THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 7, 2018 and JANUARY 10, 2019

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCCI

PEGGY POLACEK
OFFICIAL REPORTER

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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
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
James M. Masteller	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*
James E. Doyle IV	Lexington
David W. Urbom	McCook
Richard A. Birch	North Platte
Michael E. Piccolo	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
Joseph E. Dalton	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
Andrew R. Lange	Wahoo

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

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Michael P. Burns	Hastings
Timothy E. Hoeft	Holdrege
Michael O. Mead	Hastings

Eleventh District

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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*
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Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	*City*
James R. Coe	Omaha
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John R. Hoffert	Lincoln
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Julie A. Martin	Lincoln
Dirk V. Block	Lincoln

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Sarah Richerme Barnhill
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No. S-17-1106: **Wilczewski v. Wilczewski**. Stipulated motion of parties to dismiss appeal sustained; appeal dismissed.

No. S-17-1165: **State ex rel. Counsel for Dis. v. Dorr**. Motion of relator to dismiss without prejudice sustained.

No. S-17-1170: **Gonzalez-Valadez v. Hansen**. Affirmed. See § 2-107(A)(1).

No. S-17-1277: **Rent-A-Center West v. Nebraska Dept. of Rev**. Stipulation allowed; appeal dismissed.

No. S-18-090: **State v. McLemore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014); Neb. Rev. Stat. § 29-3001(4) (Reissue 2016).

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No. S-18-449: **State v. Long**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-18-534: **State v. Thorpe**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-18-572: **State v. Garza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-18-575: **State v. Lintz**. Judgment of the district court for Scotts Bluff County reversed and vacated, and cause remanded with directions to remand to county court for that court to set forth factual findings related to the motion to discharge.

No. S-18-578: **Buggs v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-18-621: **In re Adoption of Chase T**. Appeal dismissed for failure to file briefs.

No. S-18-880: **State v. Harrison**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

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No. A-17-948: **Moulton v. Moulton**. Petition of appellant for further review denied on December 4, 2018, as premature.

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No. A-17-969: **State v. Moody**, 26 Neb. App. 328 (2018). Petition of appellant for further review denied on October 29, 2018.

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No. A-18-421: **State v. Jensen**. Petition of appellant for further review denied on December 3, 2018.

No. A-18-423: **Wells v. Lewein**. Petition of appellant for further review denied on October 26, 2018.

No. A-18-475: **State v. Hauersperger**. Petition of appellant for further review denied on October 18, 2018.

No. A-18-537: **State v. Reinhardt**. Petition of appellant for further review denied on October 5, 2018.

No. A-18-568: **State v. Trevino**. Petition of appellant for further review denied on October 9, 2018, for lack of jurisdiction.

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No. A-18-842: **State v. Gardner**. Petition of appellant for further review denied on December 6, 2018, as untimely. See § 2-102(F)(1).

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No. A-18-859: **State v. Puentes**. Petition of appellant for further review denied on December 19, 2018.

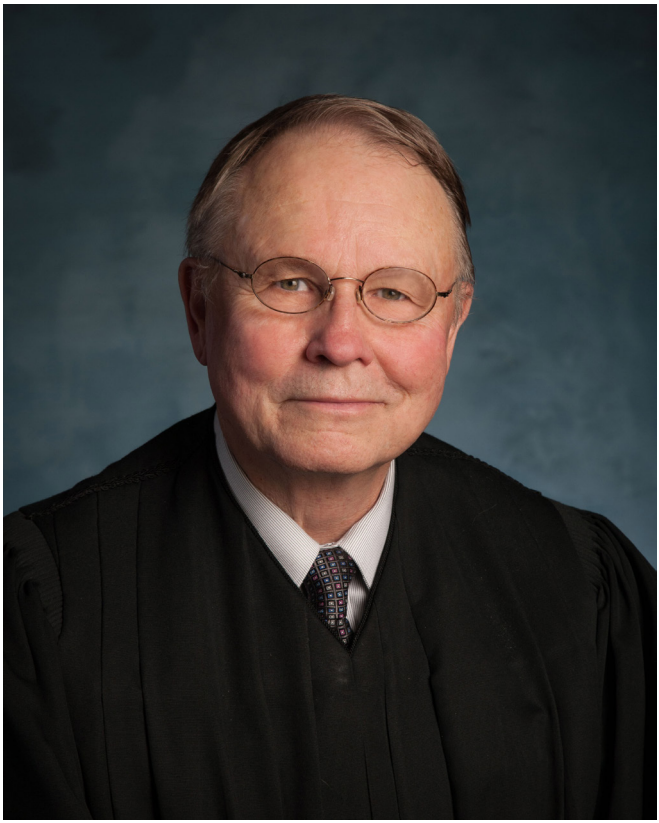
Nebraska Supreme Court

In Memoriam

Justice John F. Wright

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
September 24, 2018
2:00 p.m.

Proceedings before:
SUPREME COURT
Chief Justice Pro Tem Lindsey Miller-Lerman
Justice William B. Cassel
Justice Stephanie F. Stacy
Justice Jeffrey J. Funke
Justice Jonathan J. Papik
Justice John R. Freudenberg



Justice John F. Wright

Proceedings

JUSTICE MILLER-LERMAN: Good afternoon and welcome to everyone. The Nebraska Supreme Court is meeting in a special session on this 24th day of September, 2018, to honor the life and memory of Supreme Court Justice John F. Wright, and to note his many contributions to the legal profession.

I'm Lindsey Miller-Lerman, a Justice on the Nebraska Supreme Court, and because Chief Justice Heavican could not be here today, I'm serving as the Justice Pro Tem. And Chief Justice Heavican sends his regards and his deep respect for Justice Wright.

I would like to start this afternoon by introducing my colleagues who are here with me on the bench. To my immediate left is Justice William Cassel from O'Neill. And to his left is Jeff Funke from Nebraska City. And to his right is John Freudenberg of Rushville. And to my right is Justice Stephanie Stacy from Lincoln. And to her right is Justice Jonathan Papik from Omaha.

And it's our honor to introduce the members of the Court of Appeals. And we'll start with Chief Judge Frankie Moore, Judge Mike Pirtle, Judge Francie Riedmann, Judge Riko Bishop, Judge David Arterburn, and Judge Larry Welch.

The Court further acknowledges presence of the Wright family. And, first up, of course, is Justice Wright's wife, Debbie. Would you kindly stand? Thank you very much. And the rest of the family can now stand as a group. And present are Charlie Wright, at the counsel table, who will be sharing remarks; Jane Wright Jones from Madison, and her husband, Brian, who's able to be with us; John Wright from Texas. John's wife, Kristina, and the children are not able to join us today. And Ellen Wright in from Vermont. Thank you very much to the family. You all may be seated. Thank you very much for working with the Court on today's ceremony.

I'd also like to recognize former members of the Nebraska Supreme Court and members of the Nebraska Court of Appeals who are here with us today. Other members of the judiciary, members of the Bar, and other guests, welcome to you all. Forgive me for not naming names. That's where you always go wrong.

(Laughter.)

At this time, the Court recognizes Nebraska Court of Appeals Judge Riko Bishop. Although former Chief Judge Dick Sievers had prepared and shared today's event, he wasn't able to join us. And, of course, he sends his regards and deep respect. And Judge Bishop has graciously agreed to step in.

JUDGE BISHOP: It's my pleasure. Thank you.

Chief Justice Pro Tem Miller-Lerman and Justices of the Nebraska Supreme Court, my colleagues on the Nebraska Court of Appeals, Debbie Wright and the Wright family members, retired justices and judges, distinguished guests, and all guests joining us today to honor Justice John Flavel Wright. Again, thank you for the honor of letting me serve in Judge Sievers' place.

May it please the Court, we have five speakers and, I understand, maybe a sixth speaker presenting this afternoon — I was just notified of that — here to honor Justice John Flavel Wright. And our first speaker is Mr. Gary Young of Keating, O'Gara, Nedved, and Peter Law Offices.

Mr. Young.

JUSTICE MILLER-LERMAN: Welcome.

MR. YOUNG: Welcome. Thank you.

May it please the Court, to all the distinguished guests, to Debbie Wright and her children and family, my name is Gary Young. I'm appearing at the request of family. It is a great honor to speak today under these circumstances. I was one of the many who had the great fortune to work for Judge Wright as a law clerk. I graduated in 1995. Worked two terms with the Judge, from 1995 to '97. I refer to him a little bit informally as — maybe, as "the Judge," but that is what we all called him. And I think Sandi called him that too.

I will talk about working for him more in a bit, but, out of the gate, I want Debbie and the children to know, I am one lawyer that he gave much to. And I have unending gratitude for him and his influence on my career and my life during the 22 years I've been a lawyer. I've had two jobs since graduating from law school: first, working for Judge Wright; and then, second, working at my current firm, a firm that Judge Wright insisted that I go practice in. It was because of him I turned down an offer to work for a judge on the Seventh Circuit Court of Appeals. It was on his advice that I, at one point, pursued a judicial position myself; and it was his counsel that comforted me most when I was not selected. I cannot tell you how grateful I am for him.

When I was a third-year law student about to graduate the spring of '95, I had been recommended to Justice Gerrard, who had just been appointed to the Court and, because of timing, was desperate to find clerks. By accident, though, Judge Gerrard and I had a scheduling problem. I did not get in to see him in time. He had already hired a clerk. But Judge Gerrard called me to tell me he filled his spot, but he had a friend down the hall who was a little slow in hiring clerks. He needed a hand. It was Judge Wright. I bashfully say it today, Judge Gerrard, but I'm glad that you had already hired your last clerk.

Pretty soon, I was hearing from Sandi and heading down that quiet hallway and sitting in his great big office. I showed up in a dark green suit, the only one I had, and he must have thought I looked totally ridiculous.

(Laughter.)

I was all ready to talk about my grades or my writing and law review and all of that, but he did not want to talk about any of that. He'd called around, as I'm sure he always did, and I'd worked at the firm of his brother, and so I know he had plenty of dirt on me. Instead, we talked about baseball and we talked about fly fishing. Talked about funny trial stories he had and the Snake River and on and on. It went — I was there for something like three or four hours. I told him I grew

up goose hunting on the Platte River with my grandfather, and he knew the river and he actually knew where our blind was. So, he told me a funny story about him and his brother catching a poacher shooting a great big white swan in one of those blinds during goose season. We laughed about what bad luck it had to be to be shooting a bird illegally from a blind up the river where, sitting, was a member of the Game and Parks Commission and a sitting Judge of the Nebraska Supreme Court.

(Laughter.)

He hired me that afternoon. I was very grateful to have a job, but I really had no clue about how great a thing I had actually stumbled into. While I love the practice, I love my firm and my partners and so on, the two years, again, that I worked with Judge Wright really was the best years of my legal life. We cranked out cases, of course, and he assigned me some really interesting ones. At the time, it was a very tumultuous period of time with the Nebraska Supreme Court. Judge Wright had been a lone dissenter on a series of cases involving second degree murder. And I showed up just about the time it was — it seemed like there was a case on this issue every month. Those of you who may remember that issue, those were ca— those cases had an extremely high profile. Judges were being personally attacked, at the time, in the media and politically attacked as well. It was a fascinating time, on one hand, but it was also very hard, and Judge Wright did not appreciate the way the judges were being treated at that time.

It was also a difficult time because the Attorney General was actively pressing for executions for the first time in a very long time. The death penalty cases were appearing often. I worked there when significant litigation occurred involving cases of John Joubert and Robert Williams, Michael Ryan. Judge Wright was certainly committed to law and justice and he was never one to shirk his duties. There is no doubt. But I also know from personal conversations, the gravity of these cases, both from the violence involved and, also, the heavy reality of their penalties, were very hard on him personally.

Of course, we worked on many important and interesting cases. And what everybody has said about Judge Wright since he's passed is certainly true: He was very smart; he was imminently sensible; he was always the most personally prepared judge or, at least, it seemed that way to us law clerks. Andy Davis and I were his clerks in the first year I was his clerk, and all the second degree murder cases were very active at that time. We loved watching him work in the courtroom. The poor public defenders that were called to argue these cases were faced with having a winning case at trial but being forced to deal with Judge Wright as he slowly and deliberately took on that issue case-by-case.

When we attended arguments at that time, Judge Wright was something to watch. He was certainly the hot judge, as we clerks referred to them, most, if not all, the days of arguments that I saw him. He was always extremely well prepared. If he cared about an issue and he didn't necessarily agree with a lawyer on it, you could just kind of see him — his mind start to work like he was timing a fast ball. I would hear a lawyer start heading down some dangerous line of argument and then I would see him start to perk up on his chair a little bit. He would dig in a little and lean forward, and Andy and I would look over at each other and kind of mutually cringe. We knew what was coming. He was fair, though. He would start with mercy by giving the foolish lawyer the puzzled Judge Wright look you all surely remember. And then, only if they persisted, he would fillet this lawyer slowly like a trout.

(Laughter.)

He would deliberately and politely hone in on a salient point with such skill, one of two things would happen: the lawyer would be reduced to a judicial puddle or, in a few cases I can remember, the Judge would look over at us and kind of perk up his eyebrows being impressed. Maybe he was persuaded.

I got to where I knew him so well that, after the Clerk of the Court passed out the briefs each month, I would be reading along and something in the brief, maybe totally ridiculous, from some lawyer; and then, I would look over at the phone;

and it would ring on schedule. Here's what he would say. "Gary, this is John Wright," as if I didn't know.

(Laughter.)

"Have you read this yet? Come down here." So, I would go down there, and he would have turned the whole thing upside-down and inside-out and he would give me that puzzled look, and that was all I needed to know. Most of the time though, I think, I just enjoyed being around him and I know he loved being around his clerks.

Two things I wanted to mention to the family about Judge Wright that really mattered to me, and then I will sit down. First, during the spring of 1997 while I was working for Judge Wright, my younger brother, who was 27 at the time, died suddenly and tragically. I had been working for Judge Wright almost two years, and I was on the job market and about to leave him. My wife was pregnant with our first child. I cannot express to the family how empathetic Judge Wright was with me at that time. When we learned about my brother's death, he called me when he learned about it. He asked about my father. He told me to take whatever time off I needed, of course. And then, about 15 minutes later, there was a knock on my door at our little house on C Street. It was Judge Wright. He came in and just sat down with us. He didn't say anything. He just told me he was sorry. About a half-an-hour later, he left quietly. He expressed such care for me at that hard time, I can still feel the impact of it as I stand here many years later.

Secondly, he had a pivotal influence on my career. When I was finishing my second year with him, I was still trying to find my way to becoming a law professor. This career option was something Judge Wright never really understood.

(Laughter.)

So, after I had worked for him a while, he never stopped encouraging me to go into practice. And, as I found out only later, he was reaching out to all sorts of firms he knew for me. He called Judge Sievers, who was a judge on the Court of Appeals at the time and had been a partner at the firm I'm at now. They had offered me a job and were kind of waiting on

me to decide what I wanted to do when I grew up. But here I was, thinking I wanted to go build my law professor résumé by serving for a federal judge as a clerk. So, one day, Judge Wright called me into his office and he sat me down. He said, "I just talked to Judge Manion on the Seventh Circuit. He wants to offer you a job, but he asked me if you could write. I told him you were a good guy, but not really a writer."

(Laughter.)

"That's a problem. You need to be a tax lawyer or something." Then, he gave me a grin. "No, I didn't tell him that."

(Laughter.)

But then, he spoke to me very candidly about how much he loved the actual practice of law, the rough and tumble, how he missed it being on the bench. He thought I would love it too. "You have to do what you want," he said. "You think you won't like the practice, but I know that you are wrong." But he didn't know at that time that I was kind of coming around to his way of thinking. My wife didn't want to move. And I felt like Judge Wright really knew me and knew what was best for me. And so, that was it. I called my contact in Judge Sievers' old firm that afternoon and took the job.

In sum, I am very grateful for my time with Judge Wright on this Court. And to Debbie and the children, I am very grateful for your husband and your father's life. Thank you.

JUSTICE MILLER-LERMAN: Thank you so much.

JUDGE BISHOP: Our next speaker is the Honorable William Connolly, retired Justice of the Nebraska Supreme Court.

JUSTICE MILLER-LERMAN: Thank you so much.

JUSTICE CONNOLLY: Justice Miller-Lerman and members of the Court, Debbie, family, friends, distinguished guests, I'm delighted to be here today to say a few words about my friend and colleague, John Wright. I served with John for almost 24 years. I first met John when Governor Ben Nelson appointed both of us to the Nebraska — newly created Nebraska Court of Appeals. I had heard of his reputation. I knew he was a seasoned, experienced trial lawyer from Scottsbluff. I knew that he was a — from a distinguished legal family.

I soon learned that he was tireless worker. Because, at that time, if you remember, the judges that are here, when we first came onto the Court of Appeals, it was to alleviate the backlog of the Supreme Court. So, we were writing five to seven opinions a month, and that's a lot of opinions. And John soon demonstrated that he had a quick, a disciplined legal mind. He was a key contributor to the success of the Nebraska Court of Appeals, and they're basking in that success right now.

John served on the Court of Appeals about two years and then Governor Nelson appointed him to the Supreme Court. And then, I followed him in about eight months later. He made the transition easy for me, transitioning from the Court of Appeals to the Supreme Court. As you know, there's a lot of difference in the internal organization, administrative duties. John helped immensely getting me acquainted and up to speed on the organization and the internal workings of the Court. He also — I could observe that he earned the respect of the other sitting members of the Court at that time by his work product; his work ethic; and, of course, by his keen sense of humor and quick wit.

As Gary said, John was a great conversationalist. He was well-read, he took an interest in a lot of subjects, and he could discuss a lot of subjects. He could — if you asked him what time it was, John would tell you how the watch was built.

(Laughter.)

He, early on in his career, mastered the principles and the nuances of DNA. I think he was self-educated on that issue and, luckily he did, because, at that time, the DNA issues was trickling up through the trial courts to the appellate level. And he was an immense help, to me and the Court, in figuring out this new phenomenon of DNA.

But he was also a good listener. John would take his afternoon walks for exercise, and I don't think he got much walking done because he was always talking to somebody in the rotunda.

(Laughter.)

IN MEMORIAM
JUSTICE JOHN F. WRIGHT

He was a good listener. I think everybody liked him except a cleaning lady. John told me of the incident in — when he was assigned a criminal case, pornography, and it was adult films. And he had the task of writing the opinion. And the author judge always has the heavy oars in the water, and so he had to view this — these adult films, the pornography. And so, after hours, after five o'clock, John was viewing — put the disc into the machine and was observing the TV when the cleaning lady walked in.

(Laughter.)

The cleaning lady took a look at the TV, gasped, looked at John, and immediately fled the room.

(Laughter.)

Now, I don't know if John ever had the opportunity to tell the cleaning lady what his role and what the purpose of him viewing the film, but I wonder if she'd even believe it if he did try to tell her.

It is said that a judge's decisions and opinions are the product of the judge's personality and character and training before they go on the bench and, also, what they observe — absorb after reaching the bench. Let me tell you, John absorbed the substantive and procedural aspects of the law like a sponge. He had that ability to cut through the legal fog and could carve out the real, substantial issue in the case early in the process. He often said — if I heard it once, I heard it 20 times, he would say, "The author judge has to frame the issue. Don't let the trial lawyers, the briefs. Don't follow their rabbit tracks; don't get into the weeds with them." His theory was, if you — if the judge framed the issue early, then the opinion would write itself. And I came to believe in that theory, and John was right.

In writing his opinions, John wrote like he spoke: concisely, clearly, persuasively, and decisively. He told me, at one time anyway, that he imagined his audience was a 12th grade senior class and that he would think of them when he was writing the opinion. And he had an uncanny ability to reduce complex issues to simple concepts and could write about it. He shunned

legalese and Latin phrases. His writings were very clear and direct, and they were clarity of expression and thought.

It has been said that an appellate — 80 percent of an appellate judge's cases are routine. By routine, I mean they are readily apparent as to the result. The other 20 percent is where the judge, as you now know, you judges, they are — you earn your pay. John, in those difficult cases, could make the difficult decisions and sometimes unpopular decisions. He had the moral courage to follow his convictions. He could not be pushed. John could not be pushed. And this steadfastness, this — sometimes described as stubbornness, this steadfastness was his guiding principle in seeking justice, whether it be for a member of the oppressed or a Fortune 500 company.

Of course, we know that judges disagree; and the law is complex, statutes can be muddy, the law can not be clear, and reasonable minds can differ. And John had the ability that, when he dis— he had the ability to disagree, but not be disagreeable. He would come in, if he had a point to make and he wasn't in agreement with the opinion that I was writing, he would politely tell me where he thought that the law should go and where I was incorrect. John had that sense or that ability to attack positions not people.

Unfortunately, in 2010, the first round of cancer attacked John. I saw he was away from the Court for some months. I wondered, at times, whether he would ever return. But with the — after a long period of rehabilitation and with the help of Debbie, his soul mate and medical advocate — and he certainly needed a medical advocate at that time — John came back like a lion and he served with distinction until his death in March of 2018.

In the early 60s, the national media coined a phrase about the early astronauts, a phrase that captured their essence, their quiet competence, their quiet courage, their grace under fire. And they said or described it, a term, the right stuff. John Wright had the right stuff. And if Shakespeare is correct that a man's character is the soul — is the jewel of his soul, John's soul shines brightly. Thank you.

JUSTICE MILLER-LERMAN: Thank you so much.

JUDGE BISHOP: Our next speaker is Mr. David Domina of Domina Law Group.

Mr. Domina.

JUSTICE MILLER-LERMAN: Good afternoon. Thank you.

MR. DOMINA: Mrs. Wright and family members, members of the Supreme Court, and the people of Nebraska, John F. Wright commenced his career in the law upon admission to the Bar in 1970. At the time, this Court was writing Volume 185 of the Nebraska Reports. When Justice Wright's death ended his career, the Court was writing Volume [2]99 and the Nebraska Court of Appeals was writing its 25th volume. John Wright's career in the law spanned 43 percent of the published appellate literature of this state.

The records of this Court disclose that John Wright was here as an advocate in the practice of law 22 times. His first trip from Scottsbluff was a child support case. He turned that case into something. He found an issue and he made his first appearance here an issue of first impression. A decade later, he was back here for a farmer who couldn't get to his farm because he needed a bridge to get over an irrigation canal. John found an obscure statute to help that farmer and this Court agreed.

The Court of Appeals made John Wright Judge Wright. That happened in early 19[9]2, and several here share the distinction that was his to be on the Court of Appeals at its inception. Judge Wright joined Justice Miller-Lerman and author Judge Sievers to write a case called *1733 Estates Association v. Randolph*, published at 1 Neb. App. 1. Twenty-one pages later, Judge Wright was a author judge in a case in which a criminal conviction was under review. Writing for a unanimous three-member panel, Judge Wright, in his first published appellate opinion, taught. He spoke to the sentencing district judge, who had said when pronouncing sentence in the case that he had a sentencing policy, and that sentencing policy turned into the way that he sentenced criminals before him in certain kinds of cases. Judge Wright allowed as how the Nebraska Court of Appeals, in its third published opinion, would tell the district

court bench that it disapproved because, "Such a policy suggests the absence of the exercise of discretion and renders the presentence investigation or the recommendation concerning probation meaningless. Mandatory sentences may be imposed only by legislative act, not by the judicial policy of a trial judge." Judgments like that made Nebraska judges sit up and take notice.

Westlaw reveals about 60 opinions by Judge Wright on the Court of Appeals. One displays the facile mind of a person who could understand physical things, as well as the metaphysical things, of the law. It was a sales tax exemption dispute involving one of Nebraska's largest industries. Judge Wright found Nucor's mill rolls and billet guides are used as scrap and become component parts of Nucor's steel only when their usefulness at making steel is exhausted. The mill rolls and billet guides are not purchased for their value as scrap, but for their use in making steel. The purchase price of the mill rolls and guides is not exempt from taxation. Judgments like that make Nebraska's treasury safe.

