circulation in Lincoln County.

Robin also produced evidence another newspaper published in Lincoln County had greater circulation throughout the county and, specifically, in the ZIP code where Gladys and the property were located. He argues that Vandelay did not satisfy the publication requirement by not publishing the notice in this newspaper, by reading some type of good faith requirement into § 77-1834. However, § 77-1834 does not require publication in the newspaper of *greatest* circulation in the county, and we will not impose such a requirement. As mentioned above, a court will not read into a statute a meaning that is not there.[86]

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[84] See *Bourke v. Somers*, 3 Neb. (Unoff.) 761, 92 N.W. 990 (1902).

[85] *In re Trust of Shire, supra* note 53.

[86] *State v. Gill, supra* note 66.

Nevertheless, Robin directs us to *State, ex rel. Elliott, v. Holliday*,[87] where in 1892, we stated: "Legal advertisements should not be inserted in an obscure paper where the probabilities are that they will be seen by but few, where there is a paper of general circulation in the county, because the object of the law will be in part at least defeated." In *Holliday*, we were considering a sheriff's refusal to publish mortgage foreclosure sale notices in any newspaper except the one published by his political party, which newspaper was alleged to have been "'of such small circulation as in effect to utterly defeat the object of the law.'"[88] We do not foreclose the possibility that there is some threshold requirement for the circulation of a newspaper to satisfy the requirements of § 77-1834, but *Holliday* is inapplicable here, where, as we stated above, Robin has not presented sufficient evidence to overcome the statutory presumption that § 77-1834 was complied with.

Because we conclude Robin did not overcome the presumption Vandelay complied with the statutory notice requirements to show Vandelay's tax deed is void, we must reverse the decision of the Court of Appeals.

[40] Upon reversing a decision of the Court of Appeals, we may consider, as we deem appropriate, some or all of the assignments of error the Court of Appeals did not reach.[89] Because the Court of Appeals determined that Vandelay's tax deed was void, it did not consider whether Gladys had a mental disorder entitling Robin to redeem the property under the expanded statutory period or whether equity requires the protection of Robin's interests. The district court fully decided these issues, and the meaning of "mental disorder," under § 77-1827, is a matter of first impression. Thus, we elect to consider these assignments of error.

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[87] *State, ex rel. Elliott, v. Holliday*, 35 Neb. 327, 333, 53 N.W. 142, 144 (1892).

[88] *Id.* at 331, 53 N.W. at 143.

[89] *Burns v. Burns*, 293 Neb. 633, 879 N.W.2d 375 (2016).

3. Robin Failed to Prove He Was Entitled to Extended Redemption Period in § 77-1827

Robin argues that he was entitled to redeem the property because Gladys suffered from a mental disorder that extended the statutory redemption period and because Vandelay admitted that Robin had tendered redemption to the county treasurer. He argues that the district court erred in not finding Gladys had a mental disorder by relying on Vandelay's expert, who never examined Gladys and only selectively reviewed her medical records, over her long-term physician.

Vandelay argues that the evidence was insufficient to prove Gladys had a mental disorder affecting her ability to make legal decisions and that we should defer to the lower court's factual finding that Vandelay's expert was more credible than Gladys' physician, whose testimony was not supported by his own medical records.

[41] In order to defeat a tax deed, a party must show that it satisfied the conditions precedent in § 77-1843. One of the options to satisfy § 77-1843 includes proving that (1) the property has been redeemed from the sale and (2) such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state. As discussed above, Vandelay admitted that Robin tendered redemption to the county treasurer, which is sufficient to satisfy that condition.

Though we are aware that in 2013, the Legislature revised § 77-1827 to replace the term "mental retardation" with the term "intellectual disability," for purposes of this matter we quote from the version of the statute in place during the relevant period of this controversy. The 2009 version states: "The real property of persons with mental retardation or a mental disorder so sold, or any interest they may have in real property sold for taxes, may be redeemed at any time within five years after such sale."[90] There is no contention that Gladys suffered

[90] § 77-1827 (Reissue 2009).

from the first condition, so we consider only whether she suffered from the second condition.

[42,43] The language of the statute indicates that the extended redemption period for a mental disorder exists if the owner had a mental disorder at the time of the property's sale. Contrariwise, interpreting the statute to extend the redemption period for an individual who only later develops a mental disorder within the 5-year period provided therein would be absurd because such an individual could not reobtain the right to redeem the property after a tax deed had been validly issued. In interpreting a statute, a court is guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.[91] Accordingly, we restrict our analysis to whether Gladys had a mental disorder in March 2011.

At trial, each party called an expert witness concerning Gladys' mental state. The witnesses agreed that a mental disorder is, as characterized by Vandelay's expert, "marked primarily by sufficient disorganization of personality, mind and emotions to seriously impair the normal psychological functioning of the individual."

Robin called Dr. Ronald Asher, who provided Gladys' medical care beginning in at least 2006. He stated that an MRI record in his 2006 records indicated Gladys had vascular disease in her brain, which causes small strokes. He described Gladys' mental functioning as starting at a normal level in 2006 but slowly deteriorating until the time of her death, when she was mostly bedridden. Asher explained that Gladys' deterioration was a "step-wise progression," where she would suffer a small stroke impairing her mental status for 7 to 10 days before she recovered to a level slightly worse than before the stroke.

Asher opined Gladys had a mental disorder and dementia from at least 2009 until her death, but he could not determine exactly when she developed the mental disorder. He

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[91] *Burns v. Burns*, 296 Neb. 184, 892 N.W.2d 135 (2017).

explained she was unable to understand complicated issues, make appropriate judgments, or manage financial matters—beyond writing checks and simple cash management. While Asher never performed any psychological testing or prescribed Gladys dementia medication, he explained she had never suffered any behavioral issues warranting intervention. Finally, he acknowledged his notes from June 2012, "I thought [her] mental status was good," and May 2015, "mental status reassuring," but explained the notes were relative to her status during that period.

Robin and one of his sisters provided anecdotal testimony about Gladys' false memories and lack of reasoning, which were consistent with the symptoms of a mental disorder as described by the experts. Robin also testified that Gladys' mental condition gradually declined but that the most significant change occurred after she was hospitalized for a fall in December 2013.

Regarding Gladys' ability to handle her affairs, Robin and his sister stated that Gladys tended to keep all documents and mail she received and that they found records from doctor appointments, letters from Social Security, various bills, junk mail, and a handicapped parking pass Gladys claimed to have thrown away, but no property tax statements. Robin also stated Gladys asked him about her bills frequently after 2009 to make sure they were being paid. Robin testified he confirmed with the retirement community staff that Gladys continued to receive her mail throughout her time living there.

Dr. John Goldner, a neurologist, testified for Vandelay after conducting a comprehensive review of Gladys' medical records. Specifically, he relied on Asher's notes, the absence of psychological testing and prescriptions treating dementia, and the daily notes from the retirement community—describing Gladys as alert, orientated, and able to make her needs known and make her own decisions, through 2013. Goldner testified that Asher's notes indicated that in April 2013, Gladys suffered from decreased memory, and that then in December 2013, Gladys moved from a residential unit to the assisted living

unit at the retirement community because she required a higher level of care. He testified that at Gladys' age, it was possible that her functioning could be deficient enough to be considered a mental disorder on certain days, but that she appeared to generally be able to function within normal limits for her advanced age, which is not de facto a mental disorder. He testified Gladys' functioning could not be classified as a mental disorder before mid-2014, at which point her mental capacity was inconclusive.

The court determined that Asher's records did not support his conclusions that Gladys had a mental disorder. It concluded Robin failed to prove Gladys had a mental disorder, relying on Goldner's testimony that Gladys did not suffer from a mental disorder any time before mid-2014, the evidence that any mental decline she was experiencing was not out of line with other individuals her age, and the fact that she was never tested for a mental condition or placed on medication for dementia.

We have not previously interpreted the term "mental disorder" in the context of § 77-1827 (Cum. Supp. 2016). We have, however, interpreted that same phrase in the context of statutory limitations on certain actions. Neb. Rev. Stat. § 25-213 (Reissue 2016), in relevant part, provides:

> [I]f a person entitled to bring any action [under listed statutes] for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, is, at the time the cause of action accrued . . . a person with a mental disorder . . . every such person shall be entitled to bring such action within the respective times . . . after such disability is removed.

[44] In *Maycock v. Hoody*,[92] we adopted the definition of "mental disorder" employed by the Court of Appeals, reasoning it was consistent with our interpretation of a previous version of the statute.[93] We stated:

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[92] *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011).

[93] See *Sacchi v. Blodig*, 215 Neb. 817, 341 N.W.2d 326 (1983).

> [A] person with a mental disorder under § 25-213 is "one who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action[,]" and . . . a mental disorder within the meaning of § 25-213 is "an incapacity which disqualifies one from acting for the protection of one's rights."[94]

Because both § 77-1827 and § 25-213 relate to extending the time required to exercise a legal right for an individual suffering from a mental disorder, we interpret the meaning of the term "mental disorder" consistently among them.

While we review factual issues de novo on the record, we give deference to the fact that the trial court observed the testimony of the experts and Wisner family members. The court determined that Goldner's testimony was more credible than Asher's and the Wisners' because of the contradiction with Asher's records and lack of anyone requesting psychological testing for Gladys.

The definition of a mental disorder provided by the experts appears to be broader than the standard required by the statute. Accordingly, Goldner's opinion that Gladys did not suffer from any mental disorder before mid-2014 strongly supports not finding Gladys to have had a mental disorder in March 2011, while Asher's contrary opinion did not contain a precise conclusion regarding her ability to understand and protect her legal rights.

Both Asher and Robin described Gladys' mental condition as a slow decline. Asher could not pinpoint when Gladys developed a mental disorder but concluded it was in at least 2009 despite a general consensus that her greatest decline in functioning occurred in December 2013. While Asher stated that Gladys had a decreased ability to make judgments and understand complex issues since 2009, Robin stated that she remained vigilant regarding her financial obligations, and

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[94] *Maycock, supra* note 92, 281 Neb. at 776, 799 N.W.2d at 329, quoting *Vergara v. Lopez-Vasquez*, 1 Neb. App. 1141, 510 N.W.2d 550 (1993).

the June 2011 newspaper article indicated that typically, she was still functioning near her normal capacity—engaging in weekly card games with friends and reading. Finally, Asher's note from June 2012 does not provide any support for his conclusion that she had a mental disorder, even if it was only describing her relative status.

Based on the district court's credibility determination and our independent review of the evidence, we conclude Robin failed to prove Gladys suffered from a mental disorder in March 2011. Therefore, her right to redeem the property expired when the county treasurer delivered the tax deed to Vandelay.

4. Equities of Case Do Not Favor Robin

Robin argues the equities of this situation warrant this court's permitting him to redeem the property, even if the law does not. He argues the undisputed evidence is that Gladys was a 95-year-old widow in a retirement community with no local family and at least some diminished mental capacity. Conversely, he argues Vandelay chose to pursue the less arduous process for a tax deed and did only the bare minimum required by the tax deed statutes, in bad faith to deprive Gladys of her property at a significant windfall.

The parties dispute whether we may provide an equitable remedy at all when the situation is governed by a comprehensive, rigid statutory structure. We need not decide this issue, because even assuming, without deciding, that we could craft some type of relief for Robin, his characterization of the equities of the situation strongly distorts the reality of this case.

[45] Equity strives to do justice; it is not a rigid concept, but, instead, is determined on a case-by-case basis according to concepts of justice and fairness.[95] But "'equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common law or

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[95] *Floral Lawns Memorial Gardens Assn. v. Becker*, 284 Neb. 532, 822 N.W.2d 692 (2012).

statute.'"[96] This maxim is strictly applicable whenever the rights of the parties are clearly defined and established by law.[97] Also, equitable remedies are generally not available where there exists an adequate remedy at law.[98]

When Roger died in 2009, Robin took responsibility over managing Gladys' affairs. He passed this responsibility to the trust department of a bank but, apparently, overlooked the property taxes due on the property. Further, his own testimony provided that he did not monitor Gladys' finances, despite her persistent concern about her bills' being paid. Additionally, while Gladys was stated to have retained all of her mail, even junk mail, she apparently disposed of her repeated notices by Lincoln County and Vandelay regarding her property tax deficiency.

Steps could have been taken to ensure that Gladys' affairs were being addressed. When Gladys moved to the retirement community in 2009, her address of record was changed with the relevant agencies. Robin, as the holder of Gladys' power of attorney, could have directed that all of Gladys' mail be sent to him. He could have had the lease on the property recorded with the register of deeds to allow additional notices to be sent to the tenant. He could have paid the real estate taxes or authorized the trust department to pay the real estate taxes. He could have sought to have her mental capacity tested, and if Gladys was found to be impaired by reason of disability, he could have sought a conservatorship for her. However, Robin failed to take any one of the steps to ensure the real estate taxes were paid.

Despite the harsh result in this matter, the Legislature has established strict rules for the payment of real estate taxes and ramifications for the failure to pay those taxes. Vandelay complied with those statutory requirements to obtain a tax deed on validly purchased tax certificates. Despite Robin's arguments

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[96] *Jeffrey B. v. Amy L.*, 283 Neb. 940, 949, 814 N.W.2d 737, 745 (2012).

[97] *Id.*

[98] *Jeffrey B. v. Amy L., supra* note 96.

that it did the bare minimum required, Vandelay, in fact, researched where to find Gladys; sent Gladys, by certified mail to her correct address, notice that an application for a tax deed would be made; published notice of the application in a legal newspaper of general circulation in Lincoln County; and sent the notice of publication to Gladys by first-class mail. The last step of mailing the notice of the publication by first-class mail was not statutorily required and was made by Vandelay out of an abundance of caution to ensure Gladys was not deprived of the due process rights in her property.

Hence, the equities of this situation do not favor Robin, and this assignment of error is without merit.

V. CONCLUSION

Despite Robin's standing to challenge Vandelay's tax deed, we conclude Robin failed to present sufficient evidence to either overcome the presumption Vandelay provided Gladys with sufficient service, as required to obtain a valid tax deed, or prove Gladys suffered from a mental disorder at the time of her property's tax sale, extending her statutory redemption period. In addition, the tax certificate statutes enacted by the Legislature establish a specific process upon the failure to pay real estate taxes which does not take into consideration the amount of the delinquent tax compared to the value of the property. As a result, we determine the record in this case does not support providing Robin with a remedy he was not entitled to under the statutes. Therefore, we reverse the decision of the Court of Appeals and remand the cause with directions that the Court of Appeals affirm the judgment of the district court.

Reversed and remanded with directions.

Wright and Kelch, JJ., not participating.

Cassel, J., dissenting in part.

This court's admittedly "harsh" result flows from the district court's single failure, amidst an otherwise thorough and correct analysis, to see the forest for the trees. The district court

rejected Gladys' estate's attempt to redeem the property based on an extended redemption period authorized where a taxpayer suffers from a "mental disorder."[1] The ultimate question here is not whether Vandelay is entitled to all of the taxes, fees, and costs that it paid, together with all of the interest imposed pursuant to a high statutory rate designed to encourage prompt payment of real estate taxes. Rather, the question is whether, despite a remedy expressly authorized by the Legislature's "strict rules" in anticipation of this situation, Vandelay should reap a windfall at the expense of an extremely elderly taxpayer lacking the capacity to take action to protect her rights. Because I conclude that Gladys was entitled to the extended redemption period and that equity demands its implementation, I respectfully dissent.

In all respects but one, the district court rendered an extensive, well-researched, and well-written judgment. On appeal, the Court of Appeals concentrated on the complicated tax deed method statutes and did not reach the essential issue. On further review, my colleagues have almost everything right. I agree with this court's conclusions that Robin had standing to challenge the tax deed and that Vandelay substantially complied with the statutory notice requirements for a tax deed, and with all of this court's reasoning leading to those conclusions. The court's analysis regarding those matters is spot on. Only where the court turns to the statutory right of redemption do I part its company.