In *State v. Bennett* in 1993, the Court was asked to consider a criminal sentence for an assailant who snatched a purse and drove off with the owner of the purse, trying to retrieve it, entangled in a seat belt and dragged 1.6 miles dangling from the side of the car. The man we remember affirming the sentence, which was within statutory limits, wrote, "The senseless nature of these crimes leads us to find it nearly inconceivable that Bennett would claim his sentences are excessive. Similar to the cowboy who was dragged behind the horse over rocks and cactus, the helpless victim was dragged by an automobile over concrete and asphalt." Judgments like this make Nebraskans safe.

Judge Wright became Justice John F. Wright when this Court was writing Volume 245 of the Nebraska Reports. Justice Wright wrote first for the Court in *Lawyers Title Insurance Company v. Hoffman*. In that case, a subsequent surveyor brought suit against the original surveyor alleging that the first surveyor had misplaced pins on a boundary line and was

negligent and liable to the second surveyor because he should have known the second surveyor would depend on him for putting the pins in the right place. But Justice Wright saw through that and held against the lazy second surveyor. Judgments like that keep Nebraskans grounded.

In *City of Ralston v. Balka*, the majority of the Supreme Court struck the State lottery statute as contrary to Nebraska Constitution, Article III, Section 24. Article III, Section 24, was the sole ground for the majority's opinion for striking down the lottery. Focused, in dissent, Justice Wright wrote, "I respectfully dissent from the majority's opinion that L.B. 795 is unconstitutional. The question of whether this law violates Article III, Section 24 is not before this Court. The parties didn't raise it in argument, the district court didn't rule on it, and I express no opinion on the subject." Dissents like this purely keep the Supreme Court reminded that it's right because it's final, but it's not always final because it's right.

In *State v. Grimes*, Justice Wright wrote a 3,000 word dissent arguing that the Court was wrong in holding that malice was an element of Nebraska's second degree murder statute. Justice Wright maintained his position on that issue throughout more than a dozen dissents. Finally, in *State v. Burlison*, the Court spoke, per curiam. In one paragraph, it overruled and vacated 18 previously affirmed murder convictions. It wrote, in its per curiam opinion, "Upon further consideration, we determine that our prior decisions interpreting Section 28-304 to include malice as a necessary element of the crime of second degree murder were clearly erroneous and they're overruled." The author judge in *Burlison* is not known, but the opinion appears to be lifted from a 3,000 word dissent by a man from Scottsbluff. Judgments like this keep the law itself safe.

Justice Wright was here when this Court sat in trial in articles of impeachment in 2006. He was here in 2017 when three same-sex couples won a case to enjoin the governor from refusing to consider same-gender couples as foster or adoptive parents. In *Stewart v. Heineman*, Justice Wright wrote for the unanimous Nebraska Supreme Court, "The harm the plaintiffs

wish to avoid is not just the possible, ultimate inability to foster state wards; it is the discriminatory stigma and unequal treatment that homosexual foster applicants and licensees must suffer if they wish to participate in the foster care system." The imminent inquiry — the imminent injury was "the plaintiffs' inability to be treated on an equal footing with heterosexual applicants." "We find no merit in the defendants' narrow view that the action presented only a hypothetical harm because the plaintiffs have not shown an ultimate inability to become foster parents." Decisions like that make all Nebraskans equal.

Two more opinions of Justice Wright must be mentioned. His final published opinion was a dissent in *Waldron v. Roark* less than a year ago. He and a colleague refused to extend police immunity to what he saw as untenable facts. Justice Wright wrote, "I respectfully dissent. In my opinion, no reasonable law enforcement officer would believe that it is lawful to forcibly enter a residence while in plain clothes to arrest a resident without providing any evidence of authority to do so." As Marilyn Waldron, aged 78, answered her door one evening, a stranger shoved his way past her, into her home, his gun drawn. Another stranger soon followed. They were looking for her grandson. They claimed to be law enforcement officers, but were not in uniform. They were unable to produce a badge or a warrant to justify their intrusion. And, as instructed by her late husband, a captain of the Nebraska State Patrol, Waldron demanded to see a badge or a warrant. Dissents like this remind us how precious life is outside a police state.

Justice Wright's final majority opinion was for the unanimous Nebraska Supreme Court in *Kozal v. Nebraska Liquor Control Commission*, Justice Wright knew he was writing a decision that would mark history, though the opinion had to rest solely on rules of civil procedure. He wrote, "The often unremarkable process of renewing a liquor license has involved considerable controversy . . . . These retailers are located in the unincorporated border town of Whiteclay . . . just across the line from the Pine Ridge Indian Reservation in South Dakota, where the sale and consumption of alcohol is

prohibited." With this decision, Justice Wright for the Supreme Court ended an historic stain that extended beyond the presidency of Chester Arthur and occupied the personal attention of four of President Arthur's successors in the presidency of the United States. With decisions like this comes hope for people who need hope.

I want to speak now, Madame Presiding Justice, to the people of Nebraska just a moment. I want to say that, in memory of Justice Wright, we must all be challenged to ever affirm words expressed in the Enabling Act of 1864, signed by President Lincoln, that set the stage for the United States to add Nebraska to the roll of states three years later. In that enabling act, we were required to do certain things, including to adopt a constitution. That enabling act says, paraphrased only slightly, we are people of Nebraska, a state with a constitution is not repugnant to the Constitution of the United States and the principles of the Declaration of Independence, and provided further that our constitution does provide by an article forever irrevocable without the consent of the Congress of the United States, first, that slavery or involuntary servitude shall be forever prohibited in this state and, second, that perfect toleration of religious sentiment shall be secured and no inhabitant of this state shall ever be molested in person or property on account of his or her religious worship.

Finally, Madame Presiding Justice and present and former appellate justices, may I provide Volume 1 of the Reports of the Nebraska Court of Appeals and request that each of you present and former appellate jurists here today sign it legibly, or print after your signature, if you must. And on behalf of the practicing Bar that appears before this Court, Madame Presiding Justice, I move the Court for an order tendering this volume to Mrs. Wright and her family as a memento of our moments together today.

JUSTICE MILLER-LERMAN: That request is granted, and I'm sure Debbie will treasure it. Thank you.

JUDGE BISHOP: Chief Justice Pro Tem Miller-Lerman, a request has been made to modify the program. Former Chief

Justice John Hendry would like to come up and make a few remarks with your permission.

JUSTICE MILLER-LERMAN: Yes, of course.

Welcome, Chief Justice Hendry.

FORMER CHIEF JUSTICE HENDRY: May it please the Court.

JUSTICE MILLER-LERMAN: Thank you for joining the ceremonies.

FORMER CHIEF JUSTICE HENDRY: You're welcome.

Thank you, Debbie, for giving me — sending me out a notice to say a few words. I was just so lost coming here and not being able to tell everyone how I feel about Justice Wright.

May it please the Court, my name is John Hendry and I served as Chief Justice of this Court from October 1st, 1998, to October 2nd, 2006. Judge Wright was a senior member of the Court my entire eight years as Chief Justice. I am extremely saddened by Judge Wright's passing. Judge Wright was an outstanding jurist but, even more, and outstanding person. The eight years I served with Judge Wright as Chief Justice was the most enjoyable of my entire legal career. The joy was, in large measure, due to the members of the Court and how well we enjoyed each other's company, both on an academic and personal level. Judge Wright was always an integral component of any legal decision. His keen mind and ability to express his views in both a congenial yet professional manner was a great asset to the Court and often enhanced the quality of the Court's opinions. When Justice Wright talked, the Court listened. His mind and congeniality will surely be missed by the Supreme Court.

On a personal level, I will miss Judge Wright a great deal. We started almost identical — we shared almost identical political views, and it was always a joy to discuss them with him. Later, after my retirement, we continued that dialogue while walking a track together at Madonna Fitness Center. How I enjoyed those walks and discussions, and Debbie Wright would often join us. I always felt better after these

walks and the sharing of our respective views on the current and social landscape. I will always remember Judge Wright's smile every time I went to his office and the discussion ultimately turned to his children, whom he was so very, very proud of. Standing here, speaking to the Court and those gathered here this afternoon brings both sadness at Judge Wright's passing, yet joy for the privilege of serving with Judge Wright and the happiness he brought to the Court and to me. I will miss him dearly. Thank you.

JUSTICE MILLER-LERMAN: Thank you.

JUDGE BISHOP: May it please the Court, Justice John Flavel Wright loved to tell stories. As we remember and honor him, it appears appropriate to tell a few of our own. Let me begin with a love story. John and Debbie met in a Husker football ticket line. He was in law school; she was a junior in college. According to Debbie, John was the apple of any girl's eye. After John graduated from UNL's law college in 1970, he went into the Army and was stationed in Georgia for about half a year. The Army had a surplus of second lieutenants at the time, so John returned to Scottsbluff, registered for the Nebraska National Guard, and began practicing law at his father's law firm. Debbie was teaching in Omaha, but she and John managed to maintain their long-distance relationship until they wed on July 7th, 1972. Thus began their 45-year journey together.

Debbie soon discovered that John loved to make things and fix things. Ever enterprising, John found a way to blend his joy of hunting with his love of making things. Not too long after they were married, John told Debbie, "We're going to make portable duck blinds."

(Laughter.)

The city girl found herself in a garage with hay from an uncle's farm, chicken-coop wire, boards, and thick leather bands. Next thing she knew, she was stuck in a portable duck blind thinking to herself, "My true love has put me in a portable duck blind."

(Laughter.)

Debbie had to admit though, John was kind of a genius at putting things together. And a perfectionist. He made 38 birdhouse kits at night, after work, in his white shirt, tie tucked in, out in the garage, 38 birdhouses — kits for Debbie's class at Elliott Elementary. He wanted to make sure every hole was perfect so the children would have no trouble putting those kits together.

After Debbie and John's children were born, they made a commitment that they would always have dinner together with their children. Even if John had to go back to work, he would come home and have face time and jolly times with the children. The dinner table was always funny, very engaging. Debbie said that, as funny as John was, their children became even funnier. Dad had passed the comedic baton to his children. John coached, attended sporting events and recitals. He clearly treasured his children and, in later years, his grandchildren.

John Wright leaves a strong legacy as a devoted husband, father, and grandfather. John enriched the lives of those around him. But John's life, too, was enriched by those close to him. His strong, intelligent, and witty wife and his bright, talented children, all contributed to the essence of John Wright, and we thank you all for that.

As mentioned earlier, in 1970, John began working with his father, Floyd Wright, at his firm in Scottsbluff until Floyd's death in the latter part of that decade. According to Debbie, John and his father were best friends. She said they would light up a room with conversation. After his father's death, John eventually opened his own firm on the fourth floor of a utility company. He later bought the building where his father's office had been and moved back to that location.

John practiced law in Scottsbluff for 21 years before becoming a judge. During that time, he was Chairman for the Board of Directors of the Panhandle Legal Services, President of the Western Bar Association. He also served two terms on the Scottsbluff Board of Education, was a member of the Coordinating Commission for Post-Secondary Education, and received the Friend of Education Award from the Scottsbluff

Education Association. It is evident that John was passionate about education, was very devoted to his community, and felt strongly about public service. However, sometimes John's passion and vision for his community did not align with majority thinking. Apparently, there were schools in Scottsbluff where the children were either predominantly white or predominantly Hispanic. When John voiced his opinion that the schools should be integrated, there was an effort to have him recalled from the school board. He beat that vote, but his law practice suffered. No one came through his law office doors during that time. But that did not phase John Wright, because this was about principle and he knew how to stand firm. As Debbie said, "In spite of that negative fallout, we were a family that stood on principle and I loved him for that."

Debbie said that, all of John's life, he was a great fan of civil rights and social justice. And she stood by him, equally compelled and always supportive. After almost 100 years of Wright-family lawyers practicing in the Scottsbluff area, and after 21 years as a lawyer and champion of education and community growth in Scottsbluff, John Wright made the difficult decision to leave Scottsbluff to answer another calling in public service, to become one of six judges appointed by then governor, Ben Nelson, who is present today, to serve on our newly created Nebraska Court of Appeals.

Three of those original six Court of Appeals judges were subsequently appointed to the Nebraska Supreme Court. Justice John Wright was first and, as indicated by Justice Connolly, he was shortly thereafter, and our Chief Justice Pro Tem Lindsey Miller-Lerman thereafter. The three other original Court of Appeals Judges were retired Judge John Irwin, who is also present with us today; retired Judge Richard Sievers; and retired Judge Ed Hannon, who sadly passed away last year.

John Wright was 46 years old when he took his official oath of office in January 1992 to become one of the original six members of the Court of Appeals. The new judges were paid $78,270, and a backlog of almost 1,000 cases were waiting for them. They began hearing cases the month after they

were sworn in and, within the first year, they had disposed of about 1,600 cases. They were a highly productive and capable group of judges and much of the early opposition to the court — creation of this new intermediate-level court — diminished very quickly as a result of their dedication and high-quality work product.

At the time Judge Wright was appointed to the Court of Appeals, Jane was 15, Charlie 11, John Floyd 8, and Ellen 6. Judge Wright was quoted in an Omaha World Herald article as saying that he considered rearing his children to be his most important job. A year after his appointment to the Court of Appeals, Judge Wright emphasized that it was important for judges to remain in touch with their community. He said, "My idea about being a judge is you take your work very seriously, but you don't take yourself seriously. You don't isolate yourself. It's very important to maintain contact with the community so you have a sense of awareness of what's going on." Judge Wright said his nighttime job as a father was as important to him as his daytime job as a judge. He said, "You can't be happy and successful unless you do both well. I mean, you're reading Supreme Court opinions in the daytime and nursery rhymes at night." John Wright's love for his job and his love for his family never wavered.

I met John Wright in that first year of the Court of Appeals when I worked as a judicial law clerk for then Chief Judge Richard Sievers. Being part of that inaugural court was an incredible experience. As Judge John Irwin said back in January 1992, "The Court's six judges have started down a path with no footprints in front of them." They were in uncharted territory. I was able to watch first-hand as they worked hard to develop efficient processes without sacrificing quality and to give the citizens of Nebraska faster access to having their appeals heard.

After I was appointed to the Court of Appeals five years ago, I had the great privilege to reconnect with Justice Wright when sitting as a substitute judge on the Supreme Court on a number of different occasions and, also, just chatting with

him when I'd run into him in the cafeteria or the hallways of the Capitol building. He was still the same warm, kind, soft-spoken man I remembered from 1992. Still deeply intellectual and faithful to the law; still intensely curious about everything; still compassionate about people and fairness and equality; still devoted to his family. For all of us who were so lucky to have Justice John Wright touch our life, may we let his genuine goodness resonate within us always and compel us to model his generous and kind spirit.

I would now like to share a few final stories and comments about Justice Wright as told by other close to him. Scott Tollefsen, who I believe is here, he was Justice Wright's judicial law clerk from 1999 to 2001 and he shared Justice Wright's passion for Husker football. So, after a game weekend, he always looked forward to Monday morning when Justice Wright would give his, quote, very objective critique of the game.

(Laughter.)

This would include filling out numerous yellow sheets of paper with drawings of plays where he felt our coaches or players had fallen a bit short of what was needed to be successful. According to Scott, Justice Wright had a clear plan as to what our beloved Huskers needed to do to turn things around. Scott says, "Clerking for Justice Wright was a wonderful experience. I recall numerous times where he would remind me that, even in the most complex cases, the decision will ultimately turn on one issue. Being able to identify that issue and apply the law accordingly was our goal. To this day, I continue to apply that principle in my practice. Simply put, I could not have asked for a better mentor to begin my legal career. Justice Wright brought a razor-sharp legal mind to the bench. This trait, along with his unwavering care for people in need, made him truly a remarkable judge."

Now, a perfect example of how Justice Wright was inquisitive about everything and reveled in soaking up details. Brenda Luers served as judicial law clerk from 1996 to 1999 and, as his career law clerk in the recent couple of years. When she

returned from a trip to Alaska and told Justice Wright how she had flown over glaciers in a small float plane, he wanted to know exactly what kind of float plane. Was it a Piper? A Cessna, maybe? A single-engine or a twin-engine? A monoplane or a biplane? How many seats did it have? What kind of cargo hold?

(Laughter.)

According to Brenda, he seemed a little sad when she told him she had no idea.

(Laughter.)

But Justice Wright soldiered on and, upon further questioning, managed to flush out that it was a single-engine biplane, six seats, and probably a Piper. Though learning about small aircraft was not a topic in which she had any particular interest, Brenda said Justice Wright's enthusiasm was infectious. Brenda said that sometimes when she would go see Justice Wright in his office, her co-clerk would quip, "See you in three hours."

(Laughter.)

She admits that was not entirely inaccurate. But no matter what they ended up talking about, Brenda said it was always time well spent.

Greg Ramirez clerked for Justice Wright from 2014 to '16 and considered him an old-school scholar with a traditional way of working. Greg never received an email from Justice Wright; rather, Justice Wright would call him into his office for face-to-face talks. Greg never saw Justice Wright's computer turned on.

(Laughter.)

Instead, his desk was covered in books and printed cases with notes written in the margins. In his second week of work, Justice Wright asked Greg to go to the law library and pull a treatise off the shelf. Greg said, "At that moment, I could have probably counted on one hand how many times in the prior decade I had to physically go to a library and pull a book off a shelf. This was a culture shock for a brand-new lawyer and millennial." Greg says, "In private practice now, the ever-changing

technology, new programs, and software available to lawyers can, at times, be overwhelming. More than ever," he says, "I appreciate the simplicity and honesty about Justice Wright's methods and scholarship. Perhaps this is what made it so effective. Working for Justice Wright was a great honor. I will cherish my experience with him for the rest of my career."

Daniel Cummings clerked for Justice Wright from 2016 to '18. He also fondly remembers Justice Wright stories. Work discussions inevitably grew into stories about his time practicing law in Scottsbluff, his college and law school days at the University of Nebraska, Husker football, or his family. He would talk about the P-51 Mustang airplane or this or that aspect of some tank, artillery, or gun, and Daniel would nod along and pretend he had some clue about these things too. Justice Wright would talk about his time in the National Guard and about his uncle's service in the Navy in World War II. Daniel says, "Justice Wright's stories offered a glimpse of a life that was full and well-lived. Justice Wright's stories" — excuse me. He said, "I didn't just learn about law in my time from him, but I learned from his example of always treating people with respect and doing what he believed was right. He was a great judge, a great storyteller, and a great man."

Justice Wright's administrative assistant, Tracie McArdle, recalled Justice Wright telling her about a time he pulled into a grocery store parking lot, saw a gentleman walking down the street with four grocery bags, and Justice Wright told himself, if he sees him when he gets — comes back out of the grocery store, he was going to ask him if he needed a ride. And, sure enough, Justice Wright drove down the street, saw the man with the grocery bags. He looked a little disheveled, a little down on his luck. Justice Wright offered him a ride and the man accepted. Justice Wright drove about a mile and a half to an apartment complex where he dropped the man off. Tracie says, "This is just one example of how kind Justice Wright was to everyone. He loved to talk, but he was also a good listener. And he always tried to help someone if he could." She said, "During the time I worked for Justice Wright, he showed

over and over again what a great person he was in just the little things he did and said. He was a very unique and genuine person."

Chief Justice Mike Heavican has described Justice Wright as kind-hearted and strong-willed, open-minded but decisive, collegial and courteous to other members of the Court. He had a model judicial temperament. Chief Justice Heavican said that Justice Wright's loss leaves a great void as our longest-serving, most-experienced member of the bench. Justice Wright's 24 years on the Supreme Court made him the third longest-serving justice of the Nebraska Supreme Court since its inception in 1854.

And how he loved his work on the Court. Debbie said that John loved studying the law. He loved the research. He loved to start at the outside and come into the bullseye. He loved that part of the law. And she said, "John never felt he was special; he was just a guy going to the office."

Debbie, our many thanks to you and your family for sharing Justice John Wright with all of us in the judicial branch, the legal community, and the people of Nebraska. In addition to his legacy as a devoted husband, father, and grandfather, he leaves another strong legacy as an outstanding lawyer and jurist and as a genuinely good and kind man. Winston Churchill said, "We make a living by what we get; we make a life by what we give." And, oh, what a life Justice John Wright made. He gave so much to so many in so many different ways. We will sorely miss his presence, but his essence will remain in our jurisprudence and in our hearts forever.

We will now have a final presentation, a special reading by Charlie Wright, son of Justice John Wright and Debbie Wright.

JUSTICE MILLER-LERMAN: Thank you, Judge.

MR. CHARLES WRIGHT: Good afternoon. May it please the Court, I'm Charlie Wright. And on behalf of my loving mother, Debbie Wright, and my dear siblings, Jane Wright Jones, John Wright, and Ellen Wright, we extend our sincerest appreciation to those who could join us and those who put together this memorial service honoring my father, Judge John

Wright, his extraordinary and honorable service to the state and the people of Nebraska.

My intention today was to read the speech he wrote and intended to deliver at a banquet for human rights. While my dad saw the importance of growing with society in one's interpretation of the law, he did not see the same importance in growing with the changing technologies.

(Laughter.)

So, what I have instead is a copy of his statement when he was being considered for appointment to the Supreme Court.

"Upon returning from the Army, I began the practice of law in 1970 with my father. He was my mentor and his standards of practice and opinions in the judicial system greatly influenced me in the practice and in my service on the Nebraska Court of Appeals. It was his opinion, and is mine, that judges should be pragmatic. The law should be written with clarity and in a manner that is understandable by the public. In many of life's occurrences when there has been a death or tragedy, we are not able to answer the basic fundamental question: Why? But in writing the law, the reason for the decision should be stated with brevity and clarity. What we are not able to understand we tend to shy away from and do not respect. By answering this question, why, the Court promotes respect for the law and the judicial system. I believe this principle is fundamental.

"All judges must be aware of the problems in society. Justice Learned Hand stated the following guideline: 'Judges must be aware that there are before them more than verbal problems, more than final solutions cast in generalizations of universal applicability; they must be aware of the changing social tensions in every society which demand new schemata of adaptation which will disrupt if rigidly confined.' Based upon this guideline, I am of the opinion that a judge must maintain contact with the concerns of the public. The courts and society have a continuing and ongoing dialogue about the law. What is decided by the Court has a direct bearing on the public and its respect and appreciation for the law. The Court must be able to adapt to the needs and requirements of

society. The ability of the public to understand what the Court has decided and why it has done so clearly enhances the public trust in our system of being governed by laws and not by people, men or women.

"I see the position of a Supreme Court judge as an opportunity to continue to serve the people of Nebraska. Paramount is one's personal and judicial integrity. There must be an absence of bias or prejudice by the judge. The qualifications for this position must necessarily include the ability to recognize and understand complex legal issues and to be able to simplify such issue into terms that can be understood by the litigants and the public who are affected by the decision. If communication between the courts and the public is to remain effective, the public must understand what the Court has decided. In the courts in which I practiced law, I very much appreciated the patience and temperament of those judges who listened fully to both sides of the issues and, therefore, enabled the lawyers to fully represent their clients.

"In oral arguments before the Court of Appeals, I have tried to challenge each side to present that argument which best supports this position of the Court. It has been my philosophy to indicate, during argument, how I feel" — excuse me — "how I view the case. It is my opinion that this approach gives the lawyers the opportunity to present their best arguments in the brief time that is allotted. This requires intense preparation, concentration, and the right judicial temperament.

"As an appellate judge, I recognize that I'm keenly aware that I am a public servant. In order to meet this task, a judge must be willing to earn the respect of the public that is served. This is done, not through judicial activism, but by pragmatically applying the law to the facts and by working hard to write clear and well-reasoned decisions. To successfully perform this task, one must have the characteristics that I have described and must strive to earn the respect of the public. I believe that service in this capacity it its own greatest reward and being given the opportunity to provide such service in a state where I've lived for 48 years would be an extreme honor

and privilege. In standing here before you, I am asking for the opportunity to continue serving the people of Nebraska and to continue in our effort to foster and develop the public's respect for the law and the judicial system. I ask you for the chance to serve in this capacity as judge of the Nebraska Supreme Court and I thank you for your time and consideration."

I now leave you with a quote that embodies the philosophy he held close to his heart, that guided him through, not only his career, but throughout his life. The quote is inscribed on the headstone of the late, great Muhammed Ali and reads: "Service to others is the rent you pay for your room in heaven." Thank you.

JUSTICE MILLER-LERMAN: Thank you for those important words.

JUDGE BISHOP: May it please the Court, that completes the speakers presenting this afternoon. Thank you, Your Honors, for this appointment and for your attention at this special proceeding today.

JUSTICE MILLER-LERMAN: Thank you very much, Judge Bishop.

The Court notes the passing of Justice Wright, the passing of the first justice to have served on both the Nebraska Court of Appeals and the Nebraska Supreme Court. For the nearly 20 years that I've served on this Court until today, Justice Wright was always available to serve as the Justice Pro Tem, and I feel I'm just filling in for John and maybe he's gone to Marshall's to get a coat. He'll be back with a bargain soon.

(Laughter.)

In conclusion, I want to add that it's worth remembering that the survival and ennoblement of democracy depend on holding people in high office to high standards. Justice Wright indeed performed his duties with the highest of standards.

I take this final opportunity to note for those present that the entire proceedings have been televised and recorded. And, on the Court's own motion, the video and the written record of this memorial proceeding will be preserved in the permanent records of the Court and will be available on the Supreme

Court's internet website. Now, in the old days, I would have said you can expect a bound volume and, on the spine, there will be a memorial indication. Copies of the televised proceeding will be provided to the family, along with a verbatim transcript of this proceeding.

On behalf of the Nebraska Supreme Court, I extend our appreciation to former Chief Judge Sievers, who was serving at the Memorial Committee Chair, and to Judge Bishop for so graciously filling in. And I want to thank all the presenters for your remarks today in the ceremonial session of the Supreme Court. The Court would encourage you now to stick around, meet and greet friends, acquaintances. And the Court is advised by the Court Administrator's Office that there's a reception, including refreshments, and it's been arranged in the library. And with that, the Court is adjourned. Thank you all very much.

Lindsay International Sales & Service, LLC, appellee, v. Michael J. Wegener, an individual, and Jerome Pribil, an individual, appellants.

917 N.W.2d 133

Filed September 7, 2018. No. S-16-1051.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
3. **Jury Instructions.** Whether a jury instruction is correct is a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
6. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
7. **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.

8. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial for an abuse of discretion.
9. **Contracts: Words and Phrases.** A lack of consideration means no contract is ever formed because no consideration exists or none was intended to pass. A failure of consideration, on the other hand, means the contract is valid when formed but becomes unenforceable because the performance bargained for has not been given.
10. **Directed Verdict: Appeal and Error.** When it follows logically from a jury's findings that a theory on which a directed verdict was granted could not have been successful, the directed verdict cannot be said to have affected the outcome and is, at most, harmless error.
11. **Trial: Evidence.** Evidence that is irrelevant is inadmissible.
12. **Evidence.** Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
13. ____. Relevancy requires only that the degree of probativeness be something more than nothing.

Appeal from the District Court for Platte County: Robert R. Steinke, Judge. Affirmed.

Stephen L. Ahl and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., and Barry D. Geweke, of Stowell & Geweke, P.C., L.L.O., for appellants.

John M. Lingelbach and John V. Matson, of Koley Jessen, P.C., L.L.O., for appellee.

Heavican, C.J., Cassel, Stacy, Funke, and Papik, JJ., and Schreiner, District Judge.

Papik, J.

Lindsay International Sales & Service, LLC (Lindsay), sued Michael J. Wegener and Jerome Pribil in the district court for Platte County to collect amounts Lindsay claimed were due on personal guaranties. The district court granted Lindsay's motion for a directed verdict on certain affirmative defenses raised by Wegener and Pribil and instructed the jury

accordingly. The jury returned a verdict in favor of Lindsay for the full amount sought. Wegener and Pribil now appeal. They challenge the directed verdict, the jury instructions, the admission of evidence concerning their personal finances, and the denial of their motion for new trial. Finding no reversible error, we affirm.

BACKGROUND

Initial Discussions Between Wegener, Pribil, and Lindsay.

This case has its genesis in Wegener and Pribil's participation in an agricultural business venture in Mexico. Wegener and Pribil and another individual, Isaak Wall, also known as Isaak Wall Vogt, formed a business entity in Mexico called Ko'ol Agricola S.P.R. de R.L. de C.V. (Ko'ol Ag). Wegener, Pribil, and Wall planned to have Ko'ol Ag purchase or lease land in Mexico and raise crops there.

Wegener, Pribil, and Wall planned to take advantage of their respective backgrounds to operate Ko'ol Ag. Because Wall had ownership interests in at least two agricultural equipment dealers and ties to Mexico, he would be responsible for obtaining and setting up irrigation pivots on behalf of Ko'ol Ag. Wegener and Pribil, both of whom conduct farming operations in Nebraska, would provide the finances and farming expertise.

Beginning in November 2012, Wegener and Pribil had discussions with agents of Lindsay about purchasing pivots for the farming operation in Mexico. Wegener and Pribil indicated their desired terms for the purchase of pivots. The global director of credit for Lindsay's parent company told Wegener and Pribil that to obtain those terms from Lindsay, they would need to provide personal financial statements and provide personal guaranties for the amount owed for the pivots.

Wegener and Pribil also contend that Lindsay made representations to them about Wall and one of the equipment dealers in which he had an ownership interest, IJS Irrigation, LLC (IJS). The record contains varying accounts of those

representations. According to Wegener and Pribil, they were told that the pivots should be sold through IJS and that Wall and IJS were trustworthy and suitable partners for Wegener and Pribil in the pivot transaction.

Wegener and Pribil Agree to Personal Guaranties.

In December 2012, Wegener and Pribil provided personal guaranties to Lindsay. The agreements identified IJS as the principal debtor by describing the debt for which Wegener and Pribil were providing guaranties as follows: "For and in consideration of any existing indebtedness to [Lindsay] of IJS Irrigation, LLC invoices referencing customer KO'OL AGRICOLA S.P.R. de R.L. de C.V."

In the guaranties, Wegener and Pribil agreed to guarantee the payment of any of the above-described debt in accordance with the terms of any agreement between the principal debtor and Lindsay. They also agreed that in the event of a default by the debtor, Lindsay would not be required to proceed first against the debtor, but could immediately proceed against them.

Pivots Are Ordered and Shipped.

After the parties executed the guaranty agreements, Lindsay received orders for 16 complete pivots. Neither Wegener nor Pribil placed the orders. Wegener believed that they were placed by Wall.

The resulting invoices issued by Lindsay indicated that the pivots were sold to IJS. The invoices referenced Ko'ol Ag in the item description. While the parties agree that the pivots were all shipped to the same shipping warehouse in Florida, they dispute whether all of the pivots were actually transferred to IJS. Pointing to some bills of lading that do not list the recipient of the pivot as IJS, Wegener and Pribil contend that some of the pivots were transferred to other entities. And while it is undisputed that at least some of the pivots made it to Mexico, Wegener and Pribil assert that none of the pivots were placed on Ko'ol Ag's land.

Dispute Arises Over Payment.

Months after the pivots were shipped, Wegener and Pribil sent letters to Lindsay attempting to cancel the guaranty agreements. Lindsay responded by demanding payment.

When Lindsay did not receive payment, it filed suit against Wegener and Pribil. Lindsay alleged that it sold IJS goods for the Ko'ol Ag account on credit, that IJS had defaulted in the amount of $1,019,795.38, and that Wegener and Pribil were obligated to cover the IJS debt.

Wegener and Pribil denied that they were obligated to pay and asserted a number of affirmative defenses including false representation, fraud in the inducement, failure of consideration, impairment of collateral, deprivation of the right to be subrogated to the benefit of all security, and violation of Nebraska's Uniform Deceptive Trade Practices Act (UDTPA), Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 2014). The matter proceeded to a jury trial.

Trial.

At trial, the parties presented the evidence recounted above and the district court received Wegener's and Pribil's financial statements, over their relevance objections. After Wegener and Pribil rested their case, Lindsay moved for a directed verdict on Wegener and Pribil's affirmative defenses. The district court granted a directed verdict to Lindsay on the affirmative defenses of failure of consideration, impairment of collateral, deprivation of the right to be subrogated to the benefit of all security, and the UDTPA. The district court overruled Lindsay's request for a directed verdict on the defenses of false representation and fraud in the inducement.

As requested by Wegener and Pribil, the district court instructed the jury on the affirmative defense of material misrepresentation. Also at Wegener and Pribil's request, it instructed the jury that Lindsay was entitled to recover only "the total amount you determine is owed and unpaid on the IJS indebtedness for the pivots." But in accordance with the directed verdict, the district court declined to submit Wegener

and Pribil's proposed instruction on the definition of fraud under the UDTPA.

In closing arguments, counsel for Wegener and Pribil argued, among other things, that the evidence showed IJS did not receive all of the pivots and that thus, Wegener and Pribil could not be liable for the full amount claimed by Lindsay. The jury, however, returned a unanimous verdict in favor of Lindsay for $1,019,795.38, the full amount owing on the invoices. The district court ultimately entered a judgment on the jury verdict.

Following the verdict, Wegener and Pribil moved for a new trial. They alleged irregularities in the proceedings that prevented a fair trial, excessive damages resulting from passion or prejudice, error in assessing the amount of recovery, insufficient evidence to support the verdict, and error of law at trial. The district court ultimately overruled the motion.

Wegener and Pribil now appeal. We have determined that Wegener and Pribil's notice of appeal was timely filed. See *Lindsay Internat. Sales & Serv. v. Wegener*, 297 Neb. 788, 901 N.W.2d 278 (2017).

ASSIGNMENTS OF ERROR

Wegener and Pribil assign the following errors, condensed, restated, and reordered: The district court erred (1) in directing a verdict for Lindsay on the affirmative defense of impairment of collateral, (2) in directing a verdict for Lindsay on the affirmative defense of failure of consideration, (3) in directing a verdict for Lindsay on the affirmative defense of violation of the UDTPA, (4) in failing to give their proposed jury instruction regarding the UDTPA, (5) in admitting evidence of their personal financial conditions, and (6) in failing to grant their motion for new trial.

STANDARD OF REVIEW

[1,2] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on

behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017). A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *Id.*

[3,4] Whether a jury instruction is correct is a question of law. *Rodriguez v. Surgical Assocs.*, 298 Neb. 573, 905 N.W.2d 247 (2018). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

[5,6] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *Id.* A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Id.*

[7] 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. *Id.*

[8] An appellate court reviews a denial of a motion for new trial for an abuse of discretion. *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 298 Neb. 777, 906 N.W.2d 1 (2018).

ANALYSIS

Impairment of Collateral Affirmative Defense.

In the section of their operative answer listing affirmative defenses, Wegener and Pribil alleged that they should be released from liability under the "impairment of collateral

doctrine" and as a result of Lindsay's acts that deprived them "of their right to be subrogated to the benefit of all security." The district court granted Lindsay a directed verdict on these affirmative defenses. Wegener and Pribil contend it should not have done so.

As the following discussion will demonstrate, the concepts Wegener and Pribil asserted as separate affirmative defenses and argue separately on appeal are actually part and parcel of the same affirmative defense. For reasons we will explain, we find that this defense could not apply in these circumstances, and thus, the district court correctly granted Lindsay a directed verdict.

This court has previously recognized that a guarantor can be released from liability as a result of a creditor's actions or omissions that impair collateral securing the principal debt at issue. See, e.g., *Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc.*, 195 Neb. 292, 237 N.W.2d 645 (1976). We have previously referred to the defense as "impairment of collateral." *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 635, 748 N.W.2d 645, 656 (2008).

The impairment of collateral defense has its roots in the guarantor's subrogation right to collateral securing the underlying debt. See *Custom Leasing, Inc., supra.* That is, if the principal debtor fails to meet its obligation in such a transaction and the creditor enforces the guaranty, "a guarantor has the right to step into the shoes of the creditor and sue the debtor for collateral securing the debt." See *Century 21 Prods. v. Glacier Sales*, 129 Wash. 2d 406, 412, 918 P.2d 168, 170 (1996). Because acts or omissions of the creditor that result in the collateral's unavailability deprive the guarantor of its right of subrogation, a guarantor is generally released by such acts or omissions. See *Custom Leasing, Inc.*, 195 Neb. at 299, 237 N.W.2d at 649 ("[w]hether the guarantor is entitled to a full discharge or only pro tanto, it is released from its liability to the extent of the injury caused by the willful or negligent acts of [the creditor]").

If its name were not enough, the preceding discussion should make clear that in order for the impairment of collateral defense to apply, the underlying debt must be secured by collateral. See, e.g., *Myers v. Bank of Niobrara*, 215 Neb. 29, 31-32, 336 N.W.2d 608, 610 (1983) ("[i]t may be true that if a *secured* party . . . impairs a guarantor's ability to satisfy any obligation arising under the agreement of guaranty by releasing the *collateral securing that loan*, said guarantor's obligation is then released") (emphasis supplied); Restatement (Third) of Suretyship and Guaranty § 42 at 190 (1996) (recognizing that defense is available "[i]f the underlying obligation is *secured by a security interest in collateral* and the obligee impairs the value of that interest") (emphasis supplied). If the debt is not secured, there is no collateral to impair and no subrogation right to protect. See *Estate of Muscato v. Northwest Nat'l Bk.*, 181 Ill. App. 3d 44, 48, 536 N.E.2d 872, 875, 129 Ill. Dec. 822, 825 (1989) ("[i]t is axiomatic that because the loan was unsecured, no collateral could have been impaired").

Wegener and Pribil could not successfully assert the impairment of collateral defense because it is available only when the guarantor has a subrogation right to collateral. There is no evidence that Lindsay had a security interest in the pivots, and Wegener and Pribil do not even attempt to argue that such evidence exists.

Because there is no evidence that collateral was to secure the underlying debt, the principal cases Wegener and Pribil rely upon in support of their argument that the district court erred by directing a verdict on their impairment of collateral defense are inapplicable. In those cases, a creditor either impaired or failed to acquire a security interest as required by a contract, to the ultimate detriment of the guarantor. See, e.g., *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978); *Custom Leasing, Inc., supra*. In this case, however, the transaction did not involve a security interest. As a result, the impairment of collateral

defense could not apply and the district court correctly granted a directed verdict for Lindsay.

Failure of Consideration Affirmative Defense.

Wegener and Pribil also contend that the district court erred by granting Lindsay a directed verdict on their affirmative defense of failure of consideration. Again, we find no basis to reverse the district court's decision.

Wegener and Pribil argue that there was a failure of consideration in that the pivots Lindsay agreed to sell were not transferred to the entity that purchased them. Specifically, Wegener and Pribil contend that because Lindsay failed to perform its obligations to the principal debtor, the consideration failed and Wegener and Pribil's obligations under the guaranties were eliminated or at least diminished.

[9] Lindsay responds that there was sufficient consideration for the guaranties because Lindsay extended credit to IJS in reliance on Wegener's and Pribil's promises to pay if IJS did not. Lindsay's response appears to confuse "failure of consideration" with the separate concept of "lack of consideration." "A lack of consideration means no contract is ever formed because no consideration exists or none was intended to pass." *Federal Land Bank of Omaha v. Woods*, 480 N.W.2d 61, 66 (Iowa 1992). A failure of consideration, on the other hand, "means the contract is valid when formed but becomes unenforceable because the performance bargained for has not been given." *Id.* See, also, 3 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 7.11 (4th ed. 2008) (distinguishing these concepts).

Some courts have recognized that a guarantor can avoid liability on a guaranty through the affirmative defense of failure of consideration by showing that the creditor failed to render the performance for which the guarantor agreed to guarantee payment. See, e.g., *Walcutt v. Clevite Corporation*, 13 N.Y.2d 48, 191 N.E.2d 894, 241 N.Y.S.2d 834 (1963).

Wegener and Pribil claim these circumstances are present here, and they make alternative arguments as to why that is the case.

First, they argue that there was a failure of consideration because Lindsay did not transfer the pivots to Ko'ol Ag. We reject this argument at the outset. Both the guaranties themselves and the invoices indicate that IJS was the debtor, not Ko'ol Ag. Lindsay did not have an obligation to transfer the pivots directly to Ko'ol Ag, and thus, Wegener and Pribil cannot premise a failure of consideration defense on any failure to effectuate such a transfer.

The alternative failure of consideration argument Wegener and Pribil assert is that the consideration failed because some pivots were not delivered to IJS. Because IJS was the principal debtor in the transaction, the claim that the consideration failed because IJS did not receive pivots on which Lindsay now seeks payment cannot be dismissed so quickly. Furthermore, there was some evidence introduced at trial—bills of lading for a few of the pivots that listed entities other than IJS as the recipient and testimony about at least one pivot's having borne a stamp suggesting it was sold to another entity—that Wegener and Pribil can point to in support of their argument that IJS did not receive the pivots.

The evidence summarized above, coupled with the requirement that we draw all inferences in favor of Wegener and Pribil in reviewing the grant of a directed verdict, might suggest grounds for reversal if it were not for the fact that Wegener and Pribil already presented these very arguments to the jury and the jury rejected them. While the district court granted Lindsay a directed verdict on the failure of consideration affirmative defense, as noted above, Wegener and Pribil asked for and received a jury instruction that Lindsay was entitled to recover "the total amount you determine is owed and unpaid on the IJS indebtedness for the pivots." Counsel for Wegener and Pribil contended that this instruction was justified by evidence suggesting some pivots were

not transferred to IJS and stated that the proposed instruction "goes back to [Wegener and Pribil's] defense of failure of consideration."

Not only did Wegener and Pribil convince the court that the jury should be instructed that they were liable only to the extent IJS was indebted to Lindsay; their counsel devoted extensive time in closing argument to the contention that some of the pivots were not transferred to IJS and asked the jury not to make Wegener and Pribil pay for pivots IJS did not even receive. The jury's award of damages in favor of Lindsay for the full amount claimed demonstrates that it rejected this argument. Under these circumstances, we find that the award of a directed verdict on the failure of consideration defense was, at most, harmless error.

It does not appear that a Nebraska appellate court has previously found that the grant of a partial directed verdict could amount to harmless error. However, we have held that a summary judgment can be harmless error when viewed in light of a jury's subsequent findings. In *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005), a patient claimed, among other things, that an organ recovery service had acted negligently in not reviewing donor records and failing to inform the medical center that a certain preservative had been used. The district court granted summary judgment in favor of the recovery service. Upon the patient's appeal, we reasoned that any error in granting summary judgment was harmless, because the jury specially found no proximate cause as to one defendant and the jury's special finding on proximate cause was equally applicable to the organ recovery service.

[10] We find this reasoning in *Smith* instructive in the instant case and hold that when it follows logically from a jury's findings that a theory on which a directed verdict was granted could not have been successful, the directed verdict cannot be said to have affected the outcome and is, at most, harmless error. A number of cases from other jurisdictions

have recognized and applied this principle. See, e.g., *Goulet v. New Penn Motor Exp., Inc.*, 512 F.3d 34 (1st Cir. 2008); *Earle v. Benoit*, 850 F.2d 836 (1st Cir. 1988); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977); *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283 (Me. 1988); *Steffensen v. Smith's Management Corp.*, 820 P.2d 482 (Utah App. 1991). See, also, *Russell v. May*, 306 Kan. 1058, 400 P.3d 647 (2017) (employing same analysis as cases above but finding error not harmless in that case).

In this case, we find that the jury's verdict would not have differed if a directed verdict had not been granted on the failure of consideration affirmative defense. By instructing the jury that Wegener and Pribil were liable only to the extent IJS was indebted to Lindsay, the district court required the jury to consider the very issue raised by the failure of consideration defense—whether IJS received the pivots and was thus indebted to Lindsay. If anything, the district court relieved Wegener and Pribil of the burden of proving their failure of consideration defense by embedding it within the amount Lindsay was owed, an issue on which Lindsay bore the burden of proof. Even after Wegener and Pribil argued that IJS did not receive all the pivots, however, the jury awarded Lindsay the full amount Lindsay claimed.

The jury clearly rejected the notion that IJS did not receive the pivots and was thus indebted to Lindsay for less than the full amount claimed. In doing so, the jury rejected the substance of the failure of consideration defense. The failure of consideration affirmative defense would not have succeeded even if the directed verdict had not been granted. The directed verdict is thus, at most, harmless rather than reversible error.

Uniform Deceptive Trade Practices Act.

We now turn to Wegener and Pribil's claim that the district court erred by finding that a particular section of Nebraska's UDTPA was not a valid defense to Lindsay's claim. They

argue that Lindsay violated the UDTPA by fraudulently inducing them to sign the guaranty agreements through misleading representations about IJS. We find that the district court did not err by granting Lindsay a directed verdict on this issue.

Wegener and Pribil sought to implement the defense set forth in § 87-303.07:

> If a buyer or lessee is induced by [a deceptive trade practice] to enter into a sale or lease, the agreement is unenforceable by the seller or lessor and the buyer or lessee, at his or her option, may rescind the agreement or retain the merchandise delivered and the benefit of any services performed without any obligation to pay for them.

As the district court pointed out, this section protects a "buyer" or a "lessee." A familiar canon of statutory construction—expressio unius est exclusio alterius—suggests that § 87-303.07 does not protect guarantors. The aforementioned canon recognizes that "an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute." *Jacobson v. Shresta*, 288 Neb. 615, 623, 849 N.W.2d 515, 521 (2014). Applying the principle here, the fact that § 87-303.07 specifically lists buyers and lessees as those protected leads us to conclude that other categories of individuals—such as guarantors like Wegener and Pribil—are not.

After determining that § 87-303.07 protected only buyers and lessees, the district court went on to discuss our opinion in *Mutual of Omaha Bank v. Murante*, 285 Neb. 747, 829 N.W.2d 676 (2013). In that case, we held that certain defenses are personal to the principal debtor and thus a guarantor cannot escape liability by proving that the principal debtor is not liable pursuant to such a personal defense. The district court concluded that § 87-303.07 is such a personal defense and that thus, Wegener and Pribil, as guarantors, could not use it to avoid liability.

Whatever they may have been arguing before the district court, however, Wegener and Pribil do not make any argument to us that *the buyer* was deceived by Lindsay. Both the guaranties and the invoices make clear that the buyer of the pivots was IJS. But Wegener and Pribil argue that *they*—guarantors—were deceived by Lindsay. For reasons set forth above, we have determined that § 87-303.07 offers no protection to guarantors who claim to have been deceived. And since Wegener and Pribil make no argument to us that the buyer was deceived, it is not necessary for us to review whether § 87-303.07 is a personal defense that can be raised only by the principal debtor.

Wegener and Pribil contend that they should have been permitted to proceed under § 87-303.07 notwithstanding the limited language of the statute because a guarantor has a defense if fraudulently induced to enter into a guaranty. The only case they cite in support of this argument, however, is a case in which the guarantor asserted a general fraud in the inducement defense. See *West v. Wegner*, 172 Neb. 692, 111 N.W.2d 449 (1961). Here, Wegener and Pribil's allegations that they were induced into signing the guaranties by misrepresentations of Lindsay were submitted to the jury for consideration and rejected. In any event, the case Wegener and Pribil cite does not support the notion that they were also entitled to present an affirmative defense under § 87-303.07. We conclude that the district court did not err in determining that a defense pursuant to § 87-303.07 did not apply and in granting Lindsay's motion for directed verdict on that defense.

Because the evidence did not support the application of § 87-303.07, we also find that the district court did not err in rejecting the jury instructions tendered by Wegener and Pribil concerning the UDTPA. To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show, among other things, that the tendered instruction was warranted by the evidence. See *Rodriguez v. Surgical Assocs.*, 298 Neb. 573, 905 N.W.2d 247 (2018).

Admission of Financial Statements.