This court acknowledges that both parties assert claims for quiet title, which sound in equity. As this court's opinion admits, equity strives to do justice determined on a case-by-case basis according to concepts of justice and fairness. This court recites the correct standard of review—trying factual questions de novo on the record and, as to questions of both law and fact, reaching an independent conclusion from that of the district court.

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[1] See Neb. Rev. Stat. § 77-1827 (Cum. Supp. 2016).

Regarding whether Gladys suffered from a mental disorder during the pertinent timeframe, I assert that this court should give no weight to the district court's observation of the two medical experts. Our standard of review does not demand deference to the district court in any respect. It is purely within this court's discretion. Here, none is due, for two reasons. First, the testimony of Vandelay's expert was presented by deposition. As to that physician, the district court was in no better position than this court to make credibility assessments. Second, where I believe the district court went wrong had little to do with its observations of Robin's expert, who was Gladys' treating physician.

I accept this court's definition of "mental disorder,"[2] which the district court also employed. Thus, a mental disorder in this context is "'an incapacity which disqualifies one from acting for the protection of one's rights.'"[3]

Several facts set the stage, which is essential to an assessment of Gladys' capacity to protect her rights. She went to live at a retirement community in 2009, the year she turned age 93. She moved there after the deaths of her husband in 2007 and her son Roger in 2009. The district court recognized that "Gladys was generally unfamiliar with financial matters and did not pay her own bills." When she entered the facility, she initially lived in the residential section. By the time the tax sale certificates were sold in 2011, she was 94 years old. In late 2013, at age 97, she suffered a number of falls. Because she was no longer ambulatory, she was moved to the facility's assisted living section. By March 2014, as she approached the age of 98, she was, as the district court found, suffering from numerous chronic medical issues and having difficulty with her memory, particularly in recalling names, and with complicated tasks.

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[2] § 77-1827.

[3] *Maycock v. Hoody*, 281 Neb. 767, 776, 799 N.W.2d 322, 329 (2011).

Both the district court and this court relied on medical records kept for a significantly different purpose—to guide her caregivers at the facility. Her caregivers were not recording assessments of her understanding and ability to protect her rights in financial matters. They were concerned with her day-to-day well-being. Thus, it is no surprise that the records showed that "she was having no behavioral issues, was kind and easy to get along with, was oriented to time, person and place, was alert and cooperative, was capable of performing simple tasks, and displayed a fairly consistent pattern of normal intellectual behavior." Vandelay's expert relied solely on these medical records. He never met or observed Gladys. His testimony provides no significant insight into Gladys' capacity to protect her rights.

In contrast, Gladys' longtime physician testified to personal observations and conclusions, over an extended period, directly bearing on Gladys' incapacity which disqualified her from acting for the protection of her rights. He observed in 2006 that she had episodes of confusion and disorientation. Those were typically associated with findings suggesting small strokes—where imaging studies showed evidence of "white matter changes," that is, "ischemic injury."

When Gladys moved to the facility in 2009, her doctor observed that she was "not really able to make good judgments." He explained, "You could ask her questions and she would give a good response, but if you asked detail, if you . . . asked her to make judgments, she really wasn't able to do that very well." He opined that "over time what you could see is that she became less capable."

From 2009 until the time of Gladys' death, her doctor saw her about every 60 days. Her doctor recalled a "fairly steady but gradual deterioration in how well she did." From his observations, he described a "step-wise decrease in her . . . functional capacity," which he characterized as "more mental than physical." He described her ability to do "simple things," such as "describe that she needed to go to the bathroom, she

was hungry, she was tired." But he opined that her ability to understand business or financial matters from 2009 on was "very limited." He opined that her ability to organize information also was "very limited." He opined that she suffered from a "disorganization of the mind" from 2009 forward. And he opined that her cognitive capacity from 2009 forward showed that her "ability to deal with anything that was beyond simple was not something that she could do." With respect to her reasoning and memory, he opined that "anything that was . . . complicated would be beyond what she would be able to manage." Ultimately, Gladys' doctor opined that from 2009 to the time of her death, she suffered from a "mental disorder." He characterized it as "multi-infarct dementia," that is, "multiple small strokes which . . . progressively knock out sections of brain."

The district court recognized that the question of whether by 2014 Gladys suffered from a mental disorder in the statutory sense was "more difficult." It acknowledged that by the spring of 2014, there "had been a decline in Gladys' cognitive and mental status."

But then the district court missed the forest, stating that the "evidence [did] not establish that her decline was *out of the normal range for a person of her age*." (Emphasis supplied.) It defies reason and common sense to ignore the impact of extremely advanced age on mental ability. And coupled with the testimony of her doctor, supported by imaging showing repeated small strokes over a period of years, I cannot agree that Gladys had the capacity to act for the protection of her own rights in the payment of real estate taxes.

Because I conclude that a de novo review supports the existence of a "mental disorder" as contemplated by § 77-1827 at the relevant time, I would modify the Court of Appeals' decision and direct that court to reverse the judgment of the district court and remand the cause with directions to quiet title in Gladys' estate upon payment by the estate into court of all taxes, costs, and fees paid by Vandelay, together with statutory

interest (14 percent per annum) to the time of payment into court, to be disbursed to Vandelay in redemption of its tax deed and the underlying tax sale certificate.

I reiterate that Vandelay is entitled to the full benefit of the payments required for redemption. But Gladys (and now, her estate) is no less entitled to justice. That was the exact purpose of the statutory extended redemption period. And the failure to implement that statute permits Vandelay to reap a windfall that borders on the obscene. Because I believe that the windfall is an unjust result contrary to statute, I respectfully dissent.

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

Jason L. Armknecht, appellant, v. Alita M. Armknecht, now known as Alita M. Reynolds, appellee.

916 N.W.2d 581

Filed August 24, 2018. No. S-17-377.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. The same standard applies to the modification of child support.
2. **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. **Child Support.** As a general matter, the parties' current earnings are to be used in calculating child support.
6. **Rules of the Supreme Court: Child Support.** In general, child support payments should be set according to the Nebraska Child Support Guidelines.
7. **Child Support.** Use of earning capacity to calculate child support is useful when it appears that the parent is capable of earning more income than is presently being earned.
8. ____. The court may add "in-kind" benefits derived from an employer or other third party to a party's income for purposes of calculating child support.

9. ____. In determining child support, a court's findings regarding an individual's level of income should not be based on the inclusion of income that is entirely speculative in nature.
10. **Courts: Child Support.** The trial court has discretion to choose whether and how to calculate a deduction for subsequent children.
11. **Child Support.** No precise mathematical formula exists for calculating child support when subsequent children are involved, but the court must perform the calculation in a manner that does not benefit one family at the expense of the other.
12. **Modification of Decree: Child Support: Proof.** The party requesting a deduction for his or her obligation to support subsequent children bears the burden of providing evidence of the obligation, including the income of the other parent of the child.

Appeal from the District Court for Gage County: Daniel E. Bryan, Jr., Judge, Retired. Affirmed.

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

Mark J. Krieger and Terri M. Weeks, of Bowman & Krieger, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Derr and Urbom, District Judges.

Urbom, District Judge.

INTRODUCTION

Jason L. Armknecht appeals the modification order entered by the district court for Gage County, which modified his child support obligation to his former wife, Alita M. Armknecht, now known as Alita M. Reynolds. Jason argues the district court erred in the calculation of child support. For the reasons set forth below, we affirm the order of the district court.

BACKGROUND

Jason and Alita married in September 1997 and divorced in November 2007. They have three children: Logan Armknecht, born in 1998; Rees Armknecht, born in 1999; and Alexia Armknecht, born in 2004. In the decree, Alita was granted physical custody of all three children, subject to Jason's

parenting time, and Jason was ordered to pay child support in the amount of $950 per month. The decree ordered that such child support would be reduced to $700 for two children and $475 for one child.

In April 2016, Jason filed a complaint for modification of the decree on the basis that the parties' middle child, Rees, had "expressed a strong and consistent desire" to live with Jason and had been staying with him since January 1, 2016. Jason sought modification of custody with respect to Rees and a reduction in his child support obligation due to such change in custody. Alita counterclaimed for modification of child support, alleging there had been a material change in circumstances that would result in an increase in Jason's support obligation of more than 10 percent.

At the time of trial, Logan had reached the age of majority, Rees was living with Jason, and Alexia remained living with Alita. The parties stipulated that the split custody computation for child support would be retroactive to May 1, 2016, which was the first month following the filing of the complaint for modification. The evidence also showed that Jason had two subsequent children at the time of trial: a child born in February 2015, and a child born in October 2016.

Evidence of Income

The incomes of Jason and Alita were highly disputed at trial. Both parties remarried, and both were currently employed by their respective spouses. The evidence showed that in 2015, Jason began working as a full-time sales associate for an insurance agency owned by his wife, Tasa Paul (Tasa). At the time of trial in February 2017, Jason's two most recent pay stubs showed that he was earning $1,650 per month, although he earned significantly more the previous year. Jason's 2016 pay stubs showed that he earned $3,750 per month from January through May and $2,100 per month from June through December. Tasa testified that his salary was reduced in June 2016 because she eliminated the marketing and overhead allowances that he had been given for the first part of that

year. She explained that the agency had qualified for extra marketing dollars from the company at the end of 2015, so she decided to give Jason some extra marketing money to see if he could bring in more business. Starting in June, she went back to her previous practice of covering overhead expenses through the agency rather than having Jason pay for those expenses from his salary, and decided to eliminate some of the marketing expenses altogether because she decided the practice was not feasible.

Tasa testified that the reduction in Jason's salary from $3,750 to $2,100 in June 2016 was unrelated to the filing of his complaint to modify child support in late April 2016. She further testified that Jason first met with his attorney in December 2015, after which his income actually increased in January 2016 before it was reduced in June. However, there was no testimony to explain why Jason's salary was again reduced to $1,650 in January 2017. When asked about Jason's earning capacity, Tasa testified that she did not believe it was greater than $24,000 annually at that time and explained that his salary was very typical for his level of experience in the industry. She testified that she expected Jason's income to continue at an amount close to $2,100 per month through the calendar year.

Prior to working for Tasa, Jason was a self-employed construction worker. His tax returns for the 5 preceding years reflect that his income averaged $11,127 per year, or approximately $927 per month. However, his taxable income was greatly reduced due to deductions of business expenses in those years.

Alita testified that she works as an administrative assistant for BeachLifestyle Enterprises, LLC, which is a company owned by her husband, Gary J. Reynolds (GJ). Her income, as shown on her W-2 wage and tax statements, was $32,000 in 2013; $11,769 in 2014; and $25,000 in 2015. There was no explanation provided for the fluctuation in her income from year to year, and she did not produce any evidence of her income for 2016 or the first part of 2017.

Another contested issue at trial was whether Alita was earning any additional income through "ViSalus," a company for which both she and GJ are promoters. Jason submitted several photographs into evidence showing GJ and Alita holding placard-sized checks from ViSalus, payable to "GJ & Alita Reynolds" in various amounts. The first photograph was taken in 2012 and shows them holding one check for $100,000 and another for $250,000. When asked if the exhibit accurately depicted what was shown in the photograph, Alita indicated that both of their names were included on the checks for "recognition purposes only." She further stated that "we only were able to receive that money if we continued at a certain level, and we did not." The next photograph was taken in 2014 and shows another check made out to "GJ & Alita Reynolds" in the amount of $2 million. Another exhibit contains a promotional photograph of GJ and Alita, and states: "WE CONGRATULATE GJ & ALITA REYNOLDS FOR REACHING $2,000,000 IN ViSALUS EARNINGS." The final photograph was taken in 2016 and shows GJ and Alita holding a large placard containing both of their names, stating: "OVER $4,000,000 ViSalus Lifetime Earnings Award." At the bottom of the placard in smaller lettering, it further states: "NOT AN ACTUAL CHECK. REFLECTS TOTAL EARNINGS OVER TIME." Alita testified that some of the sums shown on these checks were earned by GJ prior to their marriage.

Given this evidence of income through ViSalus, Jason argued that a portion of the income shown on GJ and Alita's joint tax returns was attributable to her. Their joint tax returns showed a total income for each year as follows: $187,506 in 2012; $387,483 in 2013; $33,548 in 2014; and $50,677 in 2015. However, Alita testified that her personal income was limited to the wages shown on her W-2 wage and tax statements and that the remaining income shown on the joint tax returns was attributed to GJ's wages and corporate income from his company.

In addition to the ViSalus evidence, Jason also presented evidence of nonwage benefits Alita received from her employer.

In November 2014, BeachLifestyle Enterprises deeded a piece of real estate to GJ and Alita as joint tenants. They received the property free and clear and then sold it approximately 2 years later for $315,000. Alita also drives a BMW sedan, which she testified was given to her by her employer.

District Court Findings

After the close of the evidence, the district court stated its findings as follows: "[T]he calculation of income that I've seen basically in the original decree really hasn't changed dramatically here. And so I'm going to find that his is — I'm going to leave his at 3100 and hers at 3,333 a month." It then instructed Alita's counsel to prepare new child support calculations using those incomes, with credit for Jason's two subsequent children, and submit an order to the court within 10 days.

The district court subsequently entered a written order awarding physical custody of Rees to Jason and finding that a material change in circumstances had occurred due to that change in custody. It found that the income of the parties at the time the decree was entered in 2007 was an appropriate estimation of their actual earning capacity. Given the varying number of children and subsequent children being supported at various times, the district court's order split the child support computation into four different time periods, as shown in the chart below.

Date	Split Custody	Subsequent Child Credit	Final Support
May 1 to October 31, 2016	$288 (F) (3 children)	$66 (1 child)	$222 (F)
November 1, 2016, to January 31, 2017	$288 (F) (3 children)	$113 (2 children)	$175 (F)
February 1, 2016, to March 31, 2018	$3 (F) (2 children)	$113 (2 children)	$110 (M)
April 1, 2018, and thereafter	$612 (F) (1 child)	$113 (2 children)	$499 (F)

ASSIGNMENTS OF ERROR

Although Jason assigns seven errors on appeal, his assignments of error, as argued, can be consolidated into three. He argues the district court erred in (1) basing the child support order on the former income of the parties from 2007, rather than using their current incomes; (2) failing to make findings on contested matters at trial and instead adopting the child support calculations and order prepared by Alita's attorney; and (3) improperly calculating the deduction for Jason's subsequent children.

STANDARD OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.[1] The same standard applies to the modification of child support.[2]

[2,3] 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.[3] 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.[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]

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[1] *Johnson v. Johnson*, 290 Neb. 838, 862 N.W.2d 740 (2015).

[2] *Id.*

[3] *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018).

[4] *Id.*

[5] *Connolly v. Connolly*, 299 Neb. 103, 907 N.W.2d 693 (2018).

ANALYSIS

Determination of Income

Jason asserts that the district court erred in basing the child support order on the former income of the parties from 2007, rather than using their current incomes. In doing so, the court set Jason's income at $3,100 per month, but he argues his current income at the time of trial was no more than $2,100 per month. Regarding Alita's income, Jason argues the district court failed to consider evidence of her substantial earnings from ViSalus and significant nonwage benefits provided by her employer.

Alita argues that the evidence clearly showed that Jason was earning $3,750 per month before he filed the complaint for modification. She argues that the reduction of his salary to $2,100 per month in June 2016 by Tasa was directly related to the filing of his complaint to modify in late April 2016. Alita argues that her income is limited to her earnings of $25,000 per year as an administrative assistant for BeachLifestyles Enterprises, as shown on her W-2 wage and tax statements. She asserts that the ViSalus income is generated by GJ's company, which he owned prior to their marriage and in which she has no ownership interest.

[5] As a general matter, the parties' current earnings are to be used in calculating child support.[6] However, it appears here, based on the statements made by the district court on the record, that it did not find either party's evidence of current income to be credible. The court stated:

> I know that, based on these circumstances, there's no question you, from a judge's standpoint, you're looking at what we consider a little bit of a shell game here for — probably for both sides, based on the situations that they're in.

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[6] *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

> I mean, he's just not working for a third party. He's working for his wife.
>
> She's not just working for a third party. She's working for her husband.

[6,7] Given the wide discrepancy of evidence of the parties' current incomes and the fact that both parties' incomes are controlled by their respective spouses, we cannot say that the district court erred in setting the parties' incomes based on their earning capacities. In general, child support payments should be set according to the Nebraska Child Support Guidelines.[7] However, the guidelines provide that if applicable, earning capacity may 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.[8] Use of earning capacity to calculate child support is useful when it appears that the parent is capable of earning more income than is presently being earned.[9]

Here, the evidence showed that Jason was earning $3,750 per month at the time he filed the complaint for modification. Although there was testimony from Tasa that some of that income was to be used for marketing and overhead expenses, there was no evidence that any such expenses were ever incurred or paid by Jason. We find no abuse of discretion in the district court's setting his income at $3,100 per month based on his earning capacity at the time the original decree was entered and based on the evidence of what he was earning at the time he filed the complaint for modification.

The district court set Alita's earning capacity at $3,333 per month, even though her income had apparently decreased to only $2,000 per month as an administrative assistant for GJ's company. Regarding her earning capacity, the court noted:

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[7] *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013).

[8] *Id.*

[9] *Id.*

> Now, no one explained to me why she went from $3,[3]33 down to what her husband's willing to pay her, only about 24. I think she — I'm sure she's worth more than $24,000 a year, and at least what she was claiming at $3,333, before — at the time she was divorced.

[8,9] Jason argues that Alita's income should have been higher, because the court failed to consider her earnings from ViSalus and significant nonwage benefits she received from her employer. Although the ViSalus exhibits submitted by Jason appear to attribute substantial income to GJ and Alita, we agree with Alita that those photographs are not evidence of actual income. Regarding the nonwage benefits, there was no evidence that such benefits were a regular source of income for Alita. While a court is allowed to add "in-kind" benefits derived from an employer or other third party to a party's income,[10] a "'court's findings regarding [an individual's] level of income should not be based on the inclusion of income that is entirely speculative in nature.'"[11] Given the speculative nature of the ViSalus income and nonwage benefits, we cannot say that the district court erred in excluding those items from Alita's income, and in setting her earning capacity at $3,333 per month.

Failure to Make Independent Calculations

Jason argues that the district court erred in failing to make independent findings on contested matters and adopting the child support calculations prepared by Alita's attorney, rather than making its own calculations based on its own findings.

Neb. Ct. R. § 6-1504(F) provides as follows:

> A worksheet showing calculations under the Nebraska Child Support Guidelines shall be attached to every child support application, order, or decree and shall be prepared

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

[11] *Gress v. Gress*, 274 Neb. 686, 698, 743 N.W.2d 67, 78 (2007).

> by the party requesting child support, except that in a contested matter the worksheet shall be prepared by the court and attached to the order or decree.

He also points to our decision in *Brunges v. Brunges*,[12] in which the trial court generally found in favor of one party and directed counsel for that party to prepare a decree, but did not make any specific findings or orders regarding the contested issues. We expressed our disapproval of such practice and stated, "[i]n an action for dissolution of marriage, specific findings of fact must be made as to various contested issues, and it is a trial court's duty to make those findings independently."[13]

Unlike *Brunges*, here, the district court, on the record, made findings establishing the monthly income for each party and then instructed Alita's counsel to prepare new child support calculations using those incomes, with credit for Jason's two subsequent children. The district court adopted the findings contained in the proposed order and the calculations contained in the worksheet prepared by Alita's counsel. At that point, those proposed findings and calculations became the findings of the district court.

Credit for Jason's Subsequent Children

Finally, Jason argues the district court erred in calculating the deduction for his subsequent children, as it resulted in an increase in Jason's child support obligation for Alexia, even though the district court found no change in the parties respective incomes. He argues that the worksheets adopted by the district court erroneously attributed too much monthly income to Jason's current wife, Tasa, when calculating what Jason's support obligation would be for his two subsequent children. This had the effect of lowering his support obligation to his

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[12] *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000).

[13] *Id.* at 669, 619 N.W.2d at 463.

two subsequent children, which in turn raised his support obligation for Alexia.

[10-12] The trial court has discretion to choose whether and how to calculate a deduction for subsequent children.[14] When the court decides to allow a deduction, the calculation is left to its discretion so long as it considers the obligations to both families and the income of the subsequent child's other parent.[15] No precise mathematical formula exists for calculating child support when subsequent children are involved, but the court must perform the calculation in a manner that does not benefit one family at the expense of the other.[16] The party requesting a deduction for his or her obligation to support subsequent children bears the burden of providing evidence of the obligation, including the income of the other parent of the child.[17]

Here, the district court included worksheets demonstrating that it calculated Jason's subsequent child credit by determining how much child support he would owe to each family under the guidelines, after deducting the support obligation to the other family from his income. It then computed the difference between the amount of support Jason would owe without any subsequent children and the amount he would owe with each subsequent child. That amount was then deducted from his monthly support obligation as a credit for his subsequent children. We believe this method of calculating the subsequent child credit considers the obligations to both families and does not benefit one family at the expense of the other.

Although Jason argues that the worksheets attributed too much monthly income to Tasa when calculating what his

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

[15] *Id.*

[16] *Id.*

[17] *Id.*

support obligation would be for his two subsequent children, we note that Jason did not submit any proposed calculations regarding his support obligations for his subsequent children. We find no abuse of discretion in the calculations used to determine Jason's subsequent child credit.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court.

Affirmed.

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

State of Nebraska, appellee, v. Jeremy D. Foster, appellant.

916 N.W.2d 562

Filed August 24, 2018. No. S-17-707.

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. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
3. **Postconviction.** Postconviction relief is a very narrow category of relief.
4. **Postconviction: Constitutional Law: Proof.** In order to be entitled to an evidentiary hearing, a prisoner must allege facts in the motion for postconviction relief that, if proved, would constitute a violation of his or her rights under the U.S. or Nebraska Constitution.
5. **Postconviction.** A prisoner is not entitled to an evidentiary hearing on a motion for postconviction relief on the basis of claims that present only conclusory statements of law or fact.
6. ____. In the absence of alleged facts that would render the judgment void or voidable, the proper course is to dismiss the motion for postconviction relief for failure to state a claim.
7. **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.

8. **Effectiveness of Counsel: Proof.** To establish the prejudice prong of a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
9. **Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness.
10. **Effectiveness of Counsel: Appeal and Error.** An appellate court will not judge an ineffectiveness of counsel claim in hindsight; appellate courts must assess trial counsel's performance from counsel's perspective when counsel provided the assistance.
11. ____: ____. When reviewing claims of ineffective assistance, an appellate court will not second-guess trial counsel's reasonable strategic decisions.
12. **Right to Counsel: Plea Bargains.** The plea-bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies.
13. **Effectiveness of Counsel: Plea Bargains.** As a general rule, defense counsel has the duty to communicate to the defendant all formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the defendant.
14. **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.
15. **Jury Instructions: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
16. ____: ____. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
17. **Criminal Law: Motions for Mistrial.** A motion for 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.
18. **Motions for Mistrial: Proof: Appeal and Error.** A defendant must prove that an alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice, in order for a motion for mistrial to be properly granted.
19. **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 two-part test for ineffectiveness established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); if trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue.

20. ____: ____. Much like claims of ineffective assistance of trial counsel, a defendant claiming ineffective assistance of appellate counsel must show that but for appellate counsel's failure to raise the claim, there is a reasonable probability that the outcome would have been different.
21. **Witnesses: Impeachment.** Generally, the credibility of a witness may be attacked by any party, including the party who called the witness.
22. ____: ____. A party may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Jeremy D. Foster, pro se.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Strong, District Judge.

Funke, J.

Jeremy D. Foster appeals from the denial of postconviction relief without an evidentiary hearing. Foster asserts that he was prejudiced by ineffective assistance of counsel at trial and on direct appeal. We affirm the judgment below.

I. BACKGROUND

This appeal follows our decision on Foster's direct appeal in *State v. Foster*,[1] which affirmed Foster's jury trial convictions on one count of first degree murder, four counts

[1] *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013).

of assault in the second degree, and five counts of use of a deadly weapon to commit a felony. Foster and his codefendant, Darrin D. Smith, were charged with the same crimes. The two cases were jointly tried, and the jury found Smith and Foster guilty on all counts. The court sentenced both Smith and Foster to life imprisonment, plus consecutive sentences totaling 96 to 150 years.

1. Factual Background

Brothers Victor Henderson and Corey Henderson were members of the "Pleasantview" or "PMC" gang in Omaha, Nebraska, and Smith was a member of a rival gang referred to as "40th Avenue." Victor and Corey were federally indicted, and they agreed to plead guilty and testify for the government in exchange for leniency. They were released from federal prison in 2007, and they were considered "snitches" within the gang community.

In October 2008, Smith saw Victor and Corey at a party and made a derogatory remark toward Corey regarding being a "snitch." Later that month, Smith saw Victor and Corey at an American Legion hall in Omaha (the Legion), which was considered a bar for the "Pleasantview" gang. When Corey walked outside, he saw a group of men had surrounded Victor, including Smith, "Don Don" Swift, and a boy of about 14 years of age, who each had a gun. "Don Don" was arguing with Victor. Smith made another statement to the effect of "we don't mess with your kind," which Corey understood to be a comment about Victor and Corey being "snitches."

On November 9, 2008, while Victor and Corey were at the Legion, Smith and Foster entered the bar wearing hooded sweatshirts. Corey testified that Smith gave him a "hateful look or a stare." Smith and Foster were in the Legion for approximately 10 minutes, but before they left, they looked and nodded toward Victor and Corey. Around closing time, Smith and Foster returned and confronted Victor and Corey in the parking lot. Victor was fatally shot in the neck, and Corey and three others were wounded.

Smith and Foster were arrested and charged for the shootings. The evidence was in conflict as to whether Smith or Foster was the shooter. For example, there was evidence that Smith wore a black hooded sweatshirt and that Foster wore a gray hooded sweatshirt when they were first at the Legion, but had switched shirts before they confronted Victor and Corey in the parking lot. Witnesses testified the shooter was wearing black clothes with a hood pulled over his face. At least two witnesses implicated Foster as the shooter, another witness claimed Smith was the shooter, and there was evidence that the shooter was neither Foster nor Smith but was yet a third individual, including "Don Don" or a person named "Views."

The State's theory of prosecution at trial was that Foster was the shooter and that Smith aided and abetted Foster in the commission of the shootings. The State called several witnesses to establish that Smith was seen with a gun and that he handed Foster the gun just prior to the shootings.

Following a 2-week jury trial, Smith and Foster were convicted on all counts. Both parties appealed, and this court issued separate opinions affirming their convictions and sentences.[2]

2. Procedural Background

Our opinion on direct appeal in *Foster*[3] addressed Foster's assignments that the district court erred by failing to sever Foster's trial from Smith's, which was the main focus of the appeal, and allowing the jury to separate without Foster's intelligent waiver of his right to sequester.

This court rejected Foster's claim that he was prejudiced by the joint trial, reasoning that based upon the evidence, the jury could have convicted both Smith and Foster, just one of them, or neither of them. Furthermore, we determined that a joint trial was appropriate, because the charges against Smith

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[2] See, *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013); *Foster, supra* note 1.

[3] *Foster, supra* note 1.

and Foster stemmed from the same series of acts and would be proved by similar evidence.

We also rejected Foster's second assignment of error, because the trial court specifically asked Foster whether he sought jury sequestration and he replied that he did not, which satisfied the requirement for a voluntary, knowing, and intelligent waiver of the right to sequester.

Relevant to the instant appeal, Foster then filed a motion for postconviction relief, with the assistance of court-appointed counsel. Foster's motion raised claims of trial court error, prosecutorial misconduct, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel.

The district court found that Foster's claims of trial court error and prosecutorial misconduct could have been raised on direct appeal and therefore were procedurally barred. The court found Foster's ineffective assistance of counsel claims were not procedurally barred, because he was represented by the same counsel at trial and on direct appeal. The court then addressed the allegations supporting Foster's ineffective assistance of counsel claims and found that they were not specific enough to merit a hearing and that Foster had not pointed to any facts which showed he was prejudiced.

In this appeal, Foster proceeds as a self-represented litigant and reasserts his ineffective assistance of counsel claims, and he argues the court erred in failing to grant him an evidentiary hearing.

II. ASSIGNMENTS OF ERROR

Foster assigns, restated and reordered, that the district court erred in (1) failing to find trial counsel deficiency violated article I, § 11, of the Nebraska Constitution and the Sixth Amendment to the U.S. Constitution; (2) failing to grant Foster postconviction relief; (3) failing to find Foster was prejudiced by performance of trial counsel; (4) failing to find Foster was prejudiced by performance of appellate counsel; and (5) denying Foster an evidentiary hearing.

III. STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[4]

[2] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[5]

IV. ANALYSIS

[3] Under the Nebraska Postconviction Act,[6] a prisoner in custody may file a petition for relief on the grounds that there was a denial or infringement of the prisoner's constitutional rights that would render the judgment void or voidable. This category of relief is "very narrow."[7]

[4-6] Section 29-3001(2) entitles a prisoner to an evidentiary hearing on the claim, 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." In order to be entitled to an evidentiary hearing, a prisoner must allege facts in the motion for postconviction relief that, if proved, would constitute a violation of his or her rights under the U.S. or Nebraska Constitution.[8] A prisoner is not entitled to an evidentiary hearing on the basis of claims that present only conclusory statements of law or fact.[9] In the absence of alleged facts that would render the judgment void or voidable, the proper course is to dismiss the motion for postconviction relief for failure to state a claim.[10]

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[4] *State v. Collins*, 299 Neb. 160, 907 N.W.2d 721 (2018).

[5] *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017).

[6] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2016).

[7] *State v. Haynes*, 299 Neb. 249, 260, 908 N.W.2d 40, 51 (2018).

[8] *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016).

[9] *Id.*

[10] See *State v. Ryan*, 287 Neb. 938, 845 N.W.2d 287 (2014).

All of Foster's allegations in this appeal are grounded in claims of ineffective assistance of counsel. The district court correctly noted that because Foster was represented at trial and on direct appeal by the same counsel, his first opportunity to assert ineffective assistance of counsel claims was in his motion for postconviction relief.[11]

[7,8] To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, in accordance with *Strickland v. Washington*,[12] 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.[13] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[14] 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.[15] A court may address the two prongs of this test, deficient performance and prejudice, in either order.[16]

In his brief, Foster raised four arguments: (1) The district court abused its discretion in failing to find trial counsel was deficient and prejudicial, (2) the district court erred in failing to grant postconviction relief, (3) the district court erred when it failed to find that trial and appellate counsel were prejudicially ineffective, and (4) the district court abused its discretion in denying Foster an evidentiary hearing under § 29-3001. However, based on the contents of Foster's appellate brief and his motion before the trial court, these arguments can be narrowed to the following: (1) Trial counsel's performance

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[11] See *State v. Vela*, 297 Neb. 227, 900 N.W.2d 8 (2017).

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

[13] *Schwaderer, supra* note 5.

[14] *Id.*

[15] *Id.*

[16] *Id.*

was deficient, and counsel's deficient performance prejudiced the defense in the case; (2) appellate counsel's performance was deficient, and counsel's deficient performance prejudiced Foster in the appeal; and (3) the district court erred in denying Foster an evidentiary hearing.

We discuss each of the reframed arguments in turn and explain why the district court did not err in denying Foster an evidentiary hearing. Our discussion of Foster's several arguments includes a common theme that these postconviction allegations are lacking and, even accepting them as true, fail to establish that his rights were violated.