Over Wegener and Pribil's objections based on relevance, the district court received financial statements showing their net worth. Wegener and Pribil claim that the district court committed reversible error by admitting this evidence, because it was not relevant to proving liability and was offered to prejudice the jury against them and produce a higher award.

In their brief, Wegener and Pribil argue that evidence of a defendant's financial condition is not relevant. They also argue that admission of such evidence is prejudicial. At trial, however, Wegener and Pribil objected to the admission of their financial statements only on relevance grounds. Since a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court, see *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012), our review is limited to determining whether the financial statements were relevant.

[11-13] Evidence that is irrelevant is inadmissible. Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2016); *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2016). The bar for establishing evidentiary relevance is not a high one. Relevancy requires only that the probative value be "something more than nothing." *State v. Lavalleur*, 289 Neb. 102, 115, 853 N.W.2d 203, 214 (2014).

Wegener and Pribil argue that it has long been the law in Nebraska that evidence of financial standing of the parties is inadmissible. However, our jurisprudence does not completely bar evidence of financial standing. Rather, the relevance of such evidence is generally assessed on a case-by-case basis. See, e.g., *Vacek v. Ames*, 221 Neb. 333, 377 N.W.2d 86 (1985).

As Lindsay points out, the fact that Lindsay received financial statements of Wegener and Pribil and relied upon them in deciding to extend credit to IJS would be helpful to educate the jury on the background of the transaction. But Wegener and Pribil's real objection to the financial statements is not that the jury learned that they existed and that Lindsay received them; it is that the financial statements show their net worth.

Lindsay has relatively little to say about how Wegener's and Pribil's net worth was relevant to the issues in the case. That said, Wegener and Pribil did not ask that evidence of their net worth be redacted from the financial statements, and, furthermore, we can identify at least one way in which their net worth clears the relatively low relevance threshold. One of the issues the jury considered was whether Lindsay induced Wegener and Pribil to enter into the guaranties through misrepresentations. An element of this defense is that the representations of Lindsay's agents substantially contributed to the decision to guarantee IJS. Evidence of Wegener's and Pribil's relatively significant net worth might tend to rebut any notion that they were unsophisticated individuals who were susceptible to being swayed by the representations of Lindsay's agents.

Evidence of the guarantors' net worth may not have been highly probative on this issue, and Wegener and Pribil may have had a colorable argument that the potential for prejudice exceeded the probative value. Even so, we cannot say that the evidence lacked any probative value. Consequently, we cannot find that the district court abused its discretion in admitting the financial statements.

Motion for New Trial.

Finally, Wegener and Pribil argue that the trial court erred in failing to grant their motion for new trial based on the directed verdict and the admission of financial statements. An appellate court reviews a denial of a motion for new trial for

an abuse of discretion. *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 298 Neb. 777, 906 N.W.2d 1 (2018). Having concluded that the district court did not err in directing a verdict as to Wegener and Pribil's affirmative defenses and in admitting evidence of their finances, we find no abuse of discretion in its denial of their motion for new trial.

CONCLUSION

For the foregoing reasons, we find no basis to reverse the district court's decision and therefore affirm.

Affirmed.

Miller-Lerman, J., not participating.

Mark R. Christensen and Lydia Brasch, appellants, v. John Gale, Secretary of State of the State of Nebraska, et al., appellees.

917 N.W.2d 145

Filed September 12, 2018. No. S-18-825.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Judgments: Jurisdiction.** A jurisdictional question that does not involve a factual dispute is a matter of law.
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. **Constitutional Law: Initiative and Referendum.** The power of initiative in article III, § 1, of the Nebraska Constitution is "[t]he first power reserved by the people" under article III, § 2.
6. ____: ____. The right of initiative is precious to the people and one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.
7. **Initiative and Referendum: Statutes.** Statutory provisions authorizing initiative petitions should be construed in such a manner that the legislative power reserved in the people is effectual and should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise.

8. **Initiative and Referendum.** The sworn statement provision of Neb. Rev. Stat. § 32-1405(1) (Reissue 2016) is mandatory.
9. **Initiative and Referendum: Statutes: Words and Phrases.** "Sponsoring the petition" in the context of Neb. Rev. Stat. § 32-1405(1) (Reissue 2016) means assuming responsibility for the initiative or referendum petition process.
10. **Initiative and Referendum: Words and Phrases.** Defining sponsors as those who assume responsibility for the petition process serves the dual purposes of informing the public of (1) who may be held responsible for the petition, exposing themselves to potential criminal charges if information is falsified, and (2) who stands ready to accept responsibility to facilitate the referendum's inclusion on the ballot and defend the referendum process if challenged.
11. **Initiative and Referendum: Statutes.** The statutory scheme governing initiative and referendum petitions requires filings with the Secretary of State identifying the persons or entities taking legal responsibility for the petition process, while the Nebraska Political Accountability and Disclosure Act focuses on identifying those persons or entities financially supporting the petition process.
12. ____: ____. Limiting the category of "sponsors" for purposes of Neb. Rev. Stat. § 32-1405 (Reissue 2016) to those persons or entities who have specifically agreed to be responsible for the petition process and serve in the capacities the statutes require of sponsors lends clarity and simplicity to the petition process, thereby facilitating and preserving its exercise.
13. ____: ____. A non-named person or entity's motivation to decline to be a named sponsor is irrelevant to the question of who must be listed pursuant to Neb. Rev. Stat. § 32-1405(1) (Reissue 2016).
14. **Constitutional Law: Initiative and Referendum: Intent.** The controlling consideration in determining the singleness of a proposed amendment is its singleness of purpose and the relationship of the details to the general subject.
15. ____: ____: ____. The controlling consideration in determining the singleness of a subject for purposes of article III, § 2, of the Nebraska Constitution is its singleness of purpose and relationship of the details to the general subject, not the strict necessity of any given detail to carry out the general subject.
16. **Initiative and Referendum: Statutes: Intent.** Whether the elements of complex statutory amendments can be characterized as presenting different policy issues, the crux of the question is the extent of the differences and how the elements relate to the primary purpose.

17. **Courts: Justiciable Issues.** Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.
18. **Courts.** The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated.
19. **Initiative and Referendum: Justiciable Issues.** Unlike challenges to the form of a ballot measure or the procedural requirements to its placement on the ballot, which are challenges to whether the measure is legally sufficient to be submitted to the voters, substantive challenges to proposed initiatives are not justiciable before the measures are adopted by voters.
20. **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.
21. **Judges: Words and Phrases.** An abuse of discretion in a ruling on the admissibility of evidence occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Affirmed.

J.L. Spray and Ryan K. McIntosh, of Mattson Ricketts Law Firm, for appellants.

Douglas J. Peterson, Attorney General, and Ryan S. Post for appellee John Gale.

Andre R. Barry and Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees Insure the Good Life, Sarah Amanda Gershon, Kathy Campbell, and Rowen Zetterman.

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

Freudenberg, J.

NATURE OF CASE

This case presents a challenge to an initiative petition seeking to expand Medicaid coverage. The district court granted summary judgment in favor of the defendant sponsors and the Secretary of State. The court concluded that the measure did not violate the single subject rule, because the maximization of federal funding for the expanding of Medicaid eligibility had a natural and necessary connection to the expansion. The court also concluded that the list of sponsors was not incomplete under Neb. Rev. Stat. § 32-1405(1) (Reissue 2016). One of the sponsors, "Insure the Good Life," was both a political committee and a service mark. While the controlling members of the committee were named sponsors, the nonprofit organization holding the service mark was not. The court reasoned that because the nonprofit organization did not assume responsibility for the initiative process, it was not a sponsor. The court found that further challenges to the proposed measure as being an unconstitutional delegation of legislative authority and an improper appropriation were not ripe for review. We affirm.

BACKGROUND

An initiative petition to expand coverage in the Medical Assistance Act[1] was filed with Secretary of State John Gale. The petition proposed the addition of "Section 2" to that act, with five subsections and the general object to "expand eligibility to cover certain adults ages 19 through 64 whose incomes are one-hundred-thirty-eight percent (138%) of the federal poverty level or below . . . and to maximize federal financial participation to fund their care."

Specifically, the subsections of proposed section 2 would: (1) expand Medicaid to adults ages 19 through 64 whose income

[1] Neb. Rev. Stat. §§ 68-901 to 68-991 (Reissue 2009, Cum. Supp. 2016 & Supp. 2017).

is equal to or less than 138 percent of the federal poverty level, (2) direct the Department of Health and Human Services (DHHS) to submit a state plan amendment and all other necessary documents seeking required approvals or waivers to the federal centers for Medicare and Medicaid services, (3) direct DHHS to take all actions necessary to maximize federal financial participation in funding medical assistance pursuant to section 2, (4) require that no greater burdens or restrictions may be imposed on persons eligible for medical assistance under section 2 than any other population eligible for medical assistance, and (5) require that section 2 shall apply notwithstanding any other provision of law or federal waiver.

The sworn statement filed with the Secretary of State listed four sponsors of the petition: Sarah Amanda Gershon, Kathy Campbell, Dr. Rowen Zetterman, and Insure the Good Life (the named sponsors). Insure the Good Life is both a ballot question committee and a service mark registered by Nebraska Appleseed Center for Law in the Public Interest (Appleseed).

Mark R. Christensen, a former member of the Nebraska Legislature and a parent of a child who received Medicaid benefits, and Lydia Brasch, a current member of the Nebraska Legislature, brought an action for declaratory judgment under Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2016) and injunctive relief pursuant to Neb. Rev. Stat. § 32-1412(2) (Reissue 2016) against the named sponsors of the petition and Gale in his capacity as Secretary of State. They alleged that (1) the initiative violated the single subject rule of article III, § 2, of the Nebraska Constitution; (2) the initiative failed to contain a sworn statement containing the names and addresses of every person, corporation, or association sponsoring the petition, as required by § 32-1405(1); (3) the proposed amendment constituted an unconstitutional delegation of legislative authority[2]; and (4) the proposed amendment failed to meet the

[2] See Neb. Const. art. II, § 1.

criteria set forth in Neb. Rev. Stat. § 49-804 (Reissue 2010), for appropriations.

Specifically, Christensen and Brasch alleged that the initiative violated the single subject rule, because the expansion of Medicaid eligibility and the maximization of federal financial participation in funding Medicaid are two separate and distinct subjects. They alleged that the initiative violated the mandate of § 32-1405(1), that it list every person, corporation, or association sponsoring the petition, because it failed to include Appleseed. They alleged that the proposed amendment unconstitutionally delegated legislative power by directing DHHS to develop a plan for implementation of the amendment without sufficient statutory guidance or limitations. And they alleged that the proposed amendment was an appropriation, because it "requires DHHS to expand medical assistance to thousands of additional individuals at a cost of millions of dollars," and such appropriation did not satisfy the criteria of § 49-804.

The Secretary of State and the named sponsors moved to dismiss the complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1) and (6), for failure to state a claim and lack of jurisdiction. Christensen and Brasch moved for a "Judgment on the Complaint" or, alternatively, for summary judgment.

At the hearing on the motions, the Secretary of State offered, and the court received, exhibits 1 and 2. Exhibit 1 is a copy of the petition sponsors' sworn statement, the object statement, the proposed text of the statutory initiative petition, and the sample initiative petition form. Exhibit 2 is a certification by the Secretary of State that Insure the Good Life was registered as a service mark by Appleseed on September 28, 2015, with the stated purpose of being used on materials distributed to support expansion of Medicaid in the sale or advertising of services. These exhibits were also attached to the complaint. The parties agreed that the receipt of these exhibits, alone, did not convert the motions to dismiss into motions for summary judgment. But both parties offered further exhibits.

Christensen and Brasch offered exhibits 3 and 4. Exhibit 3 was a certified copy of proposed 2017 Neb. Laws, L.B. 441, with attached fiscal analyst notes from the 105th Legislature, First Session. The court sustained the sponsors' and the Secretary of State's relevancy objections, as L.B. 441 was a bill that did not pass. The bill sought to expand Medicaid, and the attached fiscal analyst notes estimated the increased state expenditures that would result.

Exhibit 4 is an exhibit by Christensen and Brasch's attorney, averring that he had personally observed Appleseed's social media accounts displaying the Insure the Good Life logo. Several posts were attached. The Secretary of State objected on relevancy. The sponsors objected on relevancy and hearsay grounds. For purposes of the motion to dismiss, the sponsors also objected that it was evidence outside the pleadings. Christensen and Brasch renewed the offer of exhibit 4 with the understanding that the motions to dismiss would be considered motions for summary judgment. The court received exhibit 4 into evidence.

The sponsors then offered exhibits 5 through 8 for purposes of summary judgment. The exhibits contain records of the Nebraska Accountability and Disclosure Commission.

Exhibit 5 is a statement of organization of a political committee, stating that Insure the Good Life is such a committee. The statement of organization lists Noelle Obermeyer as the treasurer of the committee and names Gershon, Campbell, and Zetterman as the controlling individuals of the committee.

Exhibits 6 through 8 are Insure the Good Life's campaign statements filed with the commission. Christensen and Brasch objected to exhibit 5 on relevancy and foundation grounds and to exhibits 6 through 8 on relevancy. Exhibit 7 shows that Insure the Good Life disclosed to the commission contributions by Appleseed. The court overruled the objections and entered exhibits 5 through 8 into evidence.

Treating the motions to dismiss as motions for summary judgment without any objection by the parties, the court

ultimately entered summary judgment for the named sponsors and the Secretary of State. The court concluded that the initiative did not violate the single subject rule because the maximization of federal financial participation in the Medicaid expansion had a natural and necessary connection to the expansion. The court reasoned that even viewing the evidence in a light most favorable to Christensen and Brasch and concluding that Appleseed supported the initiative through a public relations campaign and posts on social media accounts, such facts would not make Appleseed a sponsor of the petition under § 32-1405(1), because Appleseed did not assume responsibility for the initiative process. The court found that the remaining separation of powers and appropriations claims were not yet ripe for review. Christensen and Brasch appeal.

ASSIGNMENTS OF ERROR

Christensen and Brasch assign, summarized and restated, that the district court erred by (1) dismissing as unripe and failing to find merit to its claims that the ballot measure was an unconstitutional delegation of legislative authority and did not meet the criteria set forth in § 49-804 for appropriations, (2) failing to determine that the initiative petition was constitutionally deficient because it contained more than one subject, (3) failing to determine that the initiative petition was constitutionally deficient because it did not list Appleseed as a sponsor, and (4) excluding exhibit 3 from the evidence.

STANDARD OF REVIEW

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

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[3] *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010*)*, *abrogated on other grounds, City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[4]

[3] A jurisdictional question that does not involve a factual dispute is a matter of law.[5]

[4] 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.[6]

ANALYSIS

[5-7] Raising issues of statutory and constitutional interpretation, Christensen and Brasch seek to invalidate an initiative petition that received enough signatures to be placed on the November 2018 ballot. The power of initiative in article III, § 1, of the Nebraska Constitution is "[t]he first power reserved by the people."[7] The right of initiative is precious to the people and one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.[8] Statutory provisions authorizing initiative petitions should be construed in such a manner that the legislative power reserved in the people is effectual and should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise.[9]

Sponsors

[8,9] Christensen and Brasch first contend that the initiative is invalid because Appleseed was a "sponsor" of the initiative

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[4] *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016).

[5] *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003).

[6] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

[7] Neb. Const. art. III, § 2.

[8] See *Hargesheimer v. Gale, supra* note 4.

[9] See *id*.

and was not listed in the sworn statement as required by § 32-1405(1). Section 32-1405(1) provides:

> Prior to obtaining any signatures on an initiative or referendum petition, a statement of the object of the petition and the text of the measure shall be filed with the Secretary of State together with a sworn statement containing the names and street addresses of every person, corporation, or association sponsoring the petition.

The sworn statement provision of § 32-1405(1) is mandatory.[10] Section 32-1405(1) and related statutes do not provide definitions for the word "sponsor" or the phrase "sponsoring the petition." But we held in *Hargesheimer v. Gale*[11] that sponsoring the petition means assuming responsibility for the initiative or referendum petition process.

[10] In *Hargesheimer*, we explained that defining sponsors as those who assume responsibility for the petition process serves the dual purposes of informing the public of (1) who may be held responsible for the petition, exposing themselves to potential criminal charges if information is falsified,[12] and (2) who stands ready to accept responsibility to facilitate the referendum's inclusion on the ballot and defend the referendum process if challenged.[13] The initiative petition statutes impose several responsibilities upon named sponsors once the initiative process has commenced, and we indicated that the primary purpose of the "sworn statement containing the names and street addresses of every person, corporation, or association sponsoring the petition" in § 32-1405(1) is to identify those individuals agreeing to accept such responsibilities.[14]

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[10] *Loontjer v. Robinson, supra* note 5.

[11] *Hargesheimer v. Gale, supra* note 4.

[12] See Neb. Rev. Stat. § 32-1502 (Reissue 2016).

[13] *Hargesheimer v. Gale, supra* note 4.

[14] See *Loontjer v. Robinson, supra* note 5 (Hendry, C.J., concurring in result; Gerrard, J., joins). See, also, e.g., §§ 32-1405(2) and 32-1412(2) and Neb. Rev. Stat. § 32-1409(3) (Reissue 2010).

We specifically rejected the argument that sponsors must include all financial contributors to the petition, so that the public has notice of who such persons are. We explained that not only did amendments to § 32-1405(1) remove language including as sponsors all individuals or entities "'"contributing or pledging contribution of money or other things of value,"'"[15] the public has access to the identity of all financial contributors through reports filed with the Nebraska Accountability and Disclosure Commission.[16]

[11] We summarized that the statutory scheme governing initiative and referendum petitions[17] requires filings with the Secretary of State identifying the persons or entities taking legal responsibility for the petition process, while the Nebraska Political Accountability and Disclosure Act[18] focuses on identifying those persons or entities financially supporting the petition process.[19]

[12] We also explained that limiting the category of "sponsors" for purposes of § 32-1405 to "those persons or entities who have specifically agreed to be responsible for the petition process and serve in the capacities the statutes require of sponsors" lent clarity and simplicity to the petition process, thereby facilitating and preserving its exercise.[20] To interpret the term more broadly would make "compliance with the statute more precarious" by "inject[ing] ambiguity" and "expos[ing] the petition process to procedural challenges and the risk of defects unrelated to the substance of the petition."[21]

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[15] *Hargesheimer v. Gale, supra* note 4, 294 Neb. at 132, 881 N.W.2d at 596-97 (emphasis omitted).

[16] See, generally, Neb. Rev. Stat. §§ 49-1401 to 49-14,141 (Reissue 2010, Cum. Supp. 2016 & Supp. 2017).

[17] Neb. Rev. Stat. §§ 32-1401 to 32-1417 (Reissue 2016).

[18] §§ 49-1401 to 49-14,141.

[19] See *Hargesheimer v. Gale, supra* note 4.

[20] *Id.* at 134-35, 881 N.W.2d at 598.

[21] *Id.* at 134, 881 N.W.2d at 598.

Christensen and Brasch attempt to distinguish this case from *Hargesheimer* by focusing on the novel fact that Insure the Good Life was a service mark registered by Appleseed. They do not address the fact that Insure the Good Life is also a registered political committee and that all its controlling members were named in the sworn statement as sponsors.

[13] A "[s]ervice mark" is "any word, name, symbol, or device or any combination thereof used by a person, to identify and distinguish the services of one person, including a unique service, from the services of others."[22] To be licensed to use a service mark is to have the right or permission to use it.[23] Christensen and Brasch argue that Appleseed was a sponsor not because of its involvement in financing or promoting the petition, but because it purposefully attempted to deceive voters by participating in the initiative process under a service mark without listing its corporate identity. They argue that because Insure the Good Life was a sponsor, Appleseed must also be a sponsor. Christensen and Brasch's arguments are not meaningfully different than the arguments that were made in *Loontjer v. Robinson*, of hiding behind a "'sham committee.'"[24] In the course of setting forth the definition of sponsor that we later expressly adopted in *Hargesheimer*, Chief Justice Hendry found those arguments unpersuasive. A non-named person or entity's motivation to decline to be a named sponsor is irrelevant to the question of who must be listed pursuant to § 32-1405(1).

We rejected in *Hargesheimer* the concept of analyzing a person or entity's involvement in financing or promoting the petition, because doing so would inject ambiguity, making compliance with the statute more precarious and exposing the

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[22] Neb. Rev. Stat. § 87-128(8) (Reissue 2014). See, also, Neb. Rev. Stat. §§ 28-618(19) (Reissue 2016) and 87-301(22) (Cum. Supp. 2016).

[23] See Neb. Rev. Stat. § 59-1714.01 (Reissue 2010).

[24] *Loontjer v. Robinson, supra* note 5, 266 Neb. at 916, 670 N.W.2d at 312 (Hendry, C.J., concurring in result; Gerrard, J., joins).

petition process to procedural challenges and the risk of defects unrelated to the substance of the petition.[25] To inject into the sponsorship analysis questions of intent, as Christensen and Brasch suggest we ought, would inject even more ambiguity into the petition process than the test suggested and rejected by this court in *Hargesheimer*. This would unnecessarily undermine the first power reserved by the people.

Again, the sponsor is nothing more than the person or entity identifying himself, herself, or itself as willing to assume statutory responsibilities once the initiative process has commenced. Under the definition adopted in *Hargesheimer*, Insure the Good Life, Gershon, Campbell, and Zetterman are the sponsors, and there are no other persons or entities who are sponsors. The issues raised by Christensen and Brasch concerning the public's need to know who or what entity might be "hiding" their involvement are addressed through the Nebraska Political Accountability and Disclosure Act and Appleseed's disclosure of its contributions to Insure the Good Life, a ballot question committee.

We agree with the district court that the list of sponsors in the sworn statement is complete and does not violate § 32-1405(1).

Single Subject

Second, Christensen and Brasch challenge the initiative as violating the single subject rule. Article III, § 2, of the Nebraska Constitution provides, among other matters related to initiatives, that "[i]nitiative measures shall contain only one subject." A purpose of this language is to avoid voter confusion and logrolling, which is the practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately.[26]

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[25] See *Hargesheimer v. Gale, supra* note 4.

[26] See *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 853 N.W.2d 494 (2014).

[14] We, like the majority of jurisdictions, follow the natural and necessary connection test: "'[W]here the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition.'"[27] The controlling consideration in determining the singleness of a proposed amendment is its singleness of purpose and the relationship of the details to the general subject.[28] The general subject is defined by its primary purpose.[29]

In *State ex rel. Loontjer v. Gale*,[30] we held that a proposed ballot measure violated the separate-vote provision of article XVI, § 1, of the Nebraska Constitution, which imposes the same requirements as the single subject provision under article III, § 2. The proposed ballot measure asked voters to amend the state Constitution, which permitted only live and simulcast horseracing wagers, in order to allow for slot-machine-type gambling on replayed horseraces.[31] Additionally, as to both live and replayed horseracing, the measure proposed directing the tax revenues to property tax relief and education funding, thereby redirecting the live horseracing tax revenue which was at that time going elsewhere.[32] The proposed amendments did not otherwise address live horseracing.

We said that the legalization of a new form of horseracing lacked a natural and necessary connection to the measure's proposal to the use tax revenues for property tax relief and education.[33] We explained:

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[27] *Id.* at 999, 853 N.W.2d at 513. See, also, *Munch v. Tusa*, 140 Neb. 457, 300 N.W. 385 (1941).

[28] See *State ex rel. Loontjer v. Gale, supra* note 26.

[29] See *id.*

[30] *Id.*

[31] See *id.*

[32] See *id.*

[33] See *id.*

> The appropriation proposal's only connection to the wagering proposal was to enhance the odds that voters would approve the new form of wagering. Many voters who might oppose proposals for new forms of wagering, standing alone, might nonetheless want new funding for property tax relief and kindergarten through 12th grade education. But they would be presented with a take-it-or-leave-it proposition. And this type of proposition is at the heart of the prohibition against logrolling. Conversely, even voters who would support the new type of wagering might prefer that the parimutuel tax revenues continue to be credited to the state's general fund, instead of devoted exclusively to property tax relief and education.[34]

In the case before us, we do not view the funding proposal in section two of the proposed initiative language as being *only* to enhance the odds that voters would approve Medicaid expansion. And furthermore, in contrast, in *City of Fremont v. Kotas*,[35] we held that an initiative petition did not violate the single subject rule. Despite several components of the proposed measure dealing with the subjects of occupancy, licensing, electronic verification, government uses, resources, and penalties, and the application to both landlords and employers, we held that these subjects had a natural and necessary connection with each other and were part of the general subject of regulating illegal immigration. The proposed measure was not confusing or deceiving to the voters.[36]

Christensen and Brasch argue that there were two distinct subjects in the initiative: (1) the expansion of Medicaid and (2) whether such expansion would be funded, as much as possible, by the federal government. While they argue for the first time on appeal that the initiative also contained the

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[34] *Id*. at 1004, 853 N.W.2d at 515.

[35] *City of Fremont v. Kotas, supra* note 3.

[36] See *id.*

separate subject of "delegat[ing] to the executive branch the obligation to amend the State's Medicaid plan adopting, accepting and assenting to all applicable provisions of Title XIX and Title XXI of the federal Social Security Act," they did not raise this contention below.[37] Therefore, we will not address it.[38]

We agree with the district court that the expansion of Medicaid and its funding have a natural and necessary connection with each other and, thus, a singleness of purpose. The general subject is Medicaid expansion, and maximizing federal funding for that expansion is a detail related to the singleness of purpose of expanding Medicaid.

[15] This ballot measure is not like the one in *State ex rel. Loontjer*. It is more akin to *Kotas*, where several subelements related to the single subject of regulating illegal immigration. The single subject test is not, as Christensen and Brasch propose, whether the initiative could theoretically have proposed the expansion of Medicaid without also proposing that federal funding is maximized in order to do so; i.e., whether federal dollars are absolutely "necessary" to effectuate an increase in Medicaid. The controlling consideration in determining the singleness of a subject for purposes of article III, § 2, of the Nebraska Constitution is its singleness of purpose and relationship of the details to the general subject, not the strict necessity of any given detail to carry out the general subject.[39]

[16] Because its parts all relate to the same general subject, the initiative petition does not create voter confusion and logrolling. Christensen and Brasch assert that some voters might be in favor of Medicaid expansion but not in favor of expanding federal funding and that the measure presents "two separate, large substantive police [sic] issues with a single

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[37] Brief for appellants at 12.

[38] See, e.g., *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015).

[39] See *State ex rel. Loontjer v. Gale, supra* note 26.

vote."[40] Whether the elements of complex statutory amendments can be characterized as presenting different policy issues, the crux of the question is the extent of the differences and how the elements relate to the primary purpose.

The voters considering the initiative petition here at issue are unlikely to be confused and persuaded to vote for the primary purpose of expanding Medicaid in order to obtain, more generally, federal funds. The subject of federal funding does not present a level of dissimilarity that creates a risk of confusion and logrolling.

We agree with the district court that the initiative did not violate the single subject rule.

Ripeness

[17,18] Likewise, we agree with the district court that Christensen and Brasch's remaining two challenges are not ripe for review. Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.[41] The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated.[42]

[19] Unlike challenges to the form of a ballot measure or the procedural requirements to its placement on the ballot, which are challenges to whether the measure is legally sufficient to be submitted to the voters, substantive challenges to proposed initiatives are not justiciable before the measures are adopted by voters.[43] An opinion on the substantive challenge based on the contingent future event of the measure's passage would be merely advisory. Furthermore, preelection

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[40] Brief for appellants at 14.

[41] *State ex rel. Loontjer v. Gale, supra* note 26.

[42] *Id.*

[43] See, *id.*; *City of Fremont v. Kotas, supra* note 3.

judicial review of substantive challenges to initiatives tends to lessen the effectiveness of the constitutional initiative power "reserved by the people,"[44] and, regardless of the merits of the proposed initiative, inappropriately injects the courts into political debates.[45]

Christensen and Brasch rely on *State ex rel. Brant v. Beermann*[46] to argue that a challenge to the measure for its substantive defects, at least where those defects touch upon the requirements of article III, § 2, of the Nebraska Constitution, is ripe when patently clear. In *State ex rel. Brant*, we refused to issue a writ of mandamus requiring the Secretary of State to place a measure on the ballot, after the Secretary of State had determined that the measure was a mere statement of position and had no semblance of a law within the initiative provisions of the constitution. But we did not specifically address ripeness, and in *State ex rel. Loontjer*, we expressly recognized that our holding in *State ex rel. Brant* had been abrogated by *Duggan v. Beermann*.[47]

We said in *State ex rel. Loontjer* that we had "assumed [in *State ex rel. Brant*] the Secretary [of State] could reject a proposed ballot measure for its substantive constitutional defects."[48] But in *Duggan*, we had made clear that substantive defects are not ripe for review.[49]

A substantive challenge to a ballot measure is not ripe until the measure is voted into law. Both Christensen and Brasch's challenges to the proposed law as an unconstitutional delegation of legislative authority and as violating the criteria

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[44] Neb. Const. art. III, § 2.

[45] *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006).

[46] *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984).

[47] *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996). See *State ex rel. Loontjer v. Gale, supra* note 26.

[48] *State ex rel. Loontjer v. Gale, supra* note 26, 288 Neb. at 987, 853 N.W.2d at 505.

[49] See, *id.* (citing *Duggan v. Beermann, supra* note 47).

for appropriations set forth in § 49-804 are substantive challenges to the initiative. These substantive challenges are not ripe for judicial review, and we express no opinion on any of them.

Exhibit 3

[20,21] Finally, Christensen and Brasch assert that the district court erred in sustaining the Secretary of State and named sponsors' relevancy objection to exhibit 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.[50] An abuse of discretion in a ruling on the admissibility of evidence occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[51] Christensen and Brasch assert that exhibit 3 was relevant to demonstrate the extent of the expenditure that the proposed measure would entail. In other words, they assert that exhibit 3 was relevant to their appropriations challenge. Because that challenge was not ripe, the court did not abuse its discretion in determining that exhibit 3 was not relevant.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court, which dismissed Christensen and Brasch's complaint with prejudice.

Affirmed.

Miller-Lerman, J., participating on briefs.
Papik, J., not participating.

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[50] *State v. Swindle, supra* note 6.

[51] *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

Jacobs Engineering Group Inc., appellee, v. ConAgra Foods, Inc., appellant.

917 N.W.2d 435

Filed September 14, 2018. No. S-16-896.

1. **Actions: Parties: Standing.** Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
3. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
4. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
5. **Judgments: Appeal and Error.** An appellate court reviews a denial of a motion to alter or amend the judgment for an abuse of discretion.
6. **Motions for New Trial: Appeal and Error.** An appellate court reviews a trial court's ruling on a motion for a new trial for an abuse of discretion.
7. **Contracts.** Contract interpretation presents a question of law.

8. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
9. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
10. **Verdicts: Appeal and Error.** When reviewing a jury verdict, the appellate court considers the evidence and resolves evidentiary conflicts in favor of the successful party.
11. **Verdicts: Juries: Appeal and Error.** A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.
12. **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.
13. **Standing: Jurisdiction: Parties.** Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.
14. **Actions: Parties: Jurisdiction: Standing.** The question of whether a party who commences an action has standing and is therefore the real party in interest is jurisdictional. Because the requirement of standing is fundamental to a court's exercise of jurisdiction, either a litigant or a court can raise the question of standing at any time.
15. **Standing.** The stage of the litigation in which a party claims that its opponent lacks standing affects how a court should dispose of the claim.
16. **Standing: Pleadings: Pretrial Procedure.** In resolving a facial challenge, a court will review the pleadings to determine whether there are sufficient allegations to establish the plaintiff's standing.
17. **Motions to Dismiss: Jurisdiction: Pleadings: Appeal and Error.** An appellate court reviews a trial court's decision on a motion to dismiss for lack of subject matter jurisdiction based on a facial attack on the pleadings de novo.
18. ____: ____: ____: ____. Where the trial court's decision on a motion to dismiss for lack of subject matter jurisdiction is based on a factual challenge, the court's factual findings are reviewed under the clearly erroneous standard.
19. **Insurance: Contracts: Words and Phrases.** An indemnity contract is a chose in action because it confers a right to bring a legal action to recover a sum of money from or out of the contract.
20. **Liability: Damages.** Indemnification is available when one party is compelled to pay money which in justice another ought to pay or has agreed to pay.

21. **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.
22. **Jurisdiction.** While parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction 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.
23. **Pretrial Procedure: Pleadings.** A general denial is not effective where an answer contains specific admissions of facts alleged.
24. **Actions: Parties: Intent.** The primary purpose of the real party in interest requirement is to protect the defendant from the risk of multiple litigation.
25. **Insurance: Damages.** Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages.
26. **Circumstantial Evidence: Proof.** Circumstantial evidence is not inherently less probative than direct evidence, and a fact proved by circumstantial evidence is nonetheless a proven fact.
27. **Evidence: Proof.** A finder of fact may draw reasonable inferences from the facts and circumstances proved.
28. **Contracts: Words and Phrases.** An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts.
29. **Contracts.** A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.
30. **Workers' Compensation: Liability: Contracts.** When an employer, liable to an employee under the Nebraska Workers' Compensation Act, agrees to indemnify a third party for a loss sustained as the result of the third party's payment to the indemnitor's employee, the employer's exclusion from liability accorded by the act does not preclude the third party's action to enforce the indemnity agreement with the indemnitor-employer.
31. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.
32. **Jury Instructions: Appeal and Error.** If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and

adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.

33. **Verdicts: Appeal and Error.** Where a party has sustained the burden and expense of trial and has succeeded in securing a verdict on the facts in issue, that party has the right to keep the benefit of the verdict unless there is prejudicial error in the proceedings by which it was secured.
34. **Negligence.** A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.
35. ____. Because the extent of foreseeable risk depends on the specific facts of the case, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter.
36. **Verdicts: Appeal and Error.** A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
37. **Negligence: Liability.** Where separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone could not have caused the result.
38. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
39. **Verdicts: Remittitur.** Where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty.
40. **Remittitur: Appeal and Error.** An appellate court should order remittitur only when the award is contrary to all reason.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Christopher Landau, P.C., of Kirkland & Ellis, L.L.P., William F. Hargens and Lauren R. Goodman, of McGrath, North, Mullin & Kratz, P.C., L.L.O., and on brief, Jeremy M. Feigenbaum, for appellant.

Stephen B. Kinnaird and Sarah G. Besnoff, of Paul Hastings, L.L.P., Gilbert S. Keteltas, Robert G. Abrams, and Thomas E. Hogan, of Baker Hostetler, L.L.P., and Shawn D. Renner and Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

Funke, J.

This case arises out of an explosion at a ConAgra Foods, Inc. (ConAgra), plant in Garner, North Carolina, which killed 3 ConAgra employees and injured more than 60 others. When dozens of employees sued Jacobs Engineering Group Inc. (Jacobs), Jacobs sought contractual indemnification from ConAgra, but ConAgra declined, and Jacobs defended against and settled the claims.

Jacobs sued ConAgra for indemnification in the district court for Douglas County. Following a 4-week trial, the jury awarded Jacobs the full amount of the settlement payments, $108.9 million, and the court entered judgment on the verdict. We affirm.

I. BACKGROUND

1. Contract Between Jacobs and ConAgra

ConAgra, a food manufacturer, contracted with Jacobs, an engineering firm, in 2007 to provide engineering services. Jacobs' work under the contract was limited to work requested and approved by ConAgra in work orders. Section 10 of the parties' engineering agreement contained mutual indemnification provisions which provided that each party indemnify the other for "claims, losses, costs, penalties, damages and/or expenses" to the extent caused by the indemnifying party's negligence or the negligence of others under that party's control. Section 10 provided the following relevant indemnification provisions:

> 10.1 [Jacobs] shall indemnify . . . ConAgra . . . against each and every claim, loss, cost, penalty, damage, or expense . . . suffered or incurred by any third parties, employees of ConAgra and employees of [Jacobs]. [Jacobs'] obligations hereunder shall be limited to the extent caused by the negligent acts, errors or omissions of [Jacobs], or anyone directly or indirectly employed by [Jacobs] or for whose acts [Jacobs] is otherwise liable. . . .
>
> 10.2 [Jacobs'] liability, however arising by reason of the performance of the services, is specifically limited as provided herein and ConAgra will indemnify and release [Jacobs] against all other claims, losses, costs, penalties, damages and/or expenses to the extent caused by the negligence of ConAgra and/or others under its control[.]

In 2008, ConAgra planned to update the Garner plant's water heating system. ConAgra rejected Jacobs' proposal for the project as too expensive, but retained Jacobs to provide limited management and engineering support. Jacobs designated an onsite project manager, Donald Pottner, to assist with the project.

2. Energy Systems Analysts and ConAgra's Safety Policies

ConAgra hired Energy Systems Analysts (ESA), a high-efficiency water heater contractor, to design and install a 5-million Btu gas-fired water heater. ConAgra had previously engaged ESA to supply gas heat systems to plants in Iowa, Ohio, Pennsylvania, and Tennessee, and ConAgra had not experienced any safety issues with ESA.

ConAgra contractually imposed safety requirements on ESA's work on the project. The contract required ESA to "abide by safety . . . rules at all times while on company property." ConAgra personnel were required to bring "[a]pparent violations" of the "Contractor Work Rules" "or unacceptable industry work practices . . . to the attention of the contractor's representative for prompt correction."

The contractor work rules required "practices differing from [ConAgra] policy . . . to be reviewed by [ConAgra] before the implementation." The work rules placed responsibility for correction of "unacceptable conditions" on the "'controlling employer,' that is, the one in the best position to correct the situation or ensure its correction." ConAgra's management was required to report "[a]ny safety discrepancy observed . . . to the appropriate Contractor representative for immediate correction" and to suspend work "immediately" in the case of danger until "safety concern(s) have been corrected, to the satisfaction of the Company."

The contractor work rules made ConAgra responsible for ensuring that ESA prepared a "Safe Plan of Action" (SPA) for its commissioning of the water heater to identify risks and outline each step of the process in order to complete the work safely. ConAgra also had a "Fire Prevention Plan" which required "special care and handling" requirements for flammable gases that "pose a risk of catastrophic explosion if ignited." The fire prevention plan applied to all ConAgra facilities and set "procedures for controlling the hazards," required identification of "potential ignition sources," and only permitted the use or handling of natural gas "where vapors are prevented from reaching ignition sources."

3. Garner Plant Water Heater Project

ConAgra employee, Timothy Yost, was the engineering manager and supervisor at the Garner plant. ConAgra designated Yost as the individual responsible for the safety of all plant employees during the commissioning of the water heater. Yost was responsible for ensuring that ESA's plans complied with ConAgra standards and the contractor work rules. ConAgra's utility maintenance supervisor, John Puff, led the Garner plant's utilities department and was responsible for its natural gas facilities.

ESA staff testified about the amount of control ConAgra exercised over the installation of the water heater. ESA's

corporate designee testified that ConAgra had the final say on the project and controlled the schedule. He stated that Yost and Puff "were the decision-makers when it came to anything, even . . . when we were on site. If there was something that they didn't like, we'd obviously have to change it." He admitted that ConAgra did not provide directions of how the gas delivery system should be assembled.

On June 3, 2009, ESA provided its written plan for commissioning the water heater, which Yost and Puff reviewed and found acceptable. On June 4, Pottner left the plant on a planned medical leave and was not expected to return, and he ultimately was not present during the commissioning of the water heater. ConAgra confirmed its personnel would supervise the commissioning and that Jacobs' services were not needed.

Puff was responsible for determining the procedure to connect the new equipment to the plant's gas supply referred to as the "line-break" procedure. The written procedure required opening valves to purge gaslines at both the boiler and the hot water tank. The purpose of the purge was to remove any remaining mixture of air and natural gas in the line prior to firing the hot water heater. ConAgra identified explosion as a risk and specified completion of the line-break procedure as the method to control that risk.

On June 4, 2009, as part of the line-break procedure, Puff instructed the crew to purge the line to the boiler with a hose leading outside, but he failed to provide the instruction to purge the line to the hot water tank. Puff stated that "[w]e just didn't get to it." Yost admitted the line to the hot water tank should have been purged before startup to prevent an explosive mixture.

On June 5, 2009, at the direction of Yost, a ConAgra senior safety specialist inspected the pumproom where the new water heater was located. The report documented "[e]xposed wires" as possible ignition source hazards.

Curt Poppe, an ESA employee, was assigned to commission the water heater. On June 9, 2009, Poppe arrived at the

Garner plant and met with Yost to discuss the commission plan. Poppe's commissioning plan did not include purging air from the lines, and Puff did not provide the line-break procedure to Poppe. Yost and Puff did not train Poppe in ConAgra's contractor work rules or ensure that Poppe was certified as trained. In addition, no SPA was prepared for the project. ConAgra admitted that had an SPA been implemented, the explosion may have been prevented.

ConAgra's policy and practice included supervising the work of contractors, and the utilities department did not allow contractors to work on utilities unsupervised. Puff assigned a ConAgra employee, Ethner "Buddy" Roberson, to supervise Poppe during commissioning. Roberson worked with Poppe throughout the morning and, with Puff's knowledge, brought unrated temporary lighting into the room. Roberson had not reviewed the fire prevention plan, was not aware that combustibles should not be released into a room with ignition sources, and did not know whether the lighting he strung in the pump-room was safe for a flammable atmosphere.

When Poppe began the commission process, he had difficulty lighting the water heater. Over the next 3½ hours, Poppe repeatedly cracked the valve on the ⅜-inch pilotline and placed a gas meter in front of the line as he released small streams of gas into the room. Poppe said he was "'bleeding the line.'" He attempted to light the water heater 32 times.

Multiple ConAgra employees, including management, witnessed Poppe release gas into the room and were concerned about the presence of gas. A ConAgra utilities department employee smelled "[t]oo much gas" in the room and felt he was "in danger." He reported Poppe's unusual actions to Puff, who reported them to Yost.

Yost, and later Puff, went into the room and smelled gas. Puff admitted he did not tell Poppe that the line had not been purged, even after Puff realized Poppe was struggling to light the heater.

Puff was trained to purge lines outside; he had purged one of the lines outside on June 4, 2009. Puff "started smelling a lot

of gas" and thought "pure gas" was coming through the line. Puff was concerned that Poppe was not using the correct meter to measure the presence of gas or was using the meter improperly. A ConAgra witness admitted that under the contractor work rules, if the gas meter malfunctioned, then the commission should have been stopped.

There was evidence that Puff could have ordered an evacuation, but failed to do so. As the only designated plant emergency coordinator working that day, Puff controlled the decision to evacuate. An emergency evacuation plan stated that evacuation may be necessary in the face of "[i]mmediate or potential fire hazards" and could be completed within 3 minutes.

Puff interrupted the commission process so that he and Poppe could walk outside to allow Poppe to calibrate the gas meter in fresh air. Puff then left the plant to pick up supplies for another project. Puff left Poppe with Roberson even though Puff testified that he did not believe Roberson was qualified to supervise clearing air from a gasline. Roberson thought something was wrong and went to the roof to try to locate an alternate purge point.

Poppe returned to the pumproom and released gas by opening the cap on the 2-inch gas pipe. The room flooded with gas in less than 60 seconds. Puff admitted he "'should have stayed around a lot longer'" and had given the contractor "'more credit'" than he should have. When asked about Poppe's opening the cap on the gas pipe, Puff testified that if he had stayed, he "wouldn't have allowed that."

The pumproom exploded. Two sections of the plant's roof collapsed, killing three ConAgra employees and inflicting serious injuries on others.

4. Explosion Investigation and Litigation

The North Carolina Department of Labor conducted an investigation into the explosion and found multiple violations of North Carolina code. The department determined that

ConAgra violated its duty to furnish conditions of employment "free from recognized hazards that were causing or likely to cause death or serious physical harm." The department found multiple life-threatening conditions occurred in the presence of ConAgra management, including ConAgra's failure to purge the 3-inch natural gasline used to supply gas to the vacuum pumproom and allowing the presence of numerous possible ignition sources while a natural gasline was being purged in an enclosed room.

In contrast, the North Carolina Department of Labor found Jacobs performed no work that could have contributed to the accident, did not have knowledge of the hazardous condition, and did not have a scope of work that would have permitted knowledge of the hazardous condition. ConAgra "accepted what the authorities determined" and did not conduct a separate investigation.

Thereafter, 67 individuals and ConAgra's property insurers filed several lawsuits against Jacobs and Pottner; the total settlement demands exceeded $507 million. Shortly after the first suit was filed, Jacobs requested contractual indemnity from ConAgra and ConAgra denied that request and did not participate in the settlements.

A suit brought by seven ConAgra employees was the only case to go to trial. That case proceeded to trial in March 2012 before the Johnston County Civil Superior Court of North Carolina, case No. 09-CV-2330 (referred to as "*Brockington*"). Before trial, ConAgra's counsel wrote to Jacobs:

> Based upon our understanding of the evidence in this case, and the fact that the plaintiffs' claim for punitive damages has survived Jacobs' motion for summary judgment, we believe there is a possibility of a significant jury verdict against Jacobs. As such, ConAgra requests that Jacobs take all reasonable steps to settle these claims.

ConAgra stated that "settlement of plaintiffs' claims by Jacobs would be without prejudice as to any possible indemnity claim that Jacobs' [sic] may have as to ConAgra . . . ."

During the *Brockington* trial, Pottner became ill partway through his testimony, was briefly hospitalized, and returned home to Wisconsin. The court initially declared Pottner unavailable, but later found that Pottner's counsel, who also represented Jacobs, misrepresented the nature or severity of Pottner's illness. The court struck the defendants' answers and confined the jury's deliberations to the issue of damages. The jury awarded the *Brockington* plaintiffs $14.6 million.

The trial court later reinstated Jacobs' answer and granted Jacobs a new trial. Before the second trial, Jacobs settled the suit for $20 million. Jacobs then settled the remaining cases and continued to request indemnification from ConAgra, which ConAgra declined.

Jacobs brought this action against ConAgra in January 2014. Jacobs claimed that it was entitled to the $108.9 million paid to settle the North Carolina cases. Jacobs requested only $17.7 million for the *Brockington* settlement, which represented the amount of the first verdict plus interest since the time of filing.

Prior to trial, ConAgra filed motions to compel Jacobs to provide the amounts paid by Jacobs and Jacobs' insurers toward the settlements. The court overruled ConAgra's various motions and found ConAgra's arguments were not relevant to the "two substantive issues in this case," which it determined were as follows: "(1) whether the [e]xplosion was caused by the alleged negligence of ConAgra and/or others under its control in order to trigger the indemnity provision; and (2) whether the amount of the settlement payments were objectively reasonable."

During the 19-day trial in March 2016, the jury received over 300 exhibits and heard testimony from eight live witnesses and 40 videotaped depositions. The jury returned a special verdict which (1) found that both ConAgra and ESA were negligent, (2) apportioned liability of 70 percent to ConAgra and 30 percent to ESA, and (3) found that ConAgra controlled ESA. The jury further found that Jacobs was not

negligent, that Jacobs had settled the North Carolina lawsuits in good faith, and that the settlement amounts were objectively reasonable. The district court accepted the jury's verdict. ConAgra renewed its motion for directed verdict and moved for judgment notwithstanding the verdict, remittitur, and a new trial. The court denied the motions, ConAgra timely appealed, and we sustained ConAgra's request to bypass review by the Nebraska Court of Appeals.

II. ASSIGNMENTS OF ERROR

ConAgra assigns, restated, that the district court erred in failing to (1) grant ConAgra's motion for directed verdict or motion for new trial, because Jacobs failed to prove that it had standing as the real party in interest to assert its indemnification claim; (2) order a remittitur, because ConAgra did not waive its workers' compensation immunity; (3) grant ConAgra's motion for directed verdict or motion for new trial, because Jacobs did not establish that its "'losses'" were "'caused by the negligence of ConAgra and/or others under its control,'" as required by the contract; and (4) alter or amend the judgment to remove damages relating to the *Brockington* settlement that were not caused by ConAgra.