1. Ineffective Assistance of Trial Counsel

Foster alleged several claims of ineffective assistance of trial counsel. Specifically, he claimed that counsel was ineffective for (a) failing to investigate, interview, and/or call to testify specific witnesses; (b) failing to communicate Foster's acceptance of the State's plea offer before the expiration of the offer; (c) failing to provide identifying characteristics of other potential shooters; (d) failing to provide alternative theories for the murder; (e) failing to object to comments made by the State; (f) failing to object when the court gave the jury a limiting instruction regarding impeachment evidence during Foster's cross-examination and failing to request a limiting instruction for each time the State impeached a witness with prior inconsistent statements; (g) failing to properly preserve error and argument when counsel failed to object to evidence and testimony that would have been potentially inadmissible in a separate trial pursuant to Foster's overruled motion to sever; (h) failing to object when the State improperly impeached its own witnesses; (i) failing to object to jury instruction No. 9, which failed to conform to the language of NJI2d Crim. 1.2 and 9.2, or propose an appropriate jury instruction which appropriately defined Foster's presumption of innocence; (j) failing to request or ensure that the court gave a "mere presence" instruction to

the jury; and (k) failing to move for a mistrial regarding any of these errors.

[9-11] In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness.[17] An appellate court will not judge an ineffectiveness of counsel claim in hindsight.[18] We must assess trial counsel's performance from counsel's perspective when counsel provided the assistance.[19] When reviewing claims of ineffective assistance, we will not second-guess trial counsel's reasonable strategic decisions.[20]

(a) Failure to Call Witnesses

In assessing postconviction claims that trial counsel was ineffective in failing to call a particular witness, we have upheld dismissal without an evidentiary hearing where the motion did not include specific allegations regarding the testimony which the witness would have given if called.[21] The record in this matter shows the State called 24 witnesses. Foster did not testify or call any witnesses; he built his case through cross-examination of the State's witnesses.

Foster alleged that his trial counsel was deficient for failing to interview or call potential witnesses. It appears that Foster's trial counsel made the strategic choice to focus on the State's witnesses and to not call any witnesses.

In his motion to the trial court, Foster named five specific individuals that he believes should have been interviewed or called to testify and gave a brief comment about each individual. He alleges the following witnesses would have supported his defense: Kayiona Smith was present with Smith

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[17] See, *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018); *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014).

[18] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[19] *Id.*

[20] *Id.*

[21] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010); *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

prior to the shootings, but did not make any incriminating statements against Foster; Terrance Ammons, whose telephone number was wrongly attributed to Foster at the time of the incident; Brittany Lawson was Foster's girlfriend and was with him prior to the incident; Michelle Baker is Foster's mother and was present with him prior to the incident; and Tony Mays is Foster's stepfather and was present with him prior to the shootings.

Our case law is clear that in a motion for postconviction relief, a defendant is required to specifically allege what the testimony of potential witnesses would have been if they had been called at trial in order to avoid dismissal without an evidentiary hearing.[22] Absent specific allegations, a motion for postconviction relief effectively becomes a discovery motion to determine whether evidence favorable to a defendant's position actually exists.[23] Foster's vague descriptions of witness testimony do not merit an evidentiary hearing, because they fail to allege facts that, if proved, would constitute a violation of his rights.

The jury heard from a number of eyewitnesses who provided their individual accounts of the shootings. Foster did not explain how the testimony of the witnesses identified in his motion would have affected the evidence that was already presented at trial. Foster failed to show a reasonable probability that the outcome of trial would have been different had trial counsel interviewed or called these witnesses to testify. This claim of deficiency by trial counsel is without merit.

(b) Failure to Communicate Acceptance of Plea Offer

Foster alleged that his trial counsel failed to communicate his acceptance of the State's plea offer before the offer expired and that Foster would have received the benefits of "the plea offer" but for his counsel's error. The trial court determined

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[22] See *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

[23] See *id.*

that Foster's allegation did not merit a hearing, because he failed to allege any details about the plea offer.

[12,13] The plea-bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies.[24] As a general rule, defense counsel has the duty to communicate to the defendant all formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the defendant.[25] However, as the trial court determined, because Foster did not allege the terms of the plea offer and its benefits as compared to the outcome at trial, his allegations are insufficient to merit a hearing. This claim of deficiency by trial counsel is without merit.

(c) Failing to Provide Identifying Characteristics of Other Potential Shooters

Foster alleged that trial counsel failed to offer any identifying characteristics of "other" shooters. It is true that several witnesses provided the jury a physical description of Foster, including several witnesses who testified that they saw Smith enter the Legion with a man matching Foster's description (light skin, braids, and walked with a limp).

However, Foster was not the only potential shooter described to the jury. There was evidence that "Don Don" and "Views" could have been the shooter. Corey described "Don Don" as 5 feet 7 inches tall with a "brush cut," darker skin, and a missing eye, and as "real distinctive 'cause he can't see out that eye." He described "Views" as 6 feet 1 inch or 6 feet 2 inches tall with "medium length dreads" and "teeth [with] silver chrome caps." Thus, the record disproves Foster's claim that the jury was not made aware of the "identifying characteristics" of other potential shooters. This claim is without merit.

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[24] *Alfredson, supra* note 17.

[25] *Id.*

(d) Failure to Provide Alternative Theories

Foster alleged that trial counsel failed to present alternative theories for the motivation behind the shootings. Foster's motion includes a suggestion that Smith could have acted alone because he disapproved of any relationship between his family members and the victims.

As this court concluded on direct appeal, "[b]ased on the evidence at trial, the jury could conclude that Foster committed the shootings alone, that Smith committed the shootings alone, that Smith and Foster committed the shootings together, or that neither Foster nor Smith committed the shootings."[26] Foster's claim does not establish any prejudice, because the jury was presented with these alternate theories. The jury weighed these competing conclusions based on the evidence and determined that Smith and Foster committed the shootings together. This claim is without merit.

(e) Failure to Object to State's Comments

Foster alleged that trial counsel failed to object to questioning by the State, as well as comments made during closing argument, which Foster suggests gave the jury the impression that the burden of proof had shifted to Foster to prove his innocence.

[14] Contrary to Foster's claims, the trial court instructed the jury that "[t]he burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts." The trial court also instructed the jury that "[s]tatements, arguments, and questions of the lawyers . . ." are not evidence. We found on direct appeal that Foster had failed to establish the existence of an unreliable verdict.[27] Foster's postconviction allegations are too vague and conclusory to change this result. Absent

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[26] *Foster, supra* note 1, 286 Neb. at 844, 839 N.W.2d at 800.

[27] See *Foster, supra* note 1.

evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.[28] These claims are without merit.

(f) Failure to Object to or Request Limiting Instruction

Foster alleged that trial counsel failed to object every time the court gave the jury a limiting instruction regarding impeachment evidence during his cross-examinations. He also alleged that trial counsel failed to request a limiting instruction for each time the State impeached a witness with a prior inconsistent statement. Foster alleged that this "inherently prejudiced" his case.

Foster's claims are conclusory and unavailing. He did not identify the grounds on which trial counsel should have objected, why asserting numerous objections while questioning a witness would have been beneficial to his case, or what the court's ruling would have been had counsel objected. He also did not specify the testimony he is referring to. His allegations are therefore not sufficient to show how trial counsel's treatment of the court's limiting instruction would have changed the outcome of the trial. Foster did not make sufficient allegations of deficient performance or prejudice for these claims.

(g) Failure to Preserve Error

Foster alleged that trial counsel failed to preserve error when he "failed to object to evidence and testimony that would have been potentially inadmissible in a separate trial." Although Foster did not specify which evidence trial counsel failed to object to, and did not allege how such objections would have changed the outcome of the trial, Foster appears to have reasserted his argument from direct appeal that he was prejudiced by having his case jointly tried with Smith's.

This court determined in Foster's previous appeal that a joint trial was appropriate because the charges against Smith

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[28] *Cotton, supra* note 17.

and Foster stemmed from the same series of acts and would be proved by similar evidence. We found that many of Smith's statements were offered to prove his state of mind rather than the truth of the matter asserted, and therefore would have been admissible against Foster in a separate trial. Although we determined that Smith's testimony from a prior case about the fact that "gang members do carry guns and they do shoot them" would have been inadmissible in a separate trial, we determined that Smith's testimony was not prejudicial, because his statements were cumulative of other witness testimony.

Given that this issue was preserved and determined on direct appeal, there is no indication of deficient performance by trial counsel. This claim is without merit.

(h) Failure to Object to Impeaching State's Own Witness

Foster alleged that trial counsel failed to object when the State improperly impeached its own witnesses. Foster did not specify at what point during the trial this occurred. However, he may be referring to the testimony of Martini Swift, Smith's cousin.

The record shows the State conducted witness preparation with Martini leading up to trial. Martini was subpoenaed for trial, but failed to appear and was taken into custody. When she testified, she did not remain consistent with her prior statements to police. Martini began her testimony stating that she did "not really" remember the night of the shootings. She then stated she witnessed Smith come into the Legion that night and offered a courtroom identification of Smith. Martini then denied being concerned about why Smith was at the bar that night, and stated she did not know how long he stayed at the bar. She denied seeing someone else enter the bar with Smith. The State then impeached Martini with her statement to police that she observed Smith walk into the Legion with a "light-skinned boy with braids who was wearing a gray hoodie."

Contrary to Foster's allegation, the record shows Foster's trial counsel did object on improper impeachment grounds and was

granted a continuing objection throughout Martini's testimony. The trial court overruled the objection, finding that Martini was a hostile witness under Neb. Rev. Stat. § 27-611 (Reissue 2016) and that the testimony was permissible as long as the questions were confined to Martini's prior statements in a police report, rather than Martini's conversations with the prosecutor. The record thus disproves Foster's claim that his trial counsel was deficient for failing to raise an objection. This claim of ineffective assistance of trial counsel is without merit.

(i) Jury Instruction No. 9

Foster contends that his counsel was ineffective for failing to object to jury instruction No. 9, which stated: "The Defendant is presumed to be innocent. This presumption of innocence is evidence in favor of the Defendant and continues throughout the trial, until he shall have been proved guilty beyond a reasonable doubt."

Foster asserts that the final clause of the instruction created an inevitability that the jury "shall" find him guilty, contrary to the presumption of innocence. Foster alleges the instruction failed to conform to NJI2d Crim. 9.2, which states, in relevant part: "The defendant has pleaded not guilty. [The defendant] is presumed to be innocent. That means you must find [the defendant] not guilty *unless and* until you decide that the state has proved [the defendant] guilty beyond a reasonable doubt." (Emphasis supplied.)

The trial court overruled Foster's objection raised in his postconviction motion to instruction No. 9 and stated the language was proper and not prejudicial under *State v. Henry*.[29]

[15,16] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[30] All the jury instructions must be read together, and if, taken as a whole,

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[29] *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016).

[30] *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[31]

We conclude that the court did not err in giving instruction No. 9. It is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given.[32] Here, the substance of NJI2d Crim. 9.2 regarding a criminal defendant's presumption of innocence was covered in instruction No. 9. In *State v. Duncan*,[33] we approved of the district court's use of a preliminary and final jury instruction identical to the instruction used in this case and found such presumption-of-innocence instruction was an accurate statement of the law. Furthermore, in *Henry*,[34] we found that a criminal defendant's challenge to a jury instruction fashioned from NJI2d Crim. 9.2 was meritless. *Henry* is instructive here, because, even though the instruction in *Henry* included the phrase "'unless and until,'" the challenge was limited to the words "'and until,'"[35] similar to Foster's claim in this case. In considering the propriety of the instruction given, we applied well-established principles of law regarding jury instructions and found the instruction correctly stated the law regarding the presumption of innocence, adequately covered the issue, and was not misleading. Our precedent on this issue of law is controlling. Foster's allegations regarding jury instruction No. 9 lack merit.

(j) "Mere Presence" Instruction

Foster alleged that trial counsel failed to request a "mere presence" jury instruction. Foster cannot claim his counsel was deficient by failing to request a "mere presence" instruction,

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[31] *Id.*

[32] *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001); *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992).

[33] *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003).

[34] *Henry, supra* note 29.

[35] *Id.* at 853, 875 N.W.2d at 391.

because the State's theory of the case was that Foster was the shooter and that Smith aided and abetted Foster. The jury was presented with evidence that Foster was directly involved in the shootings, and not "merely present." Therefore, even if the instruction had been requested, the "mere presence" instruction would not likely have been given, because the evidence did not support the giving of the instruction. This claim is without merit.

(k) Request for Mistrial

[17,18] Foster contends that trial counsel's failure to seek a mistrial for any of the deficiencies just addressed was itself deficient and prejudicial. A motion for 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.[36] A defendant must prove that an alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice, in order for a motion for mistrial to be properly granted.[37]

We found no error warranting a mistrial and no deficiencies in the performance of trial counsel in failing to seek a mistrial. As a result, we reject the claim that counsel was deficient in failing to request a mistrial. Having discussed each of Foster's postconviction claims with respect to the performance of trial counsel, we determine that Foster's first argument fails to allege a meritorious postconviction claim and that the trial court did not err in declining to grant Foster an evidentiary hearing.

2. Ineffective Assistance of Appellate Counsel

Foster contends that his appellate counsel was ineffective for failing to raise on direct appeal (a) that the trial court overruled

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[36] *McCurry, supra* note 30.

[37] *Id.*

his motion to sever; (b) that the trial court erred when it gave a limiting instruction each time Foster impeached a witness with prior inconsistent statements, but failed to give the same limiting instruction whenever the State impeached a witness with prior inconsistent statements; (c) that the trial court erred by allowing the State to impeach its own witness; (d) that the trial court erred by allowing the State to improperly shift the burden of proof to Foster when the State examined witnesses about Foster's lack of testing the physical evidence and when the State made improper comments suggesting Foster failed to bring forth sufficient evidence to prove his innocence during closing arguments; (e) that the trial court improperly instructed the jury on instruction No. 9; and (f) that the trial court did not instruct the jury on "mere presence."

[19,20] 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*[38] test.[39] If trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue.[40] 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.[41]

(a) Failure to Sever

In regard to the trial court's failure to sever Foster's case from Smith's, that issue was raised by appellate counsel on direct appeal and we found that the trial court did not err in failing to sever the trials. This claim is without merit.

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[38] *Strickland, supra* note 12.

[39] *State v. McGuire*, 299 Neb. 762, 910 N.W.2d 144 (2018).

[40] *Id.*

[41] *Id.*

(b) Limiting Instruction

Foster claims that the trial court gave a limiting instruction each and every time he impeached a witness with prior inconsistent statements, but failed to give the same limiting instruction whenever the State impeached a witness with prior inconsistent statements. Having already determined above that Foster failed to show that his trial counsel's performance was deficient with respect to this issue, appellate counsel's failure to raise the issue on appeal was also not deficient. This claim is without merit.

(c) Impeaching State's Own Witnesses

Foster alleged ineffective assistance of appellate counsel for failing to raise on direct appeal that the trial court erred by allowing the State to impeach its own witnesses. Again, Foster did not sufficiently plead this claim. He did not identify the witness' testimony that the trial court should have excluded, and therefore his allegations are insufficient to show ineffective assistance of appellate counsel for failing to include this issue on direct appeal. As discussed above, however, Foster is likely referring to the testimony of Martini.

Martini denied that anyone entered the bar with Smith, and the State impeached Martini with her prior statement that she observed Smith enter the bar with "a light-skinned boy with braids who was wearing a gray hoodie." Although Foster's trial counsel objected to the State's impeachment methods at trial, Foster's appellate counsel did not assign as error on direct appeal the trial court's decision to overrule the objection.

[21,22] Generally, the credibility of a witness may be attacked by any party, including the party who called the witness.[42] However, "'a party may not use a prior inconsistent statement of a witness under the guise of impeachment for the *primary purpose* of placing before the jury substantive

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[42] Neb. Rev. Stat. § 27-607 (Reissue 2016); *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

evidence which is not otherwise admissible.'"'[43] In *State v. Dominguez*,[44] we articulated that the scope of § 27-607 is limited where a party knows or should know that its witness will not testify consistent with the witness' prior statement and utilizes impeachment as "'"'mere subterfuge."'"'

Martini initially established facts relevant to the prosecution without any reference to her prior statement. She placed Smith at the bar on the night of the shootings and identified Smith in court. When Martini failed to admit that Foster was with Smith at the Legion, this created a credibility issue concerning Martini's memory. The State then impeached Martini with her prior statement that Smith walked into the Legion with a person who matched the description of Foster. The prosecutor stated in her offer of proof that "when I called her today, I had information that I believed based upon what she had expressed to me before, she would testify to today and she's not doing so. So the State did not call her with the intention of impeaching her."

Foster's postconviction allegations fail to establish that the State knew Martini would provide inconsistent testimony, that the State called Martini for the primary purpose of placing her prior statement before the jury, or that Martini's prior statement was otherwise inadmissible. Rather, the evidence suggests the prosecution called Martini because she saw Smith and Foster at the Legion on the night of the shootings. The evidence was not prejudicial, because it was cumulative of other testimony that Smith was with Foster at the Legion prior to the shootings. This claim is without merit.

(d) Prosecutorial Misconduct

Foster alleged ineffective assistance of appellate counsel for failing to raise on direct appeal that the trial court erred "by

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[43] *Dominguez*, *supra* note 42, 290 Neb. at 490, 860 N.W.2d at 745, quoting *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993) (emphasis supplied).

[44] *Id*. at 491, 860 N.W.2d at 746, quoting 4 Michael H. Graham, Handbook of Federal Evidence § 607:3 (7th ed. 2012).

allowing the State to improperly shift the burden of proof" to Foster on two instances: (1) when the State examined witnesses about Foster's lack of testing the physical evidence and (2) when the State made "improper comments suggesting [Foster] failed to bring forth sufficient evidence to prove his innocence" during closing arguments. Foster did not sufficiently allege this claim. Foster did not identify the witnesses and their testimony or the improper comments that the trial court should have excluded or corrected, and therefore, his allegations are insufficient to show ineffective assistance of appellate counsel for failing to include these issues on direct appeal.

There is not a reasonable probability that inclusion of this issue would have changed the result of the appeal. As discussed above, the trial court instructed the jury that the burden was on the State to prove Foster guilty beyond a reasonable doubt, and that "[s]tatements, arguments, and questions of the lawyers . . ." are not evidence. There is no indication that the jury did not follow these instructions. Foster's claims are without merit.

(e) Jury Instruction No. 9

Foster alleged ineffective assistance of appellate counsel for failing to raise on direct appeal that jury instruction No. 9 was improper. We discussed the merits of this issue above. Foster cannot show a reasonable probability that inclusion of this issue on direct appeal would have changed the result of that appeal. This claim is without merit.

(f) Jury Instruction on "Mere Presence"

Foster alleged ineffective assistance of appellate counsel for failing to raise on direct appeal that the trial court failed to instruct the jury on "mere presence." We discussed the merits of this issue above. Foster cannot show a reasonable probability that inclusion of this issue on direct appeal would have changed the result of that appeal. This claim is without merit.

(g) Denial of Evidentiary Hearing

Foster's final argument is that the court abused its discretion in denying an evidentiary hearing under § 29-3001 and that his postconviction counsel failed to object to the court's denial of an evidentiary hearing. Additionally, Foster alleges that he was in the wrong place at the time, that there was no physical proof that he was the one who committed the crime, and that his trial counsel failed to call witnesses to show what actually occurred.

As has been demonstrated above, our inquiry is focused on whether Foster has made a sufficient showing under *Strickland* that his counsel's performance was deficient and that he suffered prejudice as a result.

Assuming that postconviction counsel failed to object to the court's denial of an evidentiary hearing, there is no indication that the counsel's failure to lodge the objection had any impact on the case. After the district court entered the order dismissing the matter, Foster filed his own motion for reconsideration and had an opportunity to raise his claims and have them reviewed by the district court. As a result, Foster cannot show prejudice by his counsel's failure to object to the dismissal.

In regard to Foster's claim that there was no physical proof he was the one who committed the crime and that he was in the wrong place at the wrong time, these claims lack the specificity required to meet his burden and establish meritorious entitlement to a hearing under § 29-3001. We therefore affirm the denial of an evidentiary hearing on Foster's motion for postconviction relief.

V. CONCLUSION

For the foregoing reasons, we affirm the order of the district court denying Foster's motion for postconviction relief without an evidentiary hearing.

Affirmed.

Heavican, C.J., not participating.

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 C. Nimmer, respondent.

916 N.W.2d 732

Filed August 31, 2018. No. S-17-111.

1. **Disciplinary Proceedings: Appeal and Error.** Because attorney discipline cases are original proceedings before the Nebraska Supreme Court, the court reviews a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
2. ____: ____. In an attorney discipline proceeding, when a party takes exception to the referee's report, the Nebraska Supreme Court conducts a trial de novo on the record, in which the court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Disciplinary Proceedings.** Client trust accounts, in particular, are always open to review by the Counsel for Discipline.
4. **Disciplinary Proceedings: Rules of the Supreme Court: Time.** An attorney's failure to preserve client trust account records does not provide an affirmative defense to charges of impermissible commingling, nor does the 5-year preservation rule under Neb. Ct. R. of Prof. Cond. § 3-501.15 constrain or limit the Counsel for Discipline's investigative or prosecutorial duties.
5. **Disciplinary Proceedings: Time.** There is no time limitation on the acts or omissions that can give rise to attorney discipline for violating the Nebraska Rules of Professional Conduct, the attorney's oath, or the provisions of Nebraska's disciplinary rules.
6. **Disciplinary Proceedings: Attorneys at Law.** Attorneys licensed to practice law in the State of Nebraska agree to operate under the supervision of the office of the Counsel for Discipline.

7. ____: ____. A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.
8. ____: ____. Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney in his or her professional capacity which tends to bring reproach on the courts or the legal profession constitutes grounds for suspension or disbarment.
9. **Disciplinary Proceedings.** Violation of the standards set forth in the disciplinary rules must be established by clear and convincing evidence.
10. **Disciplinary Proceedings: Rules of the Supreme Court.** Collectively, subsections (a) and (b) of Neb. Ct. R. of Prof. Cond. § 3-501.15 prohibit the commingling of client funds with an attorney's personal funds.
11. **Disciplinary Proceedings.** Generally speaking, an attorney violates the rule against commingling when the funds of the client are intermingled with those of the attorney in such a way that their separate identity is lost and they may be used by the attorney for personal expenses or subjected to the claims of the attorney's creditors.
12. **Disciplinary Proceedings: Proof: Circumstantial Evidence.** Disciplinary violations can be proved by circumstantial evidence.
13. **Disciplinary Proceedings: Attorneys at Law.** In the context of attorney discipline cases, the Nebraska Supreme Court has repeatedly recognized the ancient maxim that ignorance of the law is no excuse. It is a maxim sanctioned by centuries of experience and it applies with even greater emphasis to an attorney at law who is expected to be learned in the law.
14. **Disciplinary Proceedings.** Neither good faith nor ignorance of the rules prohibiting commingling client and personal funds provides a defense to a disciplinary charge that an attorney violated the rules against commingling.
15. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
16. ____. Each attorney discipline case must be evaluated in light of its particular facts and circumstances.
17. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.

18. ____. In attorney discipline cases, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
19. **Disciplinary Proceedings: Rules of the Supreme Court.** Under Neb. Ct. R. § 3-304, the Nebraska Supreme Court may impose one or more of the following disciplinary sanctions: (1) disbarment; (2) suspension; (3) probation, in lieu of or subsequent to suspension; (4) censure and reprimand; or (5) temporary suspension.
20. **Disciplinary Proceedings.** The Nebraska Supreme Court considers commingling of client funds with an attorney's own funds to be a matter of gravest concern in reviewing claims of lawyer misconduct.
21. ____. The goal of attorney discipline proceedings is not as much punishment as a determination of whether it is in the public interest to allow an attorney to keep practicing law.
22. ____. Providing for the protection of the public requires the imposition of an adequate sanction to maintain public confidence in the bar.
23. ____. An attorney's admission of responsibility for his or her actions reflects positively upon his or her attitude and character and is to be considered in determining the appropriate discipline.
24. ____. Because cumulative acts of attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions. Cumulative acts of misconduct can, and often do, lead to disbarment.
25. **Disciplinary Proceedings: Words and Phrases.** In the context of attorney disciplinary proceedings, misappropriation is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.
26. **Disciplinary Proceedings.** Lack of financial harm to clients is not a mitigating factor in disciplinary proceedings where an attorney has commingled client and personal funds.
27. ____. Absent mitigating circumstances, disbarment is the appropriate discipline in cases of misappropriation or commingling of client funds.
28. **Disciplinary Proceedings: Presumptions.** Mitigating factors may overcome the presumption of disbarment in misappropriation and commingling cases where they are extraordinary and substantially outweigh any aggravating circumstances.

Original action. Judgment of disbarment.

William F. Austin, Special Prosecutor, of Blake & Austin Law Firm, L.L.P., for relator.

John C. Nimmer, pro se.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Dobrovolny, District Judge.

Per Curiam.

On February 1, 2017, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against John C. Nimmer, alleging he violated Neb. Ct. R. of Prof. Cond. §§ 3-501.15 and 3-508.4 (rev. 2016) and his oath of office as an attorney licensed to practice in Nebraska[1] by commingling personal funds with client trust account funds. This court appointed a referee who held an evidentiary hearing and then filed a report finding Nimmer had violated the disciplinary rules by depositing personal funds into his client trust account and using his client trust account to pay personal expenses. The referee recommended a 1-year suspension followed by a 2-year period of probation. Nimmer filed an exception to the referee's report, challenging both the finding that he violated the disciplinary rules and the recommended sanction.

We find by clear and convincing evidence that Nimmer commingled client funds with personal funds, in violation of §§ 3-501.15 and 3-508.4 of the Nebraska Rules of Professional Conduct and his oath of office. Furthermore, we conclude on this record that the appropriate sanction for Nimmer's misconduct is disbarment.

I. BACKGROUND

Nimmer was admitted to the practice of law in the State of Nebraska in 1993, and since that time has practiced primarily in Omaha and Bellevue, Nebraska. In 2004, Nimmer opened a client trust account at an Omaha area bank. The manner in which Nimmer has used that client trust account is the central issue in this disciplinary proceeding.

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[1] See Neb. Rev. Stat. § 7-104 (Reissue 2012).

1. Grievance and Investigation

In a letter dated March 11, 2016, the enforcement division of the U.S. Securities and Exchange Commission (SEC) notified the Counsel for Discipline of "possible professional misconduct" by Nimmer. The SEC had subpoenaed records from Nimmer's client trust account in connection with an unrelated investigation and reported that its "review of Nimmer's trust account transactions revealed that he wrote numerous checks for personal expenses, ranging from rent and child support to dog boarding and landscaping fees." On March 18, the Counsel for Discipline notified Nimmer that he was the subject of an investigation and provided him a copy of the grievance.[2]

On June 8, 2016, the Counsel for Discipline provided Nimmer with copies of the bank records subpoenaed by the SEC and asked him to explain several checks written on his client trust account that did not appear to be client related. Nimmer was also asked to explain a $10,000 check from his mother with the memorandum notation "loan" which had been deposited into his client trust account. Nimmer declined, at the time, to answer the questions posed by the Counsel for Discipline.

The Counsel for Discipline then subpoenaed Nimmer's client trust account records directly from the bank. Through two subpoenas, records were obtained for the time period from January 1, 2006, through September 1, 2016. After reviewing these records, the Counsel for Discipline determined there were reasonable grounds for discipline, and thus reduced the SEC's grievance to a complaint and forwarded it to the Committee on Inquiry of the Fourth Judicial District.[3] Thereafter, the inquiry panel found reasonable grounds for discipline and determined it would be in the public's interest to file formal charges.[4]

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[2] See Neb. Ct. R. § 3-309(D) (rev. 2011).

[3] See § 3-309(G).

[4] See § 3-309(H)(4).

2. Formal Charges

On February 1, 2017, the Counsel for Discipline filed formal charges against Nimmer. It alleged that between January 2006 and February 2016, Nimmer wrote personal checks on his client trust account to 29 different businesses, individuals, and organizations. Additionally, it alleged that on December 20, 2007, Nimmer deposited a $10,000 check from his mother issued to him with the notation "loan" into his client trust account. The formal charges alleged that by using his client trust account in this fashion, Nimmer commingled his personal funds with client funds and thereby violated his oath of office as an attorney licensed to practice in Nebraska[5] and § 3-501.15, which provides in part:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation.
>
> (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

The formal charges also alleged Nimmer's actions violated § 3-508.4, which provides in relevant part that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct."[6]

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[5] See § 7-104.

[6] § 3-508.4(a).

3. Nimmer Moves to Dismiss and Recuse

Nimmer filed a motion to dismiss the formal charges, alleging the Counsel for Discipline "is part of the Nebraska judicial branch under the direct supervision of this Court, which violates separation of powers, which violates constitutional due process, which in turn negates [the Counsel for Discipline] from having standing to have filed the Formal Charges, thereby constituting a lack of subject matter jurisdiction." This court overruled Nimmer's motion to dismiss as meritless.[7]

Nimmer also moved to recuse the Counsel for Discipline, alleging he had a conflict of interest because Nimmer planned to call him as a necessary fact witness. We overruled his motion to recuse, but determined it was prudent under the circumstances to appoint a special prosecutor.

4. Nimmer Files Answer and Second Motion to Dismiss

After his motion to dismiss was overruled, Nimmer filed a verified answer to the formal charges. His answer admitted some of the factual allegations in the formal charges, but generally denied that his conduct amounted to commingling in violation of the disciplinary rules. Additionally, Nimmer's answer raised several affirmative defenses which will be addressed later in this opinion.

Nimmer also filed a second motion to dismiss, this time asking that the disciplinary proceeding be dismissed without prejudice due to alleged procedural errors predating the filing of the formal charges. This court found the motion was meritless and overruled it.

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[7] See, e.g., *Noffsinger v. Nebraska State Bar Assn.*, 261 Neb. 184, 622 N.W.2d 620 (2001) (matters regarding admission, suspension, discipline and disbarment of attorneys rest exclusively with Nebraska Supreme Court; in exercising its inherent power to regulate bar, court uses Counsel for Discipline to investigate allegations of misconduct and to prepare, file, and dismiss charges of misconduct against attorneys).

5. Nimmer Seeks to Exclude Client Trust Account Records

Nimmer filed "Motions to Quash Subpoenas and Exclude Evidence," seeking to prevent his client trust account records from being offered at the disciplinary hearing. He argued the records had been obtained improperly and suggested the SEC had violated federal privacy laws when it provided his trust account records to the Counsel for Discipline in connection with the grievance. Nimmer acknowledged that after receiving the grievance, the Counsel for Discipline independently subpoenaed the trust account records as part of the disciplinary investigation.[8] Nimmer did not claim those subpoenas were unreasonable or oppressive,[9] but argued he did not have an opportunity to object and thus asked that all records produced in response to those subpoenas be excluded.

Additionally, Nimmer asked that any client trust account records more than 5 years old be excluded even if more recent records were admitted. In support, Nimmer relied on § 3-501.15(a), which requires attorneys to maintain complete records of client property for 5 years after termination of the representation. Nimmer claimed that because he had not retained any client records predating 2011, the Counsel for Discipline should be prevented from offering any subpoenaed trust account records for that period.

The referee found no merit to Nimmer's arguments for exclusion of the subpoenaed trust account records and overruled the motions.

6. Evidentiary Hearing

On December 4, 2017, an evidentiary hearing was held on the formal charges. Nimmer represented himself and was the only witness to testify.

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[8] See Neb. Ct. R. § 3-317(A).

[9] See § 3-317(D).

(a) Exhibits

The special prosecutor introduced, and the referee received, Nimmer's client trust account records from 2006 through 2016. Nimmer did not dispute the veracity of those records and instead stated, "I'll concede every transaction in this exhibit is a bona fide transaction. Whatever the notations say, they say. . . . [T]he exhibit speaks for itself."