III. STANDARD OF REVIEW

[1,2] Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's

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[1] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010). See, also, *Applied Underwriters v. S.E.B. Servs. of New York*, 297 Neb. 246, 898 N.W.2d 366 (2017).

decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.[2]

[3,4] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.[3] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.[4]

[5,6] An appellate court reviews a denial of a motion to alter or amend the judgment for an abuse of discretion.[5] An appellate court reviews a trial court's ruling on a motion for a new trial for an abuse of discretion.[6]

[7-9] Contract interpretation presents a question of law.[7] Whether the jury instructions given by the trial court are correct is a question of law.[8] An appellate court independently reviews questions of law decided by a lower court.[9]

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[2] *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003). See, also, *Skyline Manor v. Rynard*, 288 Neb. 602, 852 N.W.2d 303 (2014).

[3] *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017).

[4] *Id.*

[5] *State v. Amaya*, 298 Neb. 70, 902 N.W.2d 675 (2017). See, also, *Armstrong, supra* note 3.

[6] *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 298 Neb. 777, 906 N.W.2d 1 (2018). See, also, *Armstrong, supra* note 3.

[7] *Cano v. Walker*, 297 Neb. 580, 901 N.W.2d 251 (2017).

[8] *Armstrong, supra* note 3.

[9] *Id.*

[10,11] When reviewing a jury verdict, the appellate court considers the evidence and resolves evidentiary conflicts in favor of the successful party.[10] A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.[11]

IV. ANALYSIS

1. Court Did Not Err in Determining Jacobs Is Real Party in Interest

In this case, the trial court issued an order at the pleading stage which found that Jacobs had standing as the real party in interest. The court issued its order contemporaneous with its disposition of competing motions to compel discovery. ConAgra had sought discovery regarding a breakdown of payments made by Jacobs and Jacobs' insurers toward the settlements in the North Carolina cases and argued the evidence was relevant to the issue of whether Jacobs is the real party in interest.

Under ConAgra's theory, Jacobs brought this suit as a subrogee and not an indemnitee. ConAgra asserted that there is a possibility that the settlements entered into by Jacobs were fully funded by Jacobs' insurers or other third parties and that if the evidence showed Jacobs' insurers were fully subrogated, then Jacobs would lack standing to pursue its indemnification claim against ConAgra. The court disposed of this argument by stating, "It is clear that Jacobs has the right to bring this action for the full amount of the settlements against ConAgra even if [its] insurers paid part of the settlements."

The parties continued to litigate the issue, including through posttrial motions filed by ConAgra which reiterated its theory that Jacobs is not the real party in interest. The court held a

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[10] *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017).

[11] *Id.*

hearing and received an affidavit into evidence and issued an order overruling ConAgra's motions, again determining that Jacobs is the real party in interest.

On appeal, ConAgra's primary argument is that Jacobs is not the real party in interest. ConAgra argues that Jacobs failed to prove that it had standing as the real party in interest to seek indemnification and requests that we reverse the judgment below. Jacobs argues the trial court properly found that Jacobs is the real party in interest to pursue its contractual indemnification claim and that Jacobs did not assert claims as a subrogee.

Because the parties focus much of their attention on whether the district court erred in its determination that Jacobs has standing and is the real party in interest, and repeatedly raised the issue to the court through various motions before and after trial, we will discuss the district court's determinations under both a facial and a factual analysis.

[12,13] Nebraska's real party in interest statute provides that "[e]very action shall be prosecuted in the name of the real party in interest . . . ."[12] The purpose of that section is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause.[13] 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.[14] Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.[15]

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[12] Neb. Rev. Stat. § 25-301 (Reissue 2016).

[13] *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016).

[14] *LeRette v. Howard*, 300 Neb. 128, 912 N.W.2d 706 (2018); *Manon v. Orr*, 289 Neb. 484, 856 N.W.2d 106 (2014).

[15] *Applied Underwriters, supra* note 1.

[14] We have said that the question of whether a party who commences an action has standing and is therefore the real party in interest is jurisdictional and that because the requirement of standing is fundamental to a court's exercise of jurisdiction, either a litigant or a court can raise the question of standing at any time.[16]

[15] Because a defect in standing is a defect in subject matter jurisdiction, a challenge to standing is treated as a motion to dismiss for lack of subject matter jurisdiction brought under Neb. Ct. R. Pldg. § 6-1112(b)(1).[17] We have previously explained that the stage of the litigation in which a party claims that its opponent lacks standing affects how a court should dispose of the claim.[18]

[16,17] If the motion is filed at the pleadings stage, it is considered a "facial challenge."[19] In resolving a facial challenge, a court will review the pleadings to determine whether there are sufficient allegations to establish the plaintiff's standing.[20] The court will accept the allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party.[21] At the pleadings stage, the standard for determining the sufficiency of a complaint to allege standing is fairly liberal.[22] An appellate court reviews a trial court's decision on a motion to dismiss for lack of subject matter jurisdiction based on a facial attack on the pleadings de novo.[23]

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[16] See *Stevens v. Downing, Alexander*, 269 Neb. 347, 693 N.W.2d 532 (2005).

[17] *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013).

[18] *Field Club v. Zoning Bd. of Appeals of Omaha*, 283 Neb. 847, 814 N.W.2d 102 (2012).

[19] *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 391, 740 N.W.2d 362, 366 (2007).

[20] *Id.*

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

[22] *Applied Underwriters, supra* note 1.

[23] See *Washington, supra* note 21.

[18] If a motion challenging a court's subject matter jurisdiction is filed after the pleadings stage, and the court holds an evidentiary hearing and reviews evidence outside the pleadings, it is considered a "factual challenge."[24] The party opposing the motion must then offer affidavits or other relevant evidence to support its burden of establishing subject matter jurisdiction.[25] Where the trial court's decision on a motion to dismiss for lack of subject matter jurisdiction is based on a factual challenge, the court's factual findings are reviewed under the clearly erroneous standard.[26]

(a) Facial Challenge

(i) Background

Jacobs' original complaint asserted a contractual indemnification claim against ConAgra. Jacobs alleged ConAgra's refusal to indemnify breached an agreement which stated in part: "ConAgra will indemnify and release [Jacobs] against all other claims, losses, costs, penalties, damages and/or expenses to the extent caused by the negligence of ConAgra and/or others under its control." Jacobs referred to the parties' agreement in the complaint and attached a copy of the agreement to the complaint.

Jacobs alleged that it had "incurred and continues to incur claims, losses, costs, penalties, damages and/or expenses . . . in defending against the [l]awsuits." ConAgra filed a motion which argued Jacob's indemnity claims should be dismissed because "there is no allegation that [Jacobs] has paid the claimants any sums for which [ConAgra] should be required to indemnify [Jacobs]."

Prior to a decision on ConAgra's motion to dismiss, Jacobs filed an amended complaint which alleged that it had "incurred claims, losses, costs, penalties, damages and/or expenses

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[24] *Id.* at 913, 734 N.W.2d at 311.

[25] *Id.*

[26] See *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006).

. . . in connection with the [l]awsuits" and that it had "notified ConAgra in writing that . . . Jacobs has incurred costs and expenses in connection with the [l]awsuit[s] covered by ConAgra's indemnity obligations, including costs of settlement." Jacobs further alleged that "ConAgra's refusal to . . . indemnify Jacobs for settlements, defense fees and any other payments, costs and expenses incurred by Jacobs in defense and resolution of the [l]awsuits, is a breach of S[ubs]ection 10.2 of the Agreement."

ConAgra responded by filing an answer and an amended answer, both of which admitted Jacobs' allegations that it incurred claims, losses, costs, penalties, damages, and/or expenses, but "denie[d] that such expenses and costs were reasonable and allege[d] that those expenses and costs were increased because of the conduct of Jacobs, its employee . . . Pottner and its counsel." ConAgra denied Jacobs' allegation that ConAgra breached an agreement to indemnify, but specifically admitted that "*the expenses incurred by Jacobs* in defending the lawsuits and settling claims were not reasonable and were increased by the conduct of Jacobs, its employee . . . Pottner and its counsel." (Emphasis supplied.)

Thereafter, ConAgra sought discovery regarding Jacobs' damages. ConAgra filed a motion to compel Jacobs to answer interrogatories which sought a breakdown of the amount of money Jacobs and Jacobs' insurers paid toward the settlements. ConAgra argued that it had not agreed to indemnify Jacobs' insurers; that amounts paid by Jacobs' insurers were not recoverable; that ConAgra had a right to know whether any of Jacobs' insurers had a subrogation claim against ConAgra, and if so, how much; and that Jacobs was not the real party in interest to bring a claim as a subrogee.

ConAgra relied on *Jelinek v. Nebraska Nat. Gas Co.*,[27] a subrogation case in which we found that homeowners were not the real party in interest to bring property damage claims

[27] *Jelinek v. Nebraska Nat. Gas Co.*, 196 Neb. 488, 243 N.W.2d 778 (1976).

against a gas company, because the homeowners' insurer had been fully subrogated. The insureds in *Jelinek* admitted they were "satisfied with the amount paid them by the insurance company," "considered it as settlement in full," and "ma[de] no demand on the defendant for the payment of any additional amount because they [felt] that no additional amount [was] owing to them."[28]

The trial court overruled ConAgra's motion to compel discovery and, sua sponte, without reviewing evidence, found that Jacobs was the real party in interest and that "any breakdown of payments between Jacobs and its insurers or communications and agreements between Jacobs and its insurers is not relevant." The court cited *Krause v. State Farm Mut. Auto. Ins. Co.*[29] for the proposition that when an insurer indemnifies its insured for only part of the loss the insured retains the right of action for the entire loss and stated that a partially subrogated insurer has an equitable interest in the insured's recovery.[30]

The court stated:

> It is clear that Jacobs has the right to bring this action for the full amount of the settlements against ConAgra even if their insurers paid part of the settlements. The insurers would then have a right of action against Jacobs, not ConAgra, in the event that Jacobs received a judgment.

(ii) Disposition

[19,20] A party to a contract is generally a real party in interest with standing to raise the claim of breach of contract.[31]

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[28] *Id.* at 490, 243 N.W.2d at 779.

[29] *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969), *modified on denial of rehearing* 184 Neb. 638, 170 N.W.2d 882.

[30] See John P. Lenich, Nebraska Civil Procedure § 6:3 (2018) (and cases cited therein).

[31] See, *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 655 N.W.2d 390 (2003); *Peerless Ins. Co. v. Bukacek*, 211 Neb. 505, 319 N.W.2d 98 (1982).

An indemnity contract is a chose in action because it confers a right to bring a legal action to recover a sum of money from or out of the contract.[32] Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay or has agreed to pay.[33] Nebraska has long held that a claim for indemnity accrues at the time the indemnity claimant suffers loss or damage.[34] We have elaborated that this means that the cause of action accrues when the would-be indemnitee pays the judgment arising from the underlying loss or damage.[35]

In this case, Jacobs brought an express indemnification claim based on ConAgra's refusal to indemnify under an agreement between the parties. Jacobs has standing to raise this claim.

ConAgra argues further discovery could potentially show that as a factual matter, Jacobs has been fully reimbursed for its losses. When a trial court analyzes a facial challenge, however, the court does not make factual findings but accepts the complaint allegations as true and draws all reasonable inferences in favor of the nonmoving party. ConAgra's subrogation argument violates this rule, because it asks this court to construe the parties' allegations in ConAgra's favor. We will not do so, particularly where ConAgra admitted in its pleadings that Jacobs has incurred losses and damages.

[21,22] 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

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[32] See *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 295 Neb. 419, 889 N.W.2d 596 (2016).

[33] *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012).

[34] *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006). See *City of Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 444 N.W.2d 305 (1989).

[35] *Id.*; *Lyhane v. Durtschi*, 144 Neb. 256, 13 N.W.2d 130 (1944).

the proposition of fact alleged by the opponent is true.[36] 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.[37]

At the time the trial court first determined the issue of the real party in interest, Jacobs' operative complaint alleged that Jacobs had incurred losses and damages in connection with the North Carolina lawsuits. ConAgra admitted that Jacobs incurred losses and damages, but denied that the amounts were reasonable. ConAgra's unequivocal admission that Jacobs has sustained some injury in fact establishes that Jacobs has standing to pursue its express indemnification claim.

[23] ConAgra argues that its admissions are not conclusive because, in responding to Jacobs' claim for breach of the implied covenant of good faith and fair dealing, ConAgra's pleading stated "ConAgra denies all allegations in the Amended Complaint except those specifically admitted above." We agree with Jacobs that ConAgra's general denial does not overcome the admissions made by ConAgra in its specific denials directed toward Jacobs' allegations that it incurred losses and damages. Nebraska has long held that a general denial is not effective where an answer contains specific admissions of facts alleged.[38] Thus, the scope of ConAgra's general denial is limited by the facts admitted in its answer.

The allegations show that in both its answer and its amended answer to Jacobs' amended complaint, ConAgra broadly admitted that Jacobs incurred claims, losses, costs, penalties,

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[36] *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018).

[37] *Id.*

[38] See, *State Securities Co. v. Corkle*, 191 Neb. 578, 216 N.W.2d 879 (1974); *Johnson v. School Dist. No. 3*, 168 Neb. 547, 96 N.W.2d 623 (1959).

damages, and/or expenses. ConAgra did not raise the real party in interest issue as an affirmative defense until responding to Jacobs' second amended complaint filed after the court had already determined that Jacobs had standing and was the real party in interest. Even under a de novo facial review, ConAgra's affirmative defense allegation is insufficient, because it stated that Jacobs is not the real party in interest "to the extent the claims it asserts are as a subrogee."

ConAgra's admissions establish that Jacobs' express indemnity claim had accrued and that Jacobs sought to invoke the court's jurisdiction in order to remedy ConAgra's refusal to indemnify. This is sufficient to establish that Jacobs has standing and is the real party in interest with respect to its express indemnification claim and to show that the pleadings do not support ConAgra's theory that Jacobs asserted claims as a subrogee.

[24] We have said the primary purpose of the real party in interest requirement is to protect the defendant from the risk of multiple litigation.[39] ConAgra has not advanced a persuasive argument that it will be forced to defend claims brought by multiple parties. The trial court addressed this aspect of ConAgra's argument by explaining that Jacobs' insurers would have a right to recovery against Jacobs and not ConAgra.

When the indemnity paid by the insurer covers only part of the loss, the right of action remains in the insured for the entire loss.[40] This rule is "'founded on the principle that the wrongful act was single and indivisible, and gives rise to but one liability. *Upon this theory the splitting of causes of action is avoided and the wrongdoer is not subjected to a multiplicity*

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[39] See, *Peerless Ins. Co., supra* note 31; *Redding v. Gibbs*, 203 Neb. 727, 280 N.W.2d 53 (1979). See, also, Lenich, *supra* note 30, § 6:9.

[40] See, *Schmidt v. Henke*, 192 Neb. 408, 222 N.W.2d 114 (1974); *Krause, supra* note 29; *Shiman Bros. & Co. v. Nebraska National Hotel Co.*, 143 Neb. 404, 9 N.W.2d 807 (1943).

of suits.'"[41] We have recognized one exception to this rule, not applicable here, where a tort-feasor or the tort-feasor's insurer, with notice of an insurer's subrogation claim, procures a release by settling with the insured.[42]

ConAgra's theory is not based on pleading allegations and therefore is not persuasive under a facial challenge. Accepting the parties' allegations as true and viewing reasonable inferences in Jacobs' favor, Jacobs incurred some amount of damages as a result of ConAgra's refusal to indemnify, ConAgra admitted this, and there are no contrary factual allegations stating that Jacobs' damages have been fully reimbursed. Under the rule from *Krause*, Jacobs has a right to bring an action for the full amount of its damages. The trial court was correct in determining that ConAgra was not forced to defend claims brought by multiple parties.

ConAgra also suggests Jacobs' claim may be barred by Nebraska's antisubrogation rule. Under the antisubrogation rule, no right of subrogation can arise in favor of an insurer against its own insured or coinsured for a risk covered by the policy, even if the insured is a negligent wrongdoer.[43] To allow subrogation under such circumstances would permit an insurer, in effect, to avoid the very coverage which its insured purchased.[44] For example, a fully subrogated insurer of Jacobs cannot assert a subrogation claim against Jacobs. Here, ConAgra's antisubrogation argument asks this court to assume that the real party in interest is a fully subrogated insurer of Jacobs which also happens to be an insurer of ConAgra for the same risks. This argument is not supported by the pleadings.

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[41] *Krause, supra* note 29, 184 Neb. at 593, 169 N.W.2d at 604 (emphasis in original).

[42] *Milbank Ins. Co. v. Henry*, 232 Neb. 418, 441 N.W.2d 143 (1989).

[43] *SFI Ltd. Partnership 8 v. Carroll*, 288 Neb. 698, 851 N.W.2d 82 (2014); *Buckeye State Mut. Ins. Co. v. Humlicek*, 284 Neb. 463, 822 N.W.2d 351 (2012).

[44] *Id.*

Based on the pleadings, we find Jacobs, and not ConAgra's insurer, is the real party in interest and is asserting an indemnification claim and not a subrogation claim. We therefore reject ConAgra's antisubrogation argument.

As noted, after the trial court determined that Jacobs was the real party in interest, ConAgra continued to press the issue through pretrial motions, objections at trial, and posttrial motions. We discuss below ConAgra's factual challenge and further explain why the trial court did not err in determining that Jacobs is the real party in interest.

(b) Factual Challenge

(i) Background

Before trial, ConAgra filed another motion to compel discovery of the amounts that Jacobs and its insurers paid to settle the North Carolina lawsuits. The court issued an order which maintained its prior ruling that these items were not discoverable. The court again rejected the argument that Jacobs brought its claim as a subrogee. The court's order stated that "the Court is bound by the Agreement, which contains an express indemnity contract between the parties. Jacobs is suing for ConAgra's alleged breach of the Agreement, not for subrogation."

ConAgra revived the real party in interest issue at trial when it moved for a directed verdict at the close of Jacobs' evidence. ConAgra argued that Jacobs had not offered evidence that it actually made payments to the North Carolina plaintiffs. The court denied the motion, and after trial, ConAgra renewed its motion for directed verdict and moved for judgment notwithstanding the verdict and a new trial. The court issued a written order which explained its reasons for overruling ConAgra's motions.

The court clarified that it interpreted ConAgra's argument as an objection to Jacobs' damages, rather than solely an argument about standing, and explained that ConAgra's arguments contravened the collateral source rule. The court rejected

ConAgra's contention that the collateral source rule did not apply in this breach of contract action premised upon negligent conduct.

[25] Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages.[45] The theory underlying this rule is to prevent a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice.[46] The majority of courts do not apply the collateral source rule to pure breach-of-contract actions.[47] However, in cases where the breach of contract is of a tortious character, the collateral source rule prevents unjust enrichment of the breaching party.[48]

Here, the court found that the contract expressly incorporated tort principles of negligence and found the collateral source rule applied. The court cited to *Countryside Co-op v. Harry A. Koch Co.*[49] and found that the damages Jacobs sought to recover from ConAgra, a tort-feasor, could not be diminished by losses that were wholly or partially indemnified by insurance or another collateral source. ConAgra did not assign as error this aspect of the court's ruling, and we do not find plain error based on the facts of this case, given that the other source of payment alleged is insurance, which specifically invokes the collateral source rule.[50]

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[45] *Strasburg v. Union Pacific RR. Co.*, 286 Neb. 743, 839 N.W.2d 273 (2013).

[46] *Id.*

[47] See *Midland Mut. Life Ins. v. Mercy Clinics*, 579 N.W.2d 823 (Iowa 1998) (citing cases).

[48] See *John Munic Enterprises, Inc. v. Laos*, 235 Ariz. 12, 326 P.3d 279 (Ariz. App. 2014).

[49] *Countryside Co-op, supra* note 1.

[50] See *Huenink v. Collins*, 181 Neb. 195, 147 N.W.2d 508 (1966).

In addressing ConAgra's reliance on *Jelinek*,[51] the court noted that the insureds in *Jelinek* were satisfied with payments made by their insurer and made no demand on the defendant for payment. The court also referenced *Schmidt v. Henke*,[52] a similar case cited in *Jelinek*, in which the insured had released its claims against the defendant. The court distinguished both *Jelinek* and *Schmidt* from the present case and made a factual finding that "Jacobs has made a demand on ConAgra for payment and has not expressly released any claims against ConAgra." The court again found that Jacobs was the real party in interest.

(ii) Disposition

ConAgra argues that on this record, there is no way to tell whether this case falls on the *Jelinek* or *Krause* side of the line. Jacobs argues the record supports the district court's finding that Jacobs is the real party in interest.

At trial, Jacobs introduced evidence, with information about the payor redacted, that wire transfers were made to pay the various settlements. The settlement documents stated that "JACOBS and/or its insurers" will pay. Jacobs' vice president of global litigation testified that all of the settlements have been paid, but did not testify who made the payments. Jacobs' expert testified that he was asked to "review the settlements that were paid by Jacobs." ConAgra objected and argued if the witness' answer were allowed to stand that would open the door for ConAgra to inquire into the amounts paid by Jacobs and its insurers. The court responded that "Jacobs is the real party in interest" and struck the witness' answer so that the jury would not hear evidence of collateral source payments.

After trial, ConAgra moved for judgment notwithstanding the verdict and a new trial, in part based on its argument that Jacobs failed to establish standing. Citing *Citizens Opposing*

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[51] *Jelinek, supra* note 27.

[52] *Schmidt, supra* note 40.

Indus. Livestock v. Jefferson Cty.,[53] Jacobs requested an evidentiary hearing. In *Citizens Opposing Indus. Livestock*, we held that where a motion to dismiss for lack of subject matter jurisdiction due to lack of standing was raised for the first time after trial, the motion was considered a factual challenge and the trial court was required to hold an evidentiary hearing to give a plaintiff the opportunity to offer evidence on the standing issue.

The court granted Jacobs' request, and Jacobs offered its insurance policies into evidence. The policies showed that Jacobs had deductible obligations and a 10-percent copayment obligation for all sums that exceeded $7.5 million. Although there was no direct evidence that Jacobs paid these obligations, there was also no evidence that Jacobs' insurers waived these obligations. ConAgra did not offer any evidence to support its theory and did not assign error to the district court's decisions regarding discovery. ConAgra also did not assign error as to the court's factual findings and clarified that "[t]his appeal involves only questions of law . . . ."[54] Jacobs' insurance policies therefore established circumstantial evidence that Jacobs paid a share of the $108.9 million in settlement payments.

[26,27] Circumstantial evidence is not inherently less probative than direct evidence, and a fact proved by circumstantial evidence is nonetheless a proven fact.[55] A finder of fact may draw reasonable inferences from the facts and circumstances proved.[56] Based on the court's specific findings that "Jacobs has made a demand on ConAgra for payment and has not expressly released any claims against ConAgra," and the insurance policies in evidence, we find the trial court's factual determination that Jacobs had standing and was the real party

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[53] *Citizens Opposing Indus. Livestock, supra* note 19.

[54] Brief for appellant at 4.

[55] See *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

[56] *In re Interest of Elainna R.*, 298 Neb. 436, 904 N.W.2d 689 (2017).

in interest was not clearly erroneous. There is evidence in the record to support the district court's finding that Jacobs had standing to pursue its express indemnity claim and that ConAgra will not be subjected to multiple litigation.

Although ConAgra challenged Jacobs' standing before the end of trial, unlike the defendant in *Citizens Opposing Indus. Livestock*, ConAgra was not prejudiced by the court's decision to hold a posttrial evidentiary hearing. ConAgra was on notice of the court's ruling on standing and objected at trial whenever a witness for Jacobs testified that Jacobs had paid the settlements. The court's factual determination regarding Jacobs' standing was merely a consistent supplement to its determination at the pleading stage.