The special prosecutor also introduced, and the referee received, a record of a prior attorney disciplinary proceeding involving Nimmer. In 2013, the Counsel for Discipline alleged Nimmer had received $12,500 from a client to deliver "qualified investors" as advertised on his website and then failed to provide such services.[10] Nimmer's actions were alleged to have violated Neb. Ct. R. Prof. Cond. § 3-507.1 and § 3-508.4(a).[11] Nimmer entered a conditional admission to the 2013 charges and requested a public reprimand.[12] This court accepted his conditional admission and issued a public reprimand.[13]

(b) Nimmer's Testimony

As stated, at the hearing, Nimmer did not dispute the veracity of the client trust account records or the accuracy of the notations on various checks deposited into and written on the client trust account. For instance, Nimmer admitted writing numerous checks for personal expenses from his client trust account over the course of several years, including checks for rent, checks to his church, checks to his mother, and checks for his daughter's summer camp. He also admitted his mother had given him thousands of dollars that he deposited into his client trust account. Nimmer characterized these deposits as "credit line[s]," rather than "loan[s]" from his mother, but he admitted the funds were placed into his client

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[10] *State ex rel. Counsel for Dis. v. Nimmer*, 286 Neb. 107, 834 N.W.2d 776 (2013).

[11] *Id.*

[12] *Id.*

[13] *Id.*

trust account and were available for his personal use "or hers, if she asked."

Nimmer also admitted that on several occasions, he transferred funds from his personal checking account into his client trust account. He admitted these funds were not transferred to pay bank service charges and were not connected to the representation of any client.

(c) Nimmer's Affirmative Defenses

While Nimmer did not vigorously contest the documentary evidence detailing the non-client-related funds going into and out of his client trust account, he did argue that this activity did not amount to unlawful commingling. In support of this contention, Nimmer advanced three basic arguments, which he framed as affirmative defenses. First, he argued that writing personal checks directly from his client trust account was not a violation of § 3-501.15, because it was possible he was writing those checks on earned fees. Second, he argued § 3-501.15 does not prohibit attorneys from depositing non-client-related funds into a client trust account. And third, he argued that even if the referee found he had violated the rules against commingling personal and client funds, he acted in "good faith" and thus should be exempt from discipline. He makes these same arguments in his briefing to this court, and we address them later in our analysis.

7. Referee's Report and Recommendation

On February, 13, 2018, the referee filed his written report. The referee found, summarized, that from January 1, 2006, through September 1, 2016, Nimmer impermissibly deposited personal funds into his client trust account in amounts more than necessary to pay bank service charges on that account and used his client trust account to pay personal expenses. It is not necessary to recite all of the referee's factual findings, but the following are representative:

- On or about December 20, 2007, Nimmer deposited a $10,000 check from his mother with the notation "'loan'" into his client trust account. Nimmer admitted these funds were for his personal use, but were also available to pay his mother's personal expenses if she asked. In that regard, Nimmer wrote a check from the client trust account in the amount of $4,775 to a construction company for repairs to his mother's house, and wrote several checks to his mother for a car he was purchasing from her. None of these checks or transactions were connected to representation of a client.
- On or about June 25, 2013, Nimmer deposited two checks totaling $10,855.18 into his client trust account. The checks had been made payable to Nimmer's mother, and she endorsed both checks over to him. Nimmer described this deposit as a "'credit line'" from his mother. He admitted the funds were not connected to the representation of any client, but, rather, were intended to be used by Nimmer for his personal expenses if necessary.
- On multiple occasions in 2014 and 2016, Nimmer transferred money from his personal checking account into his attorney trust account. Nimmer admitted these transfers were not to pay bank fees and were not in connection with any client representation, but he claimed the transfers were "for the benefit of" his daughter.
- Nimmer wrote approximately 35 checks on his client trust account to his church, with notations such as "dues," "Almsgiving Fund," "dinner tickets," and "Food for Hungry Funds." Nimmer admitted the notations on the checks were accurate and the payments were not made in connection with client representation.
- Nimmer wrote multiple checks over multiple years out of his client trust account to Camp St. Raphael. Nimmer admitted those checks were for his daughter's summer camp and were not connected to any client representation.
- Nimmer wrote approximately 20 checks on his client trust account payable to the landlord of his Omaha law office

in the amount of either $1,750, $2,000, or some multiple thereof. Nimmer admitted these checks were "'most probably'" for his rent.

Based on these and other factual findings, the referee concluded there was clear and convincing evidence Nimmer violated §§ 3-501.15(a) and (b) (safekeeping property) and 3-508.4 (misconduct), and thereby violated his oath of office as a licensed attorney. The referee expressly rejected all of Nimmer's affirmative defenses.

The referee also made a recommendation regarding an appropriate sanction. The referee analyzed each of the six factors outlined in *State ex rel. Counsel for Dis. v. Jorgenson*[14] and found several aggravating factors, including that (1) Nimmer had been disciplined previously in 2013, (2) Nimmer's misconduct in commingling client funds and personal funds went on for nearly a decade, and (3) Nimmer had written "a large number of checks" for personal expenses on his client trust account. The referee found as a mitigating factor that Nimmer had not "misappropriate[d] any client funds." Ultimately, the referee recommended that Nimmer be (1) suspended from the practice of law for a period of 1 year, (2) required to complete 6 credit hours of continuing legal education in the area of professional responsibility focused on law office management prior to reinstatement, and (3) placed on probation for 2 years during which time he must practice under the supervision of a licensed Nebraska attorney.

Nimmer timely filed a written exception to the referee's report, the particulars of which we address below. The matter has been briefed and argued before this court[15] and now is submitted for our determination on the questions of which, if any,

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[14] *State ex rel. Counsel for Dis. v. Jorgenson*, 298 Neb. 855, 906 N.W.2d 43 (2018).

[15] See Neb. Ct. R. § 3-310(M) (rev. 2014).

Nebraska Rules of Professional Conduct were violated and the appropriate sanction for any such violation.[16]

II. STANDARD OF REVIEW

[1] Because attorney discipline cases are original proceedings before this court, we review a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[17]

III. ANALYSIS

1. Nimmer's Exceptions to Referee's Report

Nimmer's written exceptions challenge nearly every aspect of the referee's report. Consolidated and summarized, Nimmer takes exception to the referee's (1) evidentiary rulings, including admitting the subpoenaed records of Nimmer's client trust account; (2) finding clear and convincing evidence of disciplinary violations; (3) rejecting Nimmer's affirmative defenses; and (4) recommending a 1-year suspension.

Nimmer's brief addresses these exceptions as "assignments of error" made by the referee, but we decline to address them framed as such, because we do not sit in this matter as an appellate court reviewing the record for error. Rather, proceedings for attorney discipline are original proceedings before the Nebraska Supreme Court.[18]

In such original proceedings, when an answer raises an issue of fact requiring a hearing, we refer the matter to a referee to

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[16] *State ex rel. Counsel for Dis. v. Herzog*, 281 Neb. 816, 805 N.W.2d 632 (2011). See, also, *State ex rel. Counsel for Discipline v. Gast*, 296 Neb. 687, 696-97, 896 N.W.2d 583, 591 (2017) ("[t]he basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances").

[17] *State ex rel. Counsel for Dis. v. Trembly, ante* p. 195, 912 N.W.2d 764 (2018).

[18] § 3-310(C).

oversee discovery and hold a hearing.[19] The referee observes the rules of evidence, discovery, and motion practice applicable in civil actions in Nebraska district courts and is required to make a written report stating his or her findings of fact and recommendations.[20] The referee's report is transmitted to this court along with the record of proceedings,[21] and if no written exception is taken, this court may, in its discretion, accept the referee's findings as final and conclusive.[22]

[2] But where, as here, a party takes exception to the referee's report, this court conducts a trial de novo on the record in which we reach a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[23] Because of this standard, Nimmer's claims of errors by the referee are simply "immaterial to our review."[24]

We thus proceed to consider Nimmer's exceptions, but we necessarily limit our consideration to the evidence properly admitted, and we reach our own conclusion, independent of the referee's findings and recommendation, on the central questions of whether any Nebraska Rules of Professional Conduct have been violated, and the appropriate sanction for any such violation.[25]

For the sake of completeness, we also note that Nimmer's brief assigns error to this court's prior decisions overruling his

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[19] See § 3-310(J).

[20] *Id.*

[21] *Id.*

[22] § 3-310(L).

[23] *Herzog, supra* note 16.

[24] *Id.* at 822, 805 N.W.2d at 637.

[25] *Id.*

two motions to dismiss this disciplinary proceeding. We construe these assignments as requests for this court to exercise its inherent authority to reconsider those decisions,[26] and we decline to do so.

2. Nimmer's Client Trust Account Records Were Properly Admitted

Throughout the proceedings before the referee, and in his briefing and oral argument before this court, Nimmer has repeatedly challenged the admissibility of his client trust account records, particularly those predating 2011. The referee found all of Nimmer's arguments in this regard to be without merit. We do too.

[3] With exceptions not relevant here, all lawyers admitted to practice law on active status with an office in Nebraska must have and maintain a client trust account in an approved financial institution.[27] Additionally, the Counsel for Discipline has the broad power to "audit at any time any trust account required by these rules."[28] And we have recognized that client trust accounts, in particular, are always open to review by the Counsel for Discipline.[29] The Counsel for Discipline has broad subpoena power for investigative purposes,[30] and in this case, the Counsel for Discipline followed the appropriate procedure in subpoenaing Nimmer's client trust account records.[31]

Nimmer also argues that even if his client trust account records were properly obtained, all such records before 2011

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[26] See *Houser v. American Paving Asphalt*, 299 Neb. 1, 907 N.W.2d 16 (2018) (appellate court has inherent power to reconsider order or ruling until divested of jurisdiction).

[27] Neb. Ct. R. § 3-902.

[28] Neb. Ct. R. § 3-906.

[29] *State ex rel. Counsel for Dis. v. Crawford*, 285 Neb. 321, 827 N.W.2d 214 (2013).

[30] § 3-317(A).

[31] § 3-317(B).

should nevertheless have been excluded from evidence. He reasons that § 3-501.15(a) requires lawyers to preserve records of client trust accounts "for a period of 5 years after termination of the representation." Nimmer maintains that in reliance on this rule, he did not save client subsidiary ledgers prior to 2011; thus, he argues it would be "unfair" to allow disciplinary proceedings against him based on allegations of commingling more than 5 years ago.

[4,5] Nimmer's reliance on the document preservation requirement in § 3-501.15(a) is misplaced. An attorney's failure to preserve client trust account records does not provide an affirmative defense to charges of impermissible commingling, nor does the 5-year preservation rule constrain or limit the Counsel for Discipline's investigative or prosecutorial duties. There is no time limitation on the acts or omissions that can give rise to attorney discipline for violating the Nebraska Rules of Professional Conduct, the attorney's oath, or the provisions of Nebraska's disciplinary rules.[32]

Moreover, Nimmer repeatedly points to the document preservation rule as the reason he is unable to adequately explain the personal funds going into and out of his client trust account. But we have difficulty with his suggestion that client ledgers would reveal anything of relevance, given the nature of the charges here. The alleged disciplinary violations stem from Nimmer's impermissible use of his client trust account as a personal checking account; such use, by its nature, would not have been documented in client ledgers. And it is telling that despite the availability of his post-2011 client ledgers, Nimmer points to nothing in those records that adequately explains the violations found to have occurred during that timeframe.

We conclude that all of Nimmer's client trust account records from the period from 2006 through 2016 were properly obtained by the Counsel for Discipline, were provided to

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[32] See Neb. Ct. R. § 3-303.

Nimmer well in advance of the hearing, were properly admitted into evidence by the referee, and are properly before this court for consideration.

3. General Principles in Disciplinary Proceedings

[6-9] Attorneys licensed to practice law in the State of Nebraska agree to operate under the supervision of the office of the Counsel for Discipline.[33] A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.[34] Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney in his or her professional capacity which tends to bring reproach on the courts or the legal profession constitutes grounds for suspension or disbarment.[35] Violation of those standards, which are set forth in the disciplinary rules, must be established by clear and convincing evidence.[36]

4. There Is Clear and Convincing Evidence of Violations

Our de novo review shows clear and convincing evidence that Nimmer violated § 3-501.15(a) and (b), and thereby violated § 3-508.4(a) and his oath of office under § 7-104.

Section 3-501.15(a) requires a lawyer to "hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." This rule requires that client "[f]unds shall be kept in a separate account maintained in the state where the lawyer's office is situated."

Section 3-501.15(b) recognizes one circumstance under which it is permissible for an attorney to deposit his or her own funds into a client trust account. "A lawyer may deposit

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[33] *Crawford, supra* note 29.

[34] *Id.*

[35] *Id.*

[36] *Id.*

the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose."

[10,11] Collectively, subsections (a) and (b) of § 3-501.15 prohibit the commingling of client funds with an attorney's personal funds. Generally speaking, an attorney violates the rule against commingling when the funds of the client are intermingled with those of the attorney in such a way that their separate identity is lost and they may be used by the attorney for personal expenses or subjected to the claims of the attorney's creditors.[37]

In *State ex rel. Counsel for Dis. v. Davis*,[38] we found clear and convincing evidence of commingling in violation of § 3-501.15(a) and (b) when the attorney used her client trust account as both a business account and a personal checking account. We reach the same conclusion in the present case.

Here, the record is replete with evidence that Nimmer used his client trust account as a personal checking account. From 2006 through 2016, Nimmer deposited thousands of dollars in personal funds into his client trust account. Some of these personal funds were from his mother and some were transferred directly from his personal checking account, but none were for the sole purpose of paying bank service charges on the account.

Nimmer regularly wrote checks on his client trust account for personal and business expenses. Much of this evidence was admitted by Nimmer and has been summarized in the referee's findings recited previously. But in addition to the referee's findings, our de novo review reveals considerable circumstantial evidence that Nimmer's use of his client trust account as a personal checking account was more pervasive than the referee's report would suggest. Given the volume

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[37] Annot., 94 A.L.R.3d 846, § 3 (1979 & Supp. 2018).

[38] *State ex rel. Counsel for Dis. v. Davis*, 276 Neb. 158, 760 N.W.2d 928 (2008).

of that circumstantial evidence, we cite a few representative examples.

From 2005 through 2009, Nimmer wrote 19 checks on his client trust account to the Omaha Public Power District. He testified these checks were "more likely than not" his utility payments, but claimed that without his pre-2011 subsidiary trust account records, he could not be certain.

From 2006 through 2009, Nimmer wrote 27 checks on his client trust account to "Cox Communications." Nimmer testified that Cox Communications was his current Internet service provider and was not a client of his, but he could not remember whether he had the same provider at the time the checks were written and did not want to "venture a guess."

Nimmer wrote a check to his ex-wife on the client trust account with the notation "Jan./Feb. health ins." Nimmer testified this check "may have" been a payment to his ex-wife for his daughter's health insurance, but he did not "remember for sure." Additionally, Nimmer wrote at least 22 other checks to his ex-wife, many with notations such as "camp," "daycamp," "Rachel's camp," "travel," and "cookies." Nimmer admitted these checks were not related to any client representation, but when asked if the checks represented personal payments on behalf of his daughter, Nimmer replied, "I'm not going to characterize them that way." Nimmer himself offered several exhibits documenting payments he made from his client trust account in 2011, 2013, 2014, and 2016 for his daughter's summer camp.

Nimmer wrote approximately 15 checks from his client trust account to "Cricket." Nimmer testified, "I think Cricket is a cell phone provider," but he did not recall why he had written the checks.

In 2007, Nimmer wrote a check from his client trust account to the Nebraska State Bar Association in the amount of $320. When asked whether he was paying his bar dues out of his client trust account, Nimmer replied, "There is no notation that allows me to say for sure."

[12] Disciplinary violations can be proved by circumstantial evidence,[39] and in this case, we find considerable direct and circumstantial evidence which provides clear and convincing proof that Nimmer commingled client and personal funds in his client trust account and used his client trust account as a personal checking account. This misuse of his client trust account violated § 3-501.15(a) and (b). And by doing so, Nimmer also violated § 3-508.4(a) and his oath of office under § 7-104.

5. No Merit to Nimmer's Affirmative Defenses

Nimmer does not deny depositing non-client-related funds into his client trust account, nor does he deny paying personal expenses for himself, his mother, and his daughter out of his client trust account. Instead, Nimmer raises several arguments, framed as affirmative defenses, which he contends preclude a finding that he used his client trust account in violation of the Nebraska Rules of Professional Conduct. We address his arguments below, and find all to be meritless.

(a) Earned Fees

Nimmer's verified answer alleged "it is possible though unlikely [I] may have paid some personal expenses from fees as earned—though without recourse to subsidiary ledgers it is impossible to link specific transactions to specifically earned fees." Before the referee and in his briefing to this court, Nimmer argues that it is possible he was writing personal checks on earned fees. He offered no contemporaneous billings or other credible evidence to support such a theory. And even assuming that some of the funds in Nimmer's client trust account may have represented earned fees, Nimmer did not withdraw legal fees and expenses from the client trust account

[39] *Crawford, supra* note 29 (demonstrating that even evidence which is largely circumstantial, disputed, and complicated can nonetheless be clear and convincing).

as they were earned to place them in an operating account.[40] Instead, he wrote checks for personal expenses directly from his client trust account and now attempts to defend his actions by suggesting it is possible he was using earned fees. We reject this affirmative defense as speculative and unproven, and even if Nimmer had offered sufficient proof of earned fees, it would not have excused or explained his commingling.

(b) "Third-Party" Funds

Nimmer argues he did not violate § 3-501.15 by depositing personal funds into his client trust account, because, he contends, any funds deposited were not his personal funds, but instead belonged to nonclient "third parties," such as his daughter and his mother. His attempt to characterize personal loans from his mother and funds from his personal checking account as anything other than his "own funds" is disingenuous. But even more troubling is Nimmer's proffered interpretation of § 3-501.15(a).

In Nimmer's answer, he "affirmatively avers holding third party funds in an attorney trust account not in connection with legal representation is not prohibited." In his arguments to this court, Nimmer contends that § 3-501.15(a) permits an attorney to deposit "third party" funds into a client trust account, even if such funds are unconnected to representing a client. We disagree, and reject Nimmer's position as patently contrary to the plain language of § 3-501.15(a).

Section 3-501.15(a) plainly requires that property of "clients" and property of "third persons . . . in a lawyer's possession in connection with a representation" shall be kept separate from the lawyer's own property and that all "[f]unds" must be kept "in a separate account" and all "[o]ther property" must be "identified as such and appropriately safeguarded."

While this rule references "third persons," it does so only in the context of funds in the lawyer's possession "in connection

[40] See § 3-501.15(c).

with a [client] representation." Additionally, the client trust account here was an interest-bearing trust account subject to additional rules found in chapter 3, article 9, of this court's rules. Those rules make clear that such accounts are for "the deposit of funds of clients"[41] and not, as Nimmer suggests, for holding "third-party" funds that have no connection to the representation of a client.

Nimmer's proposed interpretation of § 3-501.15(a) borders on frivolous and provides no defense to commingling.

(c) No "[G]ood [F]aith" Defense to Commingling

Finally, Nimmer argues that if we determine his use of the client trust account violated § 3-501.15(a) and (b) by commingling personal and client funds, then a "good faith" defense should apply to protect him from discipline, because, he contends, the commingling provisions of § 3-501.15(a) are not sufficiently clear. The referee found that the "good faith" defense, sometimes relied upon in defending legal malpractice cases, did not apply to protect Nimmer from the consequences of violating clear disciplinary rules prohibiting the commingling of client and personal funds. We agree.

Although we have recognized a "good faith" defense to civil liability in legal malpractice claims when the law is not well settled,[42] we have not applied such a defense in the attorney discipline context, and for good reason. It has no proper application.

[13] In the context of attorney discipline cases, "'[w]e have repeatedly recognized the ancient maxim that ignorance of the law is no excuse. It is a maxim sanctioned by centuries of experience [and it] applies with even greater emphasis

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[41] See § 3-902.

[42] See *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998).

to an attorney at law who is expected to be learned in the law.'"[43]

[14] Simply put, neither good faith nor ignorance of the rules prohibiting commingling client and personal funds provides a defense to a disciplinary charge that an attorney violated the rules against commingling.[44] The District of Columbia Court of Appeals explained it well: "If a failure to understand the most central Rules of Professional Conduct could be an acceptable defense for a charged violation, even in cases of good faith mistake, the public's confidence in the bar and, more importantly, the public's protection against lawyer overreaching would diminish considerably."[45]

We agree with this reasoning. Nimmer cannot avoid disciplinary sanctions for violating the fundamental rules prohibiting commingling by relying on a "good faith" defense.

6. Appropriate Sanction

Having concluded Nimmer violated the Nebraska Rules of Professional Conduct and his oath of office by commingling client and personal funds, we must determine the appropriate sanction.

[15,16] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.[46] Each attorney discipline

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[43] *State ex rel. Nebraska State Bar Assn. v. Hollstein*, 202 Neb. 40, 58, 274 N.W.2d 508, 517 (1979).

[44] 94 A.L.R.3d, *supra* note 37, § 10 (and cases cited therein).

[45] *In re Smith*, 817 A.2d 196, 202 (D.C. 2003).

[46] *Trembly, supra* note 17.

case must be evaluated in light of its particular facts and circumstances.[47]

[17,18] For purposes of determining the proper discipline of an attorney, we consider the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.[48] The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[49]

[19] Under Neb. Ct. R. § 3-304, this court may impose one or more of the following disciplinary sanctions: "(1) Disbarment by the Court; or (2) Suspension by the Court; or (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or (4) Censure and reprimand by the Court; or (5) Temporary suspension by the Court[.]"

(a) Nature of Offense

[20] This court considers commingling of client funds with an attorney's own funds to be a matter of gravest concern in reviewing claims of lawyer misconduct.[50] We have recognized:

> The prohibition against commingling of funds is a salutary rule adopted "'to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money. Moral turpitude is not necessarily involved in the commingling of a client's money with an attorney's own money if the client's money is not endangered by such procedure and is always available to him. However, inherently there is danger in such practice for

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[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 352 N.W.2d 875 (1984).

> frequently unforeseen circumstances arise jeopardizing the safety of the client's funds, and as far as the client is concerned the result is the same whether his money is deliberately misappropriated by an attorney or is unintentionally lost by circumstances beyond the control of the attorney.'"[51]

Even when the client suffers no loss, commingling client funds with personal funds is not a trivial or technical rule violation.[52]

(b) Need for Deterring Others

It has been suggested that violating the rule against commingling is one of the most frequent bases for disciplinary action against attorneys.[53] As such, we agree with the referee that the need to send a clear and strong message deterring others from commingling client and personal funds, and from using client trust accounts as personal checking accounts, is paramount. It has been observed: "'In most jurisdictions, disciplinary authorities treat violations of the rule against commingling trust funds and personal funds very seriously . . . even where the client or third party suffers no loss, harsh sanctions usually follow as a prophylactic warning that com[m]ingling cannot be tolerated.'"[54]

(c) Reputation of Bar

The referee correctly observed that misuse of client trust accounts, even when it does not involve obvious misappropriation, harms the reputation of the entire legal profession by undermining public confidence and trust in attorneys, in the courts, and in the legal system generally.

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[51] *Id.* at 142, 352 N.W.2d at 878.

[52] See *Disciplinary Proceedings Against Mulligan*, 365 Wis. 2d 43, 870 N.W.2d 233 (2015).

[53] 94 A.L.R.3d, *supra* note 37, § 2.

[54] See *Disciplinary Proceedings Against Mulligan, supra* note 52, 365 Wis. 2d at 61-62, 870 N.W.2d at 242.

(d) Protection of Public

[21,22] The goal of attorney discipline proceedings is not as much punishment as a determination of whether it is in the public interest to allow an attorney to keep practicing law.[55] Providing for the protection of the public requires the imposition of an adequate sanction to maintain public confidence in the bar.[56]

(e) Attitude of Respondent

The referee found that although Nimmer had not admitted his violations, he conceded that "he may have exercised poor judgment." The referee thus concluded, "It appears that [Nimmer] is open to the need to seriously correct his practices regarding his trust account management, but a period of suspension is necessary to impress upon him the critical need to do so."

[23] An attorney's admission of responsibility for his or her actions reflects positively upon his or her attitude and character and is to be considered in determining the appropriate discipline.[57] But while we consider and give weight to the referee's observations, our de novo review of the record suggests that, rather than displaying remorse for his actions and an openness to changing the behavior that prompted this disciplinary proceeding, Nimmer has generally refused to acknowledge the wrongful nature of his conduct in commingling client and personal funds.

Nimmer has challenged this court's authority to discipline him and repeatedly tried to prevent consideration and review of his client trust account records. While lawyers facing disciplinary charges should not be discouraged in any way from mounting a vigorous defense, some of the legal positions

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[55] *Trembly, supra* note 17.

[56] *Id.*

[57] *State ex rel. Counsel for Dis. v. Petersen*, 271 Neb. 262, 710 N.W.2d 646 (2006).

advanced by Nimmer in this proceeding border on the frivolous and reflect an attitude which bears negatively on his willingness to conform his conduct to the Nebraska Rules of Professional Conduct.

(f) Present or Future Fitness to Practice Law

The referee observed that Nimmer "conducted himself during the proceedings appropriately and with knowledge of the law and procedure" and thus found "no evidence to suggest that Nimmer is not fit to practice law." Although we consider and give weight to the fact that the referee heard and observed Nimmer's conduct during these proceedings, we cannot ignore that Nimmer's actions in using his client trust account as a personal checking account demonstrated continued indifference to the fundamental rule against commingling, which we conclude bears negatively on his future fitness to practice law.

(g) Aggravating Factors

We agree with the referee that the record supports several aggravating factors. Nimmer has already been publicly reprimanded by this court for a violation of the Nebraska Rules of Professional Conduct in a prior disciplinary proceeding.[58]

[24] Moreover, the extended period of time over which Nimmer engaged in commingling, and the large number of personal checks Nimmer wrote on his client trust account, are additional aggravating factors. Nimmer did more than commingle on one or two occasions—he engaged in a pattern of conduct that spanned nearly a decade and involved hundreds of checks totaling thousands of dollars. Because cumulative acts of attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions.[59]

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[58] See *Nimmer, supra* note 10.

[59] *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012).

Cumulative acts of misconduct can, and often do, lead to disbarment.[60]

(h) Mitigating Factors

[25] The referee found "the central mitigating fact in this case is that Nimmer did not misappropriate any client funds." We have defined misappropriation as any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.[61]

Nimmer was not charged with misappropriation of client funds, but we do not agree this is a mitigating factor. We note that after the years of commingling that occurred here, it would be difficult to discern whether any client funds were misappropriated. Sometimes an attorney can "so inextricably com[m]ingle[] client and personal funds" in his or her trust account that "it is impossible to know which or whose funds were being used at any particular time."[62]

[26] Here, we understand the referee's observation that Nimmer "did not misappropriate any client funds" to mean the referee saw no evidence that Nimmer's client trust account was overdrawn or that clients suffered documented financial loss. But we have been clear that lack of financial harm to clients is not a mitigating factor in commingling cases:

> [A] lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds. The fact that the client did not suffer any financial loss . . . does not provide a reason for imposing a less severe sanction."[63]

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[60] *Id.*

[61] *Crawford, supra* note 29.

[62] See *Disciplinary Proceedings Against Mulligan, supra* note 52, 365 Wis. 2d at 63-64, 870 N.W.2d at 243.

[63] *Crawford, supra* note 29, 285 Neb. at 365, 827 N.W.2d at 245.

Fortunately, there was no evidence that Nimmer's clients suffered a financial loss as a result of his commingling of funds. However, we must respectfully disagree with the referee that this should be considered a mitigating factor. And we see nothing in the record, or the briefing, that suggests any other mitigating factor.

(i) Other Cases

In *State ex rel. Counsel for Dis. v. Davis*,[64] we suspended an attorney for 1 year after finding by clear and convincing evidence that she used her client trust account as a business and personal checking account and failed to promptly deliver trust account funds to a client's health care provider. That case, however, involved several mitigating factors including: the attorney suffered from depression and anxiety, the attorney was an alcoholic and agreed to undergo treatment, the attorney had no prior disciplinary actions, and the referee received multiple letters from the community attesting to the attorney's good character and reputation.[65]

In *State ex rel. NSBA v. Veith*,[66] we disbarred an attorney after finding by clear and convincing evidence that he commingled, and misappropriated, client funds. In doing so, we disagreed with the referee's recommended discipline of an 8-month suspension.[67] And we found disbarment was appropriate even though the attorney had reimbursed his clients.[68]

In *State ex rel. NSBA v. Malcom*,[69] we disbarred an attorney after finding by clear and convincing evidence that he

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[64] *Davis, supra* note 38.

[65] *Id.*

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

[67] *Id.*

[68] *Id.*

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

commingled and misappropriated client funds on 10 occasions. We explained that the attorney's excuse that the misconduct was inadvertent did not overcome the presumption of disbarment.[70]

(j) Appropriate Sanction

[27,28] Absent mitigating circumstances, this court has repeatedly held that disbarment is the appropriate discipline in cases of misappropriation or commingling of client funds.[71] Mitigating factors may overcome the presumption of disbarment in misappropriation and commingling cases where they are extraordinary and substantially outweigh any aggravating circumstances.[72] In this case, we do not find any such mitigating factors.

For a period of nearly 10 years, Nimmer engaged in a pattern of commingling personal funds with client funds and using his client trust account as a personal checking account. His violations were serious, and there is no evidence of any mitigating factors in the record that explain or excuse his misconduct.

Nimmer has been disciplined for misconduct previously, and his prolonged and persistent violation of the rule against commingling reflects a general failure, or unwillingness, to fully comprehend the serious nature of his conduct. After balancing the relevant factors in comparison to other cases, and considering the need to protect the public, the need to deter others, the reputation of the bar as a whole, Nimmer's fitness to practice law, and the aggravating circumstances, we conclude the only appropriate sanction here is disbarment.

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[70] *Id.*

[71] See, e.g., *State ex rel. Counsel for Dis. v. Thebarge*, 289 Neb. 356, 854 N.W.2d 914 (2014); *State ex rel. Counsel for Dis. v. Council*, 289 Neb. 33, 853 N.W.2d 844 (2014); *Crawford, supra* note 29; *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000); *Malcom, supra* note 69.

[72] *Council, supra* note 71.

IV. CONCLUSION

There is clear and convincing evidence that Nimmer violated the Nebraska Rules of Professional Conduct and his oath of office by commingling client and personal funds. It is the judgment of this court that Nimmer is disbarred from the practice of law in the State of Nebraska, effective immediately. He is directed to comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, he shall be subject to punishment for contempt of this court.

Judgment of disbarment.

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

Melinda J. Brown, appellant, v. Regional West Medical Center et al., appellees.

916 N.W.2d 590

Filed August 31, 2018. No. S-17-555.

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. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations will not be set aside by an appellate court unless clearly wrong.
4. **Termination of Employment: Workers' Compensation.** To establish a prima facie case for retaliatory discharge for filing a workers' compensation claim, a plaintiff must establish the following elements: (1) The plaintiff filed a workers' compensation claim, (2) the plaintiff was terminated from employment, and (3) a causal link existed between the termination and the workers' compensation claim.
5. **Termination of Employment: Workers' Compensation: Evidence: Time.** A plaintiff supports an assertion of retaliatory motive by demonstrating proximity in time between the workers' compensation claim and the firing, along with evidence of satisfactory work performance and supervisory evaluations.

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

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Howard P. Olsen, Jr., Steven W. Olsen, and John L. Selzer, of Simmons Olsen Law Firm, P.C., for appellee Regional West Medical Center.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Schreiner, District Judge.

Schreiner, District Judge.

INTRODUCTION

Melinda J. Brown appeals from an order of the district court granting summary judgment in favor of Regional West Medical Center (RWMC) and dismissing her complaint for employment discrimination and retaliatory discharge. The district court found that Brown's discrimination claims were barred by the applicable statute of limitations. It dismissed her retaliation claim on the basis that there was no evidence to support a finding that her termination was retaliatory. For the reasons set forth below, we affirm the judgment of the district court.

BACKGROUND

Brown was employed by RWMC as a customer service representative in the patient financial services department. On August 16, 2011, Brown fell in the parking lot of RWMC as she was leaving work, injuring her right hand and wrist. She reported for work the following day, but was instructed to seek medical care shortly after she arrived. Brown notified RWMC of the injury and made a workers' compensation claim. Despite being cleared to work with certain restrictions as of March 21, 2012, she has not returned to work since that day.

After providing Brown with 12 weeks of requested leave under the Family Medical Leave Act, RWMC sent a letter to Brown on December 13, 2011, advising her that she had been

approved for an additional 8 weeks of director-approved leave which would expire on January 7, 2012. The letter further advised Brown that she was "not guaranteed a return to any job" but was "encouraged to apply to any posted open position" with RWMC.

On December 16, 2011, Brown delivered a letter to RWMC asking for reasonable accommodations to allow her to continue her employment, either in her current department or in another department within RWMC. RWMC responded with a letter asking Brown to complete an employee accommodation request form in order to determine whether she was eligible for accommodation. Brown completed the form, writing that she had "limited use of [her] Right hand," and requested the following accommodation: "Want a job that I can come back to after I am cleared by my Doctor . . . ."

On January 19, 2012, RWMC sent a letter to Brown informing her that her period of director-approved leave had been exhausted as of January 8, 2012, and that she was being placed on furlough until August 15. It explained that although her position was not being held, she would remain on the employment rolls for purposes of receiving benefits while in furlough status. The letter further notified Brown that her employment would terminate on August 15 unless she applied for and secured another position with RWMC before that date. Brown testified that she did not look for or apply for any other positions with RWMC, as she felt she should not have to reapply.

On August 15, 2012, RWMC sent a termination letter to Brown, stating:

> Following the use of all available leave time, you requested, and [RWMC] granted, your move to "Furlough" status. The maximum amount of leave and furlough time has now been depleted, and you have not returned to work with [RWMC] in another position. Therefore, consistent with our policies, we are now administratively ending your employment with [RWMC].

On December 20, 2012, Brown filed a charge of discrimination with the Nebraska Equal Opportunity Commission (NEOC) and the U.S. Equal Employment Opportunity Commission (EEOC), alleging violations of the Nebraska Fair Employment Practice Act (NFEPA) and the Americans with Disabilities Act (ADA). She alleged that she was denied reasonable accommodations and that her employment was ultimately terminated by RWMC due to her disability. On March 12, 2013, the NEOC issued a "right to sue" notice on Brown's discrimination charge.

Brown filed a complaint in the district court for Scotts Bluff County, alleging violations of the ADA and NFEPA for wrongful termination and failure to accommodate her disability. She further alleged that RWMC retaliated against her for filing a workers' compensation claim. RWMC denied the majority of Brown's allegations and asserted the statute of limitations as an affirmative defense.

RWMC moved for summary judgment on the basis that (1) Brown's claims under the ADA and NFEPA were barred by the statute of limitations, (2) Brown cannot establish a prima facie case for retaliation because RWMC had legitimate nonretaliatory reasons for terminating Brown's employment, and (3) Brown's claims for punitive damages are barred by the Nebraska Constitution, and any punitive damages under the ADA are barred by the statute of limitations.

At the summary judgment hearing, RWMC submitted depositions of several human resources personnel, who testified regarding the leave structure at RWMC. They testified that after an employee used his or her 12 weeks of legally mandated leave under the Family Medical Leave Act, RWMC's policies provided for an additional 8 weeks of "general" or "director approved" leave. After an employee had exhausted 12 weeks of leave under the Family Medical Leave Act and 8 weeks of director-approved leave, RWMC policies provided for the employee to be placed on furlough for a period ending 1 year from the date of the employee's first absence. An

employee on furlough does not have a position with RWMC, but is kept on the employment rolls for purposes of benefit eligibility and is required to apply for an open position in order to return to work for RWMC. If an employee on furlough does not apply for and obtain another position, his or her employment will be administratively terminated at the end of the furlough period.

RWMC also submitted its written leave policy into evidence. It states, in part:

> The combination of the different leaves available shall not exceed 20 calendar weeks in a rolling 12-month period.
>
> The hospital is not required to, and generally will not, reserve an employee's position beyond a total of 20 weeks leave time in a rolling 12-month period. In the case of an extended medical leave of absence, however, even though the employee's position is no longer reserved, the hospital will wait the balance of one full year before officially removing the employee's name from the employment rolls. During this time, the status of the employee will be designated as "on furlough" and the employee, if eligible under the insurance contract, may continue payment of their insurance premiums as if they were still in their initial 20 weeks of leave of absence. If an employee has not returned to active duty in a regular employment position prior to the expiration of the furlough date, their employment will be terminated.
>
> If, during the course of a leave of absence, an employee is engaged in light duty work, the period(s) of time engaged in light duty shall not affect or in anyway [sic] extend the above stated one full year clause. Light duty assignments shall not collectively exceed six (6) months.
>
> If, an employee has the appropriate clearance to return to work and the return to work date is after 20 weeks of leave of absence but before the end of one full year, that employee will be considered for any job openings for

> which they qualify. If no job match can be made within the one year period, termination will result. The former employee may then continue to apply for positions as an outside applicant.

RWMC also submitted evidence showing that it had placed other employees on furlough and terminated their employment in accordance with the leave policies described above.

Brown acknowledged that she did not apply for any other positions with RWMC, but testified that she made numerous contacts with human resources, her department supervisor, and workers' compensation personnel, asking to be returned to work. She testified that she never heard back from anyone at RWMC about her accommodation requests.

The district court granted summary judgment in favor of RWMC and dismissed Brown's complaint. It found that Brown's ADA and NFEPA claims were barred by the applicable 300-day statute of limitations. It found that the alleged discriminatory action took place on January 19, 2012, when RWMC informed Brown that her employment would terminate on August 15 unless she applied for and secured another position with RWMC. The time for filing claims under the ADA and NFEPA expired 300 days later, on November 16, but Brown did not file such claims until December 20. The district court found there was no evidence of a subsequent employment practice by RWMC that would restart the limitations period. Regarding Brown's common-law retaliation claim, the district court found there was no evidence of a causal link between Brown's termination of employment and her filing of a workers' compensation claim. Rather, the evidence showed that the termination resulted from RWMC's following its standard policies and procedures for employment termination. Brown appeals.

ASSIGNMENTS OF ERROR

Brown assigns six errors on appeal, but her arguments can be consolidated into three areas. She argues the district court

erred in (1) finding that her ADA and NFEPA claims were barred by the applicable statute of limitations; (2) finding that there was no retaliation, in that there was no causal link between Brown's termination of employment and the filing of her workers' compensation claim; and (3) denying her claim for punitive damages.

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]

[3] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations will not be set aside by an appellate court unless clearly wrong.[3]

ANALYSIS

Statute of Limitations

Under both the ADA and the NFEPA, a claim must be filed with the EEOC and the NEOC within 300 days after the occurrence of the alleged unlawful employment practice.[4] The

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

[2] *Id.*

[3] *Strode v. City of Ashland*, 295 Neb. 44, 886 N.W.2d 293 (2016).

[4] 42 U.S.C. §§ 12117(a) and 2000e-5(e)(1) (2012); Neb. Rev. Stat. § 48-1118(2) (Reissue 2010).

issue presented in this case is when that limitations period began to run. RWMC argues that the statute of limitations began to run on January 19, 2012, when it notified Brown that she had been placed on furlough and that her employment would terminate on August 15 if she did not obtain another position with RWMC before that date. Brown argues that the limitations period did not begin to run until the actual date of termination, which was August 15.

The U.S. Supreme Court addressed a similar issue in *Delaware State College v. Ricks*,[5] in which the plaintiff, who was a professor at the college, was informed that the college had voted to deny him tenure, but was given a 1-year terminal contract after which his employment would terminate. The plaintiff argued that the statute of limitations for his EEOC claim began to run only after his 1-year terminal contract expired. The U.S. Supreme Court disagreed and held that the limitations period begins to run at the time the employment decision is made and communicated to the employee, even though the effects of the employment decision may not occur until a later date.[6]

Here, we find that the limitations period began to run when Brown was notified of RWMC's decision on January 19, 2012, even though the consequences of that decision (i.e., her termination of employment) did not occur until August 15. Upon receiving the January 19 letter, Brown was on notice that her employment would terminate on August 15 unless she applied for and obtained another position with RWMC before that date. As in *Ricks*, it does not matter that the date of termination was delayed, given that the employment decision was made and communicated to Brown, and her termination of employment was an inevitable

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[5] *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980).

[6] *Id.*

consequence of her being placed on furlough and not obtaining another position within the specified time period. Although Brown argues that there is no evidence in the record as to when Brown received the January 19 letter, we note that her NEOC complaint acknowledges receipt of such letter in January 2012.

We are also not persuaded by Brown's argument that there were numerous acts of continuing violations that occurred within the limitations period, such as RWMC's continued failure to make reasonable accommodations. Rather, we conclude that the continuing violations doctrine does not apply here because Brown's allegations are for wrongful termination and failure to accommodate, both of which are allegations of discrete discriminatory acts that are individually actionable.[7] Because the alleged discriminatory acts are discrete, they must have occurred within the limitations period in order to be actionable. Additionally, we agree with RWMC's argument that its first alleged failure to make reasonable accommodations occurred in December 2011 (outside the limitations period), and Brown cannot restart the limitations period by renewing a previously denied request for accommodation. If an employee could render a claim timely by simply renewing a previously denied request, the limitations period would be rendered meaningless.[8]

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[7] See, *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002); *Dick v. Dickinson State University*, 826 F.3d 1054, 1059 (8th Cir. 2016) ("'denial of a request for a reasonable accommodation' . . . 'is a *discrete act* of discrimination that is an *independently actionable* unlawful employment practice under the ADA'"); *Taxi Connection v. Dakota, MN & Eastern R.R. Corp.*, 513 F.3d 823, 825 (8th Cir. 2008) ("[t]he continuing violation doctrine does not encompass discrete discriminatory acts, such as termination, failure to promote, denial of transfer, or refusal to hire, which are individually actionable").

[8] *Mercer v. Southeastern Pennsylvania Transit Auth.*, 26 F. Supp. 3d 432 (E.D. Pa. 2014).

We conclude that the statute of limitations began to run when Brown was notified of RWMC's decision on January 19, 2012, and expired 300 days later on November 16. Brown did not file her claims with the EEOC and NEOC until December 20. Thus, the district court did not err in finding that Brown's ADA and NFEPA claims were barred by the applicable statute of limitations.

Retaliation

[4,5] Brown argues that the district court erred in dismissing her common-law retaliation claim. To establish a prima facie case for retaliatory discharge for filing a workers' compensation claim, a plaintiff must establish the following elements: (1) The plaintiff filed a workers' compensation claim, (2) the plaintiff was terminated from employment, and (3) a causal link existed between the termination and the workers' compensation claim.[9] A plaintiff supports an assertion of retaliatory motive by demonstrating proximity in time between the workers' compensation claim and the firing, along with evidence of satisfactory work performance and supervisory evaluations.[10]

We agree with the district court that Brown could not establish that a causal link existed between her termination of employment and the filing of her workers' compensation claim. There was no real temporal proximity, as Brown filed her workers' compensation claim on or about August 17, 2011, and RWMC did not place her on furlough until approximately 20 weeks later. She was then administratively discharged 1 year after her first absence. The evidence showed that RWMC's decisions were based on the expiration of Brown's leave balances, in accordance with its policies and procedures, and consistent with how it treated other similarly situated employees. In other words, there was no evidence of retaliation against

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[9] See *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006).
[10] *Id.*

Brown for filing a workers' compensation claim. The district court did not err in dismissing this claim.

Punitive Damages

Finally, Brown assigns the district court erred in denying her claim for punitive damages. Given our conclusions above that the district court did not err in dismissing her substantive claims, it follows that she was not entitled to punitive damages.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court.

Affirmed.

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. Joseph P. Cullan, respondent.

916 N.W.2d 730

Filed August 31, 2018. No. S-18-441.

Original action. Judgment of public reprimand.

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

Per Curiam.

INTRODUCTION

On May 2, 2018, the Iowa Supreme Court filed an order of public reprimand of the respondent, Joseph P. Cullan. The Counsel for Discipline of the Nebraska Supreme Court, the relator, filed a motion for reciprocal discipline against the respondent. We grant the motion for reciprocal discipline and impose the same discipline as the Iowa Supreme Court.

FACTS

The respondent was admitted to the practice of law in the State of Nebraska on July 1, 2001. The respondent is also a member of the state bars of California and Arizona.

On May 2, 2018, the Iowa Supreme Court, through the Iowa Supreme Court Attorney Disciplinary Board, issued an order of public reprimand of the respondent in case No. 18-0434. The respondent's case before the Iowa attorney disciplinary board generally involved representing in an application for admission pro hac vice that he had not been sanctioned in the past. In

fact, the respondent had recently been sanctioned in two cases in the district court for Douglas County, Nebraska.

On May 4, 2018, the relator filed a motion for reciprocal discipline pursuant to Neb. Ct. R. § 3-321 of the disciplinary rules.

ANALYSIS

The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Murphy*, 283 Neb. 982, 814 N.W.2d 107 (2012). In a reciprocal discipline proceeding, a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction. *Id*. Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
>
> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

Section 3-321 of the disciplinary rules provides in part:

> (A) Upon being disciplined in another jurisdiction, a member shall promptly inform the Counsel for Discipline of the discipline imposed. Upon receipt by the Court of appropriate notice that a member has been disciplined in another jurisdiction, the Court may enter an order imposing the identical discipline, or greater or lesser discipline as the Court deems appropriate, or, in its discretion,

> suspend the member pending the imposition of final discipline in such other jurisdiction.

In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Murphy, supra*.

Upon due consideration of the record, and the facts as determined by the Iowa attorney disciplinary board, we determine that public reprimand is appropriate. Our record includes a notice of the findings of the Iowa attorney disciplinary board which found that the respondent's "lack of care . . . went beyond mere negligence." We take the determination of misconduct as found in the Iowa public reprimand to be established herein. Accordingly, we grant the motion for reciprocal discipline and enter an order of public reprimand.

CONCLUSION

The motion for reciprocal discipline is granted. The respondent is publicly reprimanded. The respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of public reprimand.

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. Patrick J. Cullan, respondent.

916 N.W.2d 436

Filed August 31, 2018. No. S-18-442.

Original action. Judgment of public reprimand.

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

Per Curiam.

INTRODUCTION

On May 2, 2018, the Iowa Supreme Court filed an order of public reprimand of the respondent, Patrick J. Cullan. The Counsel for Discipline of the Nebraska Supreme Court, the relator, filed a motion for reciprocal discipline against the respondent. We grant the motion for reciprocal discipline and impose the same discipline as the Iowa Supreme Court.

FACTS

The respondent was admitted to the practice of law in the State of Nebraska on May 22, 2007. The respondent is also a member of the state bar of California.

On May 2, 2018, the Iowa Supreme Court, through the Iowa Supreme Court Attorney Disciplinary Board, issued an order of public reprimand of the respondent in case No. 18-0433. The respondent's case before the Iowa attorney disciplinary board generally involved representing in an application for admission pro hac vice that he had not been sanctioned in the past. In

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> suspend the member pending the imposition of final discipline in such other jurisdiction.

In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Murphy, supra*.

Upon due consideration of the record, and the facts as determined by the Iowa attorney disciplinary board, we determine that public reprimand is appropriate. Our record includes a notice of the findings of the Iowa attorney disciplinary board which found that the respondent's "lack of care . . . went beyond mere negligence." We take the determination of misconduct as found in the Iowa public reprimand to be established herein. Accordingly, we grant the motion for reciprocal discipline and enter an order of public reprimand.

CONCLUSION

The motion for reciprocal discipline is granted. The respondent is publicly reprimanded. The respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of public reprimand.

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