Under both a facial and a factual analysis, this assignment of error is without merit.

2. Court Did Not Err in Finding ConAgra's Workers' Compensation Immunity Inapplicable

ConAgra asserts the trial court erred in finding that Jacobs could be indemnified for settlements made to ConAgra employees, because the indemnification agreement with Jacobs did not explicitly waive ConAgra's workers' compensation immunity. Jacobs argues that ConAgra agreed to indemnify Jacobs for claims and losses incurred by ConAgra employees and that the agreement is all that is required under Nebraska law. We agree with Jacobs that ConAgra misconstrues our precedent regarding the relationship between the Nebraska Workers' Compensation Act (NWCA), Neb. Rev. Stat. § 48-101 et seq. (Reissue 2010, Cum. Supp. 2016 & Supp. 2017), and an employer's liability based on express indemnification of third parties.

[28,29] An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts.[57] A contract must

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[57] *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009).

receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.[58]

(a) Parties' Contract Covered Indemnification of Claims and Losses Incurred by ConAgra Employees

Subsection 10.1 of the contract provides that "[Jacobs] shall indemnify . . . ConAgra . . . against each and every claim, loss, cost, penalty, damage, or expense . . . suffered or incurred by any third parties, employees of ConAgra and employees of [Jacobs]." Subsection 10.2 provides that "ConAgra will indemnify and release [Jacobs] against all other claims, losses, costs, penalties, damages and/or expenses to the extent caused by the negligence of ConAgra and/or others under its control."

The district court explained that "[w]hen Section 10 of the Agreement is viewed as a whole, there is no question that S[ubs]ection 10.2 is an express contract in which ConAgra agreed to indemnify Jacobs against claims by ConAgra employees." We agree the meaning of section 10 becomes clear once subsections 10.1 and 10.2 are construed together.

Subsections 10.1 and 10.2 are reciprocal indemnification provisions. Subsection 10.1 states Jacobs shall indemnify ConAgra "against each and every claim, loss, cost, penalty, damage, or expense" incurred by "employees of ConAgra," and subsection 10.2 states that ConAgra will indemnify Jacobs "against all other claims, losses, costs, penalties, damages and/or expenses." In addition, subsection 10.1 states that Jacobs' "obligations hereunder shall be limited to the extent caused by the negligent acts, errors or omissions of [Jacobs]," and subsection 10.2 states that Jacobs' liability "is specifically limited as provided herein."

Reading section 10 as a whole and in context, the term "all other claims" as provided in subsection 10.2 must refer

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[58] *Id.*

to "all other claims" within section 10. Because subsection 10.1 plainly provides for indemnification of claims brought by employees of ConAgra, when read together, subsections 10.1 and 10.2 provide a clear indication that ConAgra agreed to indemnify Jacobs for claims and losses incurred by employees of ConAgra "to the extent caused by the negligence of ConAgra and/or others under its control." Thus, the district court correctly interpreted the parties' contract to obligate ConAgra to indemnify claims and losses incurred by ConAgra employees caused by ConAgra's negligence.

(b) NWCA Does Not Immunize ConAgra From Indemnifying Jacobs for Losses Sustained by ConAgra Employees

Section 48-148 of the NWCA provides that if an employee's injury arises out of and in the course of employment, the employee's exclusive remedy is against the employer for workers' compensation.[59] The NWCA imposes liability on the employer without fault, and in return, shields the employer from tort actions.[60] But nothing in Nebraska law or public policy prevents an employer from indemnifying a third party for losses paid to the indemnitor's employee.[61]

[30] We held in *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*[62] that when an employer, liable to an employee under the NWCA, agrees to indemnify a third party for a loss sustained as the result of the third party's payment to the indemnitor's employee, the employer's exclusion from liability accorded by the NWCA does not preclude the third

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[59] *Bennett v. Saint Elizabeth Health Sys.*, 273 Neb. 300, 729 N.W.2d 80 (2007).

[60] *Estate of Teague v. Crossroads Co-op Assn.*, 286 Neb. 1, 834 N.W.2d 236 (2013).

[61] See, *Petznick v. United States*, 575 F. Supp. 698 (D. Neb. 1983); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988).

[62] *Union Pacific RR. Co., supra* note 61.

party's action to enforce the indemnity agreement with the indemnitor-employer.[63]

ConAgra argues that Jacobs' claim is based on a general indemnification provision and that ConAgra cannot be deprived of the protections of the NWCA absent an affirmative waiver of workers' compensation immunity. Our precedent, however, does not recognize the rule ConAgra suggests, and we have taken the opposite approach in analyzing indemnification agreements, finding a waiver of workers' compensation immunity where an indemnity provision fails to include language stating that an employer has not waived immunity.[64]

In interpreting the effectiveness of the indemnity agreement in *Union Pacific RR. Co.*, we noted that the "agreement contains no specific provision or language which excludes, exempts, or exonerates [the employer] from liability for indemnification or contribution as a contractual duty,"[65] and concluded that the employer remained liable for indemnification or contribution based on the railroad's settlement with the employer's employee. We found that to conclude otherwise would rewrite the agreement by adding a provision to preserve the employer's workers' compensation immunity.[66]

Similarly, in *Oddo v. Speedway Scaffold Co.*,[67] we cited *Union Pacific RR. Co.* and found the NWCA did not bar a contractor's liability under an indemnification agreement by reasoning that the agreement "contains no specific provision or language which excludes, exempts, or exonerates Contractor from indemnification as a contractual duty."[68]

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[63] See, also, *Harsh International v. Monfort Indus.*, 266 Neb. 82, 662 N.W.2d 574 (2003).

[64] *Union Pacific RR. Co., supra* note 61.

[65] *Id.* at 169, 425 N.W.2d at 879.

[66] *Id.*

[67] *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596 (1989).

[68] *Id.* at 9, 443 N.W.2d at 602.

The same analysis applies here. The agreement between ConAgra and Jacobs includes indemnification obligations for claims and losses incurred by ConAgra employees and does not express any exclusions in favor of ConAgra or Jacobs based on workers' compensation immunity. Therefore, ConAgra's contractual liability remains.

ConAgra urges a different result based on our decision in *Harsh International v. Monfort Indus.*[69] In *Harsh International*, the district court dismissed a petition brought by a manufacturer which asserted a contribution claim against an employer, after settling claims brought by injured employees. We affirmed the district court's dismissal of the petition. In doing so, we rejected the manufacturer's implied indemnity claim and found the employer's liability was limited to the employee, absent an express indemnity contract or an implied indemnification claim involving a special relationship.[70] In dicta, we contrasted a contractual indemnity claim from an implied indemnity claim by stating that "[u]nder an express contract of indemnity, an employer has explicitly agreed to reimburse a third party for payment to an injured employee."[71] We did not hold, as ConAgra argues, that an employer who enters an indemnity agreement must affirmatively waive its workers' compensation immunity in order to be subject to indemnity claims brought by third parties based on employees' losses.

Rather, we have consistently held that an indemnification agreement is construed according to general contract principles.[72] ConAgra may be applying the different rule, not applicable here, that an indemnitee shall not be indemnified

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[69] *Harsh International, supra* note 63.

[70] *Id.*

[71] *Id.* at 88, 662 N.W.2d at 580.

[72] See, *Kuhn, supra* note 57; *Oddo, supra* note 67; *Union Pacific RR. Co., supra* note 61. See, also, *Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co.*, 196 Neb. 158, 241 N.W.2d 674 (1976); *Currency Services, Inc. v. Passer*, 178 Neb. 286, 133 N.W.2d 19 (1965).

for a loss occasioned by his or her own negligence unless the language of the contract affirmatively expresses an intent to indemnify for such loss.[73] Here, Jacobs seeks indemnification for claims and losses caused by ConAgra's negligence and not Jacobs' own negligence. The NWCA does not bar ConAgra's liability to Jacobs for settlements made with ConAgra employees. This assignment of error is without merit.

3. Jacobs Established Jury Issue That ConAgra Breached Contract

ConAgra assigns, restated, that the district court erred in declining to direct a verdict in favor of ConAgra or grant a new trial based on the argument that Jacobs failed to establish ConAgra breached the contract.

In order to establish that ConAgra's refusal to indemnify breached the contract at issue, Jacobs was required to satisfy two components: (1) that Jacobs incurred claims, losses, costs, penalties, damages, and/or expenses and (2) that Jacobs' claims, losses, costs, penalties, damages, and/or expenses were caused by the negligence of ConAgra and/or others under its control. ConAgra asserts Jacobs failed to prove both aspects as a matter of law. We find no merit to this assignment of error.

(a) Jacobs Established Sufficient Evidence of Its Claims, Losses, or Damages to Submit Issue to Jury

ConAgra argues Jacobs did not establish a triable claim that ConAgra caused Jacobs' losses. ConAgra relies on an instruction given by the district court regarding Jacobs' damages which stated that "Jacobs is entitled to indemnification for all objectively reasonable settlements of the North Carolina lawsuits to the extent that *the explosion and/or the resulting*

[73] *Kuhn, supra* note 57.

injuries and damages to the North Carolina plaintiffs were caused by the negligence of ConAgra and/or others under its control." (Emphasis supplied.) ConAgra argues the court erred by instructing the jury that the losses at issue were the injuries and damages from the underlying explosion, as opposed to Jacobs' settlement payments. ConAgra argues that it was prejudiced, because the court's instructions and special verdict form deprived ConAgra of the ability to argue that the settlements were caused by the efficient intervening cause of defense counsel's performance during the *Brockington* trial.

[31-33] A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.[74] If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.[75] Where a party has sustained the burden and expense of trial and has succeeded in securing a verdict on the facts in issue, that party has the right to keep the benefit of the verdict unless there is prejudicial error in the proceedings by which it was secured.[76]

ConAgra claims it was prevented from arguing that the actions of defense counsel during the *Brockington* trial were an unforeseeable efficient intervening cause that negated its liability. ConAgra points to language from the court's damages instruction provided above, and the special verdict form, which asked the jury: "Did ConAgra's negligence proximately cause the explosion and/or the resulting injuries and damages to the North Carolina plaintiffs?" and "Were the settlement amounts that Jacobs is seeking in all of the North Carolina lawsuits objectively reasonable?" In evaluating ConAgra's argument, we cannot view these instructions in artificial

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[74] *Rodriguez v. Surgical Assocs.*, 298 Neb. 573, 905 N.W.2d 247 (2018).

[75] *Id.*; *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

[76] *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993).

isolation but must consider the instructions provided to the jury as a whole.[77]

Beginning with the court's statement of the case instruction, jury instruction No. 2, the court explained that Jacobs' claim was not confined to only its "losses" as ConAgra argues on appeal. The court provided the language of subsection 10.2 to demonstrate that Jacobs sought to recover for "claims, losses, costs, penalties, damages and/or expenses." The court instructed the jury that it had determined that subsection 10.2 required ConAgra to indemnify Jacobs "for *claims* to the extent the Garner plant explosion and/or the resulting injuries and damages were caused by the negligence of ConAgra and/or others under ConAgra's control." (Emphasis supplied.)

The court then provided a breach of contract instruction, jury instruction No. 11. The instruction provided, "For Jacobs to recover on its claim for breach of contract against ConAgra, Jacobs must prove, by the greater weight of the evidence . . . [t]hat ConAgra's breach of contract was a proximate cause of some damage to Jacobs." Jury instruction No. 12 stated, in part, "You must determine whether ConAgra owes a contractual duty to indemnify Jacobs for any amounts paid to settle the North Carolina lawsuits." Thus, the court instructed the jury to consider whether ConAgra breached a contractual duty to indemnify Jacobs for claims, whether ConAgra's breach was a proximate cause of damage to Jacobs, and whether ConAgra was responsible to Jacobs for amounts paid to settle the lawsuits.

The court also provided a general proximate cause instruction, jury instruction No. 14, which stated, "A proximate cause is a cause [that] produces a result in a natural and continuous sequence, and without which the result would not have occurred." And, near the beginning of jury instruction No. 21, prior to the portion quoted by ConAgra, the court instructed the jury that "Jacobs is seeking as damages amounts it agreed to settle the claims of the North Carolina plaintiffs."

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[77] See *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

Although in isolated parts of the instructions the district court could have more precisely stated that under subsection 10.2, Jacobs sought to prove that ConAgra's negligence caused the settlements rather than the North Carolina plaintiffs' personal injuries, we certainly cannot say the failure to do so under the circumstances of this case impacted the fairness of trial. As noted, the scope of the indemnification provision under subsection 10.2 includes claims and damages, in addition to losses. All of the claims in this case were for injuries caused by the explosion, ConAgra was liable for claims under the indemnity provision, the court made the jury aware that Jacobs was seeking damages based on the settlement figures, and the court provided proximate cause instructions. Taken together as a whole, the instructions asked the jury to determine whether ConAgra proximately caused Jacobs' settlements.

ConAgra's request for an efficient intervening cause instruction was not supported by the evidence. An efficient intervening cause is the new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury.[78] The evidence showed the North Carolina plaintiffs brought their claims against Jacobs as a result of the explosion.

ConAgra criticized the outcome of the *Brockington* trial and sought to argue that the settlement was caused by the performance of defense counsel. We agree with the district court which rejected this argument by stating that the misconduct of Jacobs' attorney in the *Brockington* lawsuit "in no way intervened to cause the injuries resulting from the [e]xplosion at the Garner Plant." And, even taking ConAgra's argument at face value, ConAgra failed to prove prejudice, because it never argued what the amount of the *Brockington* settlement would have been had the misconduct not occurred. ConAgra never provided what it claimed to be the appropriate settlement value and, in fact, told the jury during closing

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[78] *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014).

argument that the value could be $14.4 million, $17.7 million, or $20 million.

Jacobs established a triable issue that ConAgra caused Jacobs' claims, losses, and damages. The evidence did not support the use of an efficient intervening cause instruction regarding performance of defense counsel at trial. ConAgra was not prejudiced. This argument is without merit.

(b) Jacobs Established Triable Issue That Its Claims, Losses, or Damages Were Caused by ConAgra or Someone Under ConAgra's Control

ConAgra raises three additional arguments which claim that it cannot be held liable for the explosion as a matter of law. First, ConAgra argues that it did not cause Jacobs' claims, losses, or damages, because Poppe's removal of the cap on the 2-inch gasline broke the causal chain between ConAgra and the explosion as a matter of law. Second, ConAgra argues that Poppe and ESA were not under ConAgra's control, and relatedly, third, that the indemnification provision is inapplicable under the circumstances of this case.

Jacobs contends that sufficient evidence was presented that ConAgra's employees knew of the significant danger posed by Poppe's action, but did nothing to stop him. In addition, Jacobs contends that there was sufficient evidence submitted to the jury of ConAgra's control over Poppe and ESA. In the alternative, Jacobs contends that ConAgra had a nondelegable duty to protect its employees with a safe working environment free of deadly hazards.

We agree with Jacobs that there was sufficient evidence to support the jury's determination that Poppe's actions did not breach the causal chain as a matter of law. In addition, we find there was evidence supporting the jury's determination that Poppe and ESA were under ConAgra's control. With regard to the nondelegable duty doctrine, we note that this issue concerns an alternative and independent theory of ConAgra's liability based on negligence at common law, and we agree

with the statement from ConAgra's brief that "[t]here is no basis for reading this contract to require [common-law tort] liability."[79] However, we conclude there is evidence to support the contract theory.

(i) There Was Evidence to Support Jury's Finding ConAgra's Negligence Was Proximate Cause of Jacobs' Damages

[34,35] A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.[80] Because the extent of foreseeable risk depends on the specific facts of the case, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter.[81]

[36] A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.[82]

The district court found "there [was] evidence that ConAgra employees knew of the significant dangers posed by . . . Poppe's action, and did nothing to stop him" and that its judgment should not be substituted for the jury's. We have the same view. There was competent evidence to sustain the jury's determination that ConAgra was a proximate cause of Jacobs' damages.

Even if Poppe's decision to unscrew the cap to the 2-inch line was "crazy" and was the final act prior to the explosion,

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[79] Brief for appellant at 50.

[80] *Welsh v. Zuck*, 192 Neb. 1, 218 N.W.2d 236 (1974).

[81] See, *Pittman v. Rivera*, 293 Neb. 569, 879 N.W.2d 12 (2016); *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[82] *InterCall, Inc., supra* note 75.

there was evidence to support a jury finding that Poppe's decision was either (1) set in motion by ConAgra's negligence or (2) was connected with or flowed from ConAgra's negligence, and was not independent thereof. The evidence showed that ConAgra breached the standard of care in the planning and execution of its water heater project and that Poppe's actions occurred because of a series of errors committed by ConAgra.

ConAgra's worksite hazard assessment plan described the line-break procedure and the need to address the risk of explosion. Puff was responsible for the line-break procedure, but did not follow the written procedure and did not train Poppe in the procedure resulting in the gasline to the water heater's not being purged prior to the commissioning. ConAgra allowed Poppe to attempt to light the water heater for 3½ hours, even after ConAgra employees witnessed Poppe crack the pilotline and release gas into the room. Puff smelled gas and did not tell Poppe that the line had not been purged, and he allowed Poppe to continue to purge inside even though Puff had been trained to purge outdoors and had already purged one of the lines outdoors 5 days prior. Puff testified that the gas smell eventually grew stronger and that he temporarily stopped Poppe from working due to his concern about whether the gas meter was functioning properly. Puff left the scene and admitted that he should not have left Poppe unsupervised. Puff admitted he would not have allowed Poppe to open the cap on the gasline if he had stayed. Had Puff purged the line on June 4, 2009, the explosion may have been avoided.

In addition, an SPA was never created for ConAgra's water heater, and ConAgra admitted that, if implemented, an SPA would have prevented Poppe from venting in the pumproom, and thus prevented the explosion. Further, ConAgra failed to comply with the fire prevention plan, which prohibited the handling of natural gas "where vapors are prevented from reaching ignition sources."

[37] Even if the jury determined that Poppe's decision to remove the gas cap was a proximate cause of the explosion, the record supports the verdict, because Jacobs had to show that ConAgra was only a proximate cause of Jacobs' damages, and not the sole proximate cause. Jury instruction No. 11, discussed above, stated that Jacobs was required to prove that "ConAgra's breach of contract was *a* proximate cause of some damage to Jacobs." (Emphasis supplied.) Even ConAgra's refused instruction stated that Jacobs must prove that "ConAgra's negligence was *a* proximate cause of Jacobs' losses." (Emphasis supplied.) Where separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone could not have caused the result.[83] The record provided the jury a sufficient basis from which to conclude that Poppe's decision to remove the gas cap was not the single, independent cause of Jacobs' damages. ConAgra's argument that Poppe broke the causal chain as a matter of law is without merit.

(ii) Jacobs Established Triable Issue Regarding ConAgra's Control of ESA Under Contract

ConAgra asserts that it did not exercise control over ESA, an independent contractor, and was entitled to a directed verdict based on this issue. As noted above, ConAgra asserted that the contract does not incorporate common-law nondelegable duties. ConAgra also argues that as a matter of law, Jacobs' claims did not satisfy the general rule discussed in *Gayton v. Wal-Mart*[84] that "one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or its servants."

Jacobs argues that ConAgra had control over ESA's ability to purge the gasline and that Puff and Roberson exercised

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[83] *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

[84] *Gaytan v. Wal-Mart*, 289 Neb. 49, 57, 853 N.W.2d 181, 192 (2014).

control over Poppe's work. Jacobs further argues that sufficient evidence was presented to satisfy the three-part test from *Gaytan* to establish that ConAgra had control over Poppe and ESA.

In *Gaytan*, we held that in order to impose liability on a general contractor for injury to a subcontractor's employee, the general contractor must have (1) supervised the work that caused the injury to the employee, (2) actual or constructive knowledge of the danger which ultimately caused the injury, and (3) the opportunity to prevent the injury.

On the question of ConAgra's "control" of ESA, we give primary consideration to Jacobs' contract theory. Under Jacobs' theory of contractual indemnification, we interpret the contractual term "under [ConAgra's] control" according to its plain meaning and context. "Control" is defined as "the power or authority to manage, direct, or oversee."[85] To the extent ConAgra's arguments can be interpreted as claiming that it did not exercise authority over ESA, we reject those arguments based on the record in this case.

Drawing every reasonable inference from the evidence in Jacobs' favor, there was evidence that Puff and his team had control over the line-break procedure and the purging of the natural gasline and that ConAgra should have required ESA to follow this procedure to comply with industry standards. There was evidence that in accordance with ConAgra policy, Puff and Roberson supervised Poppe's work and had the ability to train and instruct Poppe and stop his work if needed. There was also evidence that ConAgra knew Poppe was releasing gas into an enclosed room, that Roberson brought unrated temporary lighting into the room, and that ConAgra could have had Poppe purge outside, discontinue the commissioning based on an inoperative gas meter, or evacuate the building. Thus, there was competent evidence that ConAgra exercised supervisory authority over ESA, that ConAgra had actual or

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[85] Black's Law Dictionary 403 (10th ed. 2014).

constructive knowledge of the danger which ultimately caused the injuries, and that ConAgra had the opportunity to prevent the injuries. Therefore, ESA was under ConAgra's control within the meaning of the indemnification provision. This assignment of error is without merit.

4. Court Did Not Err in Declining to Reduce Jury's Award of Damages

ConAgra assigns error to the trial court's decision not to reduce the amount of damages awarded by the jury. ConAgra argues that we should reduce the judgment by the amount of the *Brockington* settlement, because the $17.7 million figure was arbitrary.

[38-40] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.[86] The law is well established that where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty.[87] A request for remittitur is generally made in lieu of a request for a new trial.[88] An appellate court should order remittitur only when the award is contrary to all reason.[89]

ConAgra argues there was no evidentiary basis upon which a jury could value the *Brockington* settlement at $17.7 million. However, Jacobs' expert, a North Carolina trial lawyer with over 40 years of experience, testified that the $17.7 million

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[86] *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010).

[87] *Barbour v. Jenson Commercial Distributing Co.*, 212 Neb. 512, 323 N.W.2d 824 (1982).

[88] See, *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990); *Barbour, supra* note 87; *Pearse v. Loup River Public Power District*, 137 Neb. 611, 290 N.W. 474 (1940).

[89] *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

figure represented the amount of the first verdict, $14.6 million, plus prejudgment interest under North Carolina law. He compared the settlement amounts to what would be fair compensation for the injuries suffered and opined that the settlement amounts were objectively reasonable.

Jacobs' expert witness' opinion was based on an objective 10-factor analysis, which considered: venue, nature and magnitude of disaster, horrific nature of the injuries, ratio of demands to settlements, target defendants, ConAgra's exposure, and comparable verdicts and settlements. In demonstrating the objective reasonableness of the *Brockington* settlement, he testified that the *Brockington* venue was "plaintiff-friendly" and that Jacobs was a target defendant as an out-of-state "faceless" corporation with deep pockets. He stated the settlement demand for the *Brockington* case was $25 million before the first and second trials.

The expert witness described the horrific nature of the injuries at issue in the *Brockington* case, which involved seven plaintiffs. The severe nature of the plaintiffs' injuries included burns to the face and upper torso and legs; the insertion of a metal plate to repair musculoskeletal injuries; temporary blindness and paralysis; a traumatic brain injury; and neck, spine, and knee surgeries.

The jury's decision was supported by evidence and bore a reasonable relationship to the damages proved. As already noted, ConAgra did not actually specify to the jury the amount to award for the *Brockington* settlement. We cannot conclude that the jury's verdict was contrary to all reason, and we therefore decline to alter the amount of damages awarded.

V. CONCLUSION

For the reasons set forth herein, we find no merit to ConAgra's assignments of errors and affirm the judgment of the district court.

Affirmed.

Kelch, J., not participating in the decision.

Wright, J., not participating.

State of Nebraska, appellee, v.
Steven D. Shaull, appellant.
916 N.W.2d 900

Filed September 14, 2018. No. S-17-943.

1. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged to be excessive, an 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.
2. **Judgments: Appeal and Error.** 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 Lancaster County: Lori A. Maret, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, John C. Jorgensen, and Sarah L. Burghaus, Senior Certified Law Student, for appellant.

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

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

Heavican, C.J.

INTRODUCTION

Steven D. Shaull was convicted of theft by deception and sentenced to 2 years' imprisonment and 12 months' postrelease

supervision. He appeals from the conditions set by the district court. We affirm.

FACTUAL BACKGROUND

On June 29, 2017, Shaull was charged by amended information with theft by deception, a Class IV felony pursuant to Neb. Rev. Stat. § 28-518 (Reissue 2016), in connection with the fraudulent sale of a vehicle engine through an online auction service. Shaull, a resident of Anaheim, California, received $11,500 for the engine from a resident of Lancaster County, Nebraska, but never delivered the engine. An investigation showed that Shaull sold, but failed to deliver, the same engine to individuals in multiple states.

Shaull was extradited to Nebraska and eventually pled no contest to theft by deception. As noted, Shaull was sentenced to 2 years' imprisonment and 1 year of postrelease supervision. That supervision was subject to 20 conditions, which are set forth in the district court's order of postrelease supervision.

At the sentencing hearing, Shaull's counsel, citing to *State v. Phillips*,[1] which was at the time pending with this court, objected to the terms of postrelease supervision. Counsel specifically argued that because Shaull was to be extradited to Kentucky to face charges there, the conditions specific to remaining in Nebraska were not feasible. Counsel also argued that the imposition of various fees was error, because Shaull was indigent. Counsel's objections were noted and overruled.

Shaull appeals.

ASSIGNMENT OF ERROR

Shaull assigns that the district court abused its discretion in failing to impose terms and conditions of postrelease supervision that (1) could be served by Shaull while he was

[1] *State v. Phillips*, 297 Neb. 469, 900 N.W.2d 522 (2017).

incarcerated in another state and (2) were reasonably related to his rehabilitation.

STANDARD OF REVIEW

[1,2] Where a sentence imposed within the statutory limits is alleged to be excessive, an 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.[2] 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]

ANALYSIS

On appeal, Shaull assigns that the district court erred by imposing terms and conditions for his postrelease supervision that were not related to his rehabilitation and that could not be met, because he would be serving that term of postrelease supervision in the custody of another state's criminal justice system.

Postrelease supervision is a relatively new concept in Nebraska. Both Neb. Rev. Stat. §§ 28-105 and 29-2204.02 (Supp. 2017) authorize the imposition of postrelease supervision as part of a determinate sentence. Section 28-105(5) provides that "[a]ll sentences of post-release supervision shall be served under the jurisdiction of the Office of Probation Administration and shall be subject to conditions imposed pursuant to section 29-2262 and subject to sanctions authorized pursuant to section 29-2266.02."

Neb. Ct. R. § 6-1904(A) (rev. 2016) provides the process to undertake when imposing a sentence of postrelease supervision. According to that rule:

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[2] *Id.*

[3] *Id.*

> In cases requiring a determinate sentence pursuant to Neb. Rev. Stat. § 29-2204.02, the court shall, at the time a sentence is pronounced, impose a term of incarceration and a term of post-release supervision pursuant to Neb. Rev. Stat. § 29-2204.02(1), and shall enter a separate post-release supervision order that includes conditions pursuant to Neb. Rev. Stat. § 29-2262. The court shall specify, on the record, that conditions of the order of post-release supervision may be modified or eliminated pursuant to Neb. Rev. Stat. § 29-2263(3).

Our case law generally provides that a conviction and sentence in a criminal case is a final, appealable order.[4] And we held in *State v. Phillips* that a term of postrelease supervision ordered alongside a determinate sentence is final.[5]

Section 6-1904(A) requires the conditions to be imposed upon the defendant at the time of sentence. Subsections (B) and (C) of § 6-1904 provide that prior to an individualized release date (45 days for inmates incarcerated with the Department of Correctional Services and 30 days if in the county jail), the "court shall receive a post-release supervision plan" and "shall consider modification to the post-release supervision order, upon application and recommendation, based upon the post-release supervision plan from the probation office." In the case of inmates within the Department of Correctional Services, the "plan shall be collaboratively prepared by the Office of Probation Administration and the Department of Correctional Services to provide information regarding performance and programming while incarcerated, an updated risk/needs assessment, along with a community needs and service assessment." And subsection (D) of § 6-1904 provides that "the court shall, if applicable, modify the post-release supervision order" within

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[4] See, generally, *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[5] *State v. Phillips, supra* note 1.

30 days (Department of Correctional Services inmates) or 15 days (county jail).

The imposition of conditions at the time of sentencing is done to guide a defendant to needed services during incarceration. And our rule provides that conditions may need to be modified upon a defendant's "performance and programming while incarcerated."[6]

On appeal, Shaull assigns that the district court erred in imposing conditions to his postrelease supervision (1) that he cannot comply with because he will be incarcerated out of state and (2) that do not bear a reasonable relationship to the purposes of postrelease supervision—namely leading a law-abiding life.

We do not address Shaull's second argument, because a review of the record reveals that no objection was made to any of the conditions of employment on the basis that they did not bear a reasonable relationship to the purposes of his supervision. As such, Shaull has waived such objections.

We turn then to Shaull's first argument. Shaull argues that he will be unable to comply with the conditions of his postrelease supervision, because he will be extradited to another state once he finishes serving his term of imprisonment in Nebraska.

While counsel argued that Shaull would be extradited, that action had not taken place at the time of sentencing. Nor was there any evidence presented that such extradition was a certainty. In the event such extradition takes place, we observe that the conditions of postrelease supervision are modifiable upon motion of the defendant or on the court's own motion.[7] Thus, if Shaull were to be extradited, he could seek a modification to those terms with which he feels he would be unable to comply.

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[6] § 6-1904(B).

[7] Neb. Rev. Stat. § 29-2263(3) (Supp. 2017); § 6-1904.

We review the imposition of a sentence for an abuse of discretion. The sentence and conditions imposed are within the statutory limits.[8] We have reviewed the presentence report and further conclude that the sentence and conditions are not otherwise an abuse of discretion.[9] Shaull's arguments on appeal are without merit.

CONCLUSION

The sentence of the district court is affirmed.

Affirmed.

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[8] § 28-105.

[9] See *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

State of Nebraska, appellee, v. Matthew W. Nielsen, appellant.

917 N.W.2d 159

Filed September 14, 2018. No. S-17-1033.

1. **Appeal and Error.** Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error.
2. **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 the Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
3. **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 objective and reasonable reliance on a law that is not clearly unconstitutional at the time.
4. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
5. **Search and Seizure: Proof.** The State has the burden of showing that the good faith exception applies.

Appeal from the District Court for Lancaster County, Andrew R. Jacobsen, Judge, on appeal thereto from the County Court for Lancaster County, Timothy C. Phillips, Judge. Judgment of District Court affirmed.

John S. Berry, of Berry Law Firm, for appellant.

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

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

Cassel, J.

INTRODUCTION

Matthew W. Nielsen was convicted for driving under the influence, after having submitted to a pre-*Birchfield* blood draw.[1] Based upon the exclusionary rule's good faith exception, the county court denied Nielsen's motion to suppress. On appeal, the district court affirmed. On appeal to this court, Nielsen contends that the exception does not apply and that the State failed to raise the issue in the county court. Because our holding in *State v. Hoerle*[2] controls and because the State sufficiently raised the issue, the county court correctly denied the motion and the district court properly affirmed. Therefore, we also affirm.

BACKGROUND

Arrest

On December 17, 2015, a police officer conducted a traffic stop and arrested Nielsen under suspicion of drunk driving. Ultimately, the arresting officer took Nielsen to a hospital. There, he read the "Post Arrest Chemical Test Advisement Form" to Nielsen. Nielsen signed the form and agreed to a blood draw.

Motion to Suppress

Based upon the results of the blood test, the State charged Nielsen in the county court with driving under the influence. Nielsen moved to suppress evidence obtained from the traffic

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[1] See *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).

[2] *State v. Hoerle*, 297 Neb. 840, 901 N.W.2d 327 (2017).

stop and warrantless blood draw. There were other charges not pertinent to this appeal.

On his motion to suppress, Nielsen argued that the U.S. Supreme Court decision in *Birchfield v. North Dakota*[3] should retroactively control, because the Court determined that warrantless blood tests are an unconstitutional search under the Fourth Amendment. According to the county court's order disposing of the motion, the State responded that *Birchfield* should not apply retroactively based upon the decision in *Davis v. United States*.[4]

The county court determined that while the blood draw was not voluntarily given, retroactive application of *Birchfield* was inappropriate, because the officer "acted on a good faith-belief that his conduct in obtaining the blood [draw] was lawful." Accordingly, the court denied the motion.

Remaining Procedural History

The county court bifurcated Nielsen's trial. The driving under the influence charge was tried to a jury and the remaining charges to the bench. The jury found Nielsen guilty, and the court imposed a sentence.

Nielsen timely appealed to the district court. But he failed to submit a statement of errors, and that court reviewed only for plain error. It determined that the jury had sufficient evidence to convict and that the county court did not err in denying the motion to suppress. It affirmed the county court's judgment.

ASSIGNMENTS OF ERROR

Nielsen assigns that (1) the district court erred in finding the good faith exception to the exclusionary rule applied and (2) the State failed to preserve the good faith exception for review.

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[3] *Birchfield, supra* note 1.

[4] *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011).

STANDARD OF REVIEW

[1] Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error.[5]

[2] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate the Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[6]

ANALYSIS

Good Faith Exception Application to *Birchfield*

[3] Nielsen argues that the good faith exception should not be applied to pre-*Birchfield* cases, because consent was not voluntarily given. We settled this issue in *Hoerle*.[7] A court may decline to apply the exclusionary rule when evidence is obtained pursuant to an officer's objective and reasonable reliance on a law that is not clearly unconstitutional at the time.[8] We reasoned, "Because the officer here acted in objectively reasonable reliance on a statute that had not been found unconstitutional at the time, excluding the results of [the defendant's] blood test would not serve the purpose of the exclusionary rule."[9] We concluded that "the good faith exception applies to warrantless pre-*Birchfield* blood draws."[10]

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[5] *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005).

[6] *State v. Petsch*, 300 Neb. 401, 914 N.W.2d 448 (2018).

[7] *Hoerle, supra* note 2.

[8] *Id.*

[9] *Id.* at 851, 901 N.W.2d at 334.

[10] *Id.*

The same conclusion applies here. Nielsen was arrested on December 17, 2015, and *Birchfield* was decided on June 23, 2016. The county court applied the good faith exception to Nielsen's pre-*Birchfield* blood draw. The district court found no plain error. Neither do we.

Asserting Good Faith Exception

Nielsen argues that in the county court, the State failed to assert the good faith exception. Thus, he contends, this court should not consider whether the exception applies. The State responds that it did raise good faith in the county court. Moreover, the State argues, Nielsen cited no authority precluding the State from asserting the exception on appeal.

But, as we have already implicitly recognized, the State *did* raise the exception. The county court, in denying the motion, stated that "[i]n support of it[s] position [the State] cites Davis v. United States . . . ." The *Davis* Court held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."[11] In doing so, the *Davis* Court expressly relied on the *United States v. Leon*[12] good faith exception rationale. Because the State cited to *Davis*, it sufficiently raised the issue.

[4] Nielsen argues that at the suppression hearing, the arresting officer's testimony on this point was on redirect examination that exceeded the scope of cross-examination. Thus, he argues, it cannot be used to show that the officer relied on the implied consent statute when he conducted the blood draw. But Nielsen did not object to the testimony. Nor did he raise the matter in the district court—he filed no statement of errors. And even in this court, his brief assigned no evidentiary error. An appellate court does not consider errors which are argued but not assigned.[13] For a multiplicity of reasons, we do

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[11] *Davis, supra* note 4, 564 U.S. at 232.

[12] *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

[13] *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

not address Nielsen's argument regarding allegedly improper redirect examination.

[5] Although we do not reach the State's argument that raising good faith for the first time on appeal is sufficient, Nielsen's contrary premise seems unconvincing. Our decision in *State v. Tompkins*[14] declined to answer the precise question. We recognize that the State has the burden of showing that the good faith exception applies.[15] In *Tompkins*, we stressed that an appellate court *on its own motion* cannot consider the good faith exception. In brief and at oral argument, except perhaps for a fleeting reference, the State did not challenge the holding of *Tompkins*. But we also said that "at the appellate level, the State has ample opportunity to raise the *Leon* good faith exception."[16] This would suggest that in order for an appellate court to consider the good faith exception, the State can raise it either at the trial court or on appeal. Here, the State presented the county court with case law expressly relying on a good faith exception. The citation directly spoke to the issue of good faith. Even if Nielsen's premise was correct, no more was required. Once again, we find no plain error.

CONCLUSION

We conclude that the district court did not err in performing its review for plain error. There was no plain error in applying the good faith exception to warrantless pre-*Birchfield* blood draws or in determining that the State raised the good faith exception. We affirm the decision of the district court.

Affirmed.

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[14] *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006).

[15] See *id*. See, also, *U.S. v. Diehl*, 276 F.3d 32 (1st Cir. 2002); *State v. Havatone*, 241 Ariz. 506, 389 P.3d 1251 (2017); *People v. Willis*, 28 Cal. 4th 22, 46 P.3d 898, 120 Cal. Rptr. 2d 105 (2002); *People v. Gutierrez*, 222 P.3d 925 (Colo. 2009).

[16] *Tompkins, supra* note 14, 272 Neb. at 552, 723 N.W.2d at 349.

Kathleen Chafin, appellant, v. Wisconsin Province of the Society of Jesus and the Catholic Archdiocese of Omaha, appellees.

917 N.W.2d 821

Filed September 21, 2018. No. S-17-1059.

1. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. **Motions to Dismiss: Pleadings: 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.
3. **Limitations of Actions: Fraud.** An action for fraud does not accrue until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery.
4. **Limitations of Actions: Pretrial Procedure.** Discovery, as applied to the statute of limitations, occurs when one knows of the existence of an injury or damage and not when he or she has a legal right to seek redress in court.
5. **Limitations of Actions: Pleadings: Proof.** If the complaint on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations and, at trial, has the burden to prove those facts.
6. **Fraud: Estoppel: Limitations of Actions: Proof.** In order to successfully assert the doctrine of fraudulent concealment and thus estop the defendant from claiming a statute of limitations defense, the plaintiff must show the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the misconduct.
7. **Fraud: Pleadings: Time.** Allegations of fraudulent concealment for tolling purposes must be pleaded with particularity.

8. **Motions to Dismiss: Fraud: Pleadings: Proof.** In order to survive a motion to dismiss, a complaint alleging fraudulent concealment must plead with particularity how material facts were concealed to prevent the plaintiff from discovering the misconduct and how, through due diligence, the plaintiff failed to discover his or her injury.
9. **Pleadings: Words and Phrases.** Pleading facts with particularity means the who, what, when, where, and how: the first paragraph of any newspaper story.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed.

Thomas C. Dorwart and Benjamin E. Maxell, of Govier, Katskee, Suing & Maxell, P.C., L.L.O., for appellant.

James J. Frost, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee Wisconsin Province of the Society of Jesus.

Patrick M. Flood and Lisa M. Meyer, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee Catholic Archdiocese of Omaha.

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

Cassel, J.

INTRODUCTION

Kathleen Chafin sued two religious organizations, alleging that when she gave birth, these organizations kidnapped her newborn son and fraudulently concealed his adoption. Based upon the statute of limitations, the district court dismissed her amended complaint. Chafin contends that her allegation of fraudulent concealment tolled the statute. Because a pleading rule requires the facts of fraudulent concealment to be stated with particularity and because Chafin pled mere legal conclusions, dismissal was correct. Therefore, we affirm.

BACKGROUND

1969 Adoption

Because of the procedural posture, we state facts as alleged in the amended complaint. And at this stage, we are required to assume that these allegations are true. Chafin gave birth to a son in 1969, who was then put up for adoption through the Wisconsin Province of the Society of Jesus and the Catholic Archdiocese of Omaha (collectively the Church). Chafin alleges that her son was fraudulently adopted without her consent and that the Church concealed this fraud over 40 years, until Chafin reunited with her son in 2015.

In 1968, Chafin discovered she was pregnant and left college to return home to Omaha, Nebraska. After the discovery of the pregnancy, Father Thomas A. Halley "forced" Chafin to sign a contract for room and board in a residence for young unmarried pregnant women. The complaint alleges that "the end-game in this process was to provide babies for compliant couples in good standing with the [Church] under for-profit fraudulent adoptions."

While at the residence, Chafin arranged for her grandmother "to rescue her from this nightmare" of the residence. Before Chafin's grandmother arrived, Chafin went into labor and the baby was immediately "taken" from her.

We set forth the allegations of fraudulent concealment in the analysis section below.

Motion to Dismiss

The Church moved to dismiss the amended complaint for failure to state a claim. The district court determined that the allegations failed to toll the statute of limitations for various reasons. It reasoned that the amended complaint failed to plead sufficient facts to overcome the statute of limitations. The court granted the motion and dismissed the claims with prejudice.

Chafin filed a timely appeal, which we moved to our docket.[1]

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

ASSIGNMENTS OF ERROR

Chafin assigns generally that the district court erred (1) in dismissing her amended complaint and (2) in evaluating its merits.

[1] But Chafin's argument is quite limited. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[2] Chafin argues only that the fraudulent concealment of the adoption persisted until she discovered her son in 2015, therefore tolling the statute of limitations. Thus, we confine her assignment of error to her specific argument regarding fraudulent concealment.

STANDARD OF REVIEW

[2] 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.[3]

ANALYSIS

Statute of Limitations

The Church asserts that Chafin's claims are barred by a 4-year statute of limitations. Neb. Rev. Stat. § 25-207(3) (Reissue 2016) sets forth a 4-year statute of limitations for "an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated." Although a claim under § 25-207 can be asserted at the time the cause of action accrued, "an action for relief on the ground of fraud . . . shall not be deemed to have accrued until the discovery of the fraud."[4]

[3,4] An action for fraud does not accrue until there has been a discovery of the facts constituting the fraud, or facts

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[2] *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014); *Carlson v. Allianz Versicherungs-AG*, 287 Neb. 628, 844 N.W.2d 264 (2014).

[3] *Burklund v. Fuehrer*, 299 Neb. 949, 911 N.W.2d 843 (2018).

[4] § 25-207(4).

sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery.[5] Discovery, as applied to the statute of limitations, occurs when one knows of the existence of an injury or damage and not when he or she has a legal right to seek redress in court.[6]

Unless Chafin sufficiently pled fraudulent concealment, the statute of limitations began to run in 1969 when Chafin discovered the existence of her injury. At that point, Chafin knew that the Church facilitated the adoption, knew that the child never returned to her, and knew she was injured by the adoption because she was not allowed to keep her son. At the time of her child's birth, Chafin was aware of her injury and sufficient facts to put a person of ordinary intelligence and prudence on inquiry. From these facts, Chafin knew who allegedly committed the fraud, what was done, where it was done, how it was done, and when her injury from the fraud occurred.

Tolling by Fraudulent Concealment

[5,6] Chafin asserts that fraudulent concealment tolls the statute of limitations. If the complaint on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations and, at trial, has the burden to prove those facts.[7] In order to successfully assert the doctrine of fraudulent concealment and thus estop the defendant from claiming a statute of limitations defense, the plaintiff must show the defendant has, either by deception

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[5] *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

[6] *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005). See, also, *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007); *Kalkowski v. Nebraska Nat. Trails Museum Found.*, 20 Neb. App. 541, 826 N.W.2d 589 (2013) (applying general discovery rule to discovery of fraud).

[7] See *Lindner v. Kindig*, 285 Neb. 386, 826 N.W.2d 868 (2013).

or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the misconduct.[8] Under the doctrine of fraudulent concealment, the plaintiff must show that he or she exercised due diligence to discover his or her cause of action before the statute of limitations expired.[9]

Pleading Fraudulent Concealment With Particularity

In order to determine whether an allegation of fraudulent concealment is sufficient to survive a motion to dismiss, we must determine the proper pleading standard. The Church contends that a specific pleading rule controls.

"In all averments of fraud, . . . the circumstances constituting fraud . . . shall be stated with particularity."[10] The heightened pleading requirement stems from the practice at common law and under the codes and "imparts a note of seriousness and encourages a greater degree of pre-institution investigation by the plaintiff."[11]

[7] Because we have not specifically considered whether § 6-1109(b) applies to pleading fraudulent concealment to avoid a statutory bar and because the Nebraska Court Rules of Pleading in Civil Cases are modeled after the Federal Rules of Civil Procedure, we may look to federal decisions for guidance.[12] The Eighth Circuit determined that "allegations of fraud, including fraudulent concealment for tolling purposes, [must] be pleaded with particularity."[13] While we are not

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[8] *Andres v. McNeil Co., supra* note 6.

[9] *Id.*

[10] Neb. Ct. R. Pldg. § 6-1109(b) (rev. 2008).

[11] See 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1296 at 31 (3d ed. 2004).

[12] See *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

[13] *Great Plains Trust Co. v. Union Pacific R. Co.*, 492 F.3d 986, 995 (8th Cir. 2007).

bound to follow this decision, we are persuaded by the Eighth Circuit's reasoning. Moreover, at oral argument, Chafin effectively conceded that the "particularity" requirement applies to fraudulent concealment. We now hold that allegations of fraudulent concealment for tolling purposes must be pleaded with particularity.

[8,9] In order to survive a motion to dismiss, a complaint alleging fraudulent concealment must plead with particularity how material facts were concealed to prevent the plaintiff from discovering the misconduct and how, through due diligence, the plaintiff failed to discover his or her injury.[14] "'This means the who, what, when, where, and how: the first paragraph of any newspaper story.'"[15]

Chafin's brief argued that she "pled specific facts that support her further allegation that the original fraud regarding the illegal taking of her baby was fraudulently concealed by the [Church] until 2015."[16] At oral argument, she again claimed to have alleged specific facts.

So, what did Chafin plead to meet this requirement? Only four statements in the amended complaint purport to address the period from 1969 to 2015. These were:

- The Church "covered-up and concealed facts and witnesses necessary to pursue and [sic] action against them."
- The concealment continued from the birth of her son until they were reunited in 2015.
- The Church "continued in their fraudulent adoption and fraudulently covered up and concealed from Chafin any facts that would have put her on notice of the adoption fraud and, therefore, Chafin was unable to discover the necessary relevant facts to put her on notice of the adoption fraud perpetrated against her."

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[14] See *Andres v. McNeil Co., supra* note 6.

[15] *Great Plains Trust Co. v. Union Pacific R. Co., supra* note 13, 492 F.3d at 995 (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir. 1990)).

[16] Brief for appellant at 6.

- Chafin was unaware of her claims until 2015 as a result of the Church's "deceptions, cover-up, concealment, misrepresentations, illegal suppression of evidence and destruction of evidence," and remained unaware of potential legal claims because of the concealment.

But all of these allegations are mere legal conclusions. As to fraudulent concealment, the amended complaint simply does not tell us the who, what, when, where, and how. Because Chafin failed to particularly allege fraudulent concealment, the statute of limitations did not toll. Thus, long before 2015, her claims were time barred.

CONCLUSION

We conclude that Chafin's claims are barred by the statute of limitations. We therefore affirm the order of the district court granting the motion to dismiss her amended complaint with prejudice.

Affirmed.

Barbara F. Hotz, appellee, v. James P. Hotz, appellant.

917 N.W.2d 467

Filed September 21, 2018. No. S-17-1152.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support is entrusted to the discretion of the trial court. An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.
2. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judgments: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
4. **Child Support: Rules of the Supreme Court.** Interpretation of the Nebraska Child Support Guidelines presents a question of law.
5. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
6. **Statutes: Rules of the Supreme Court.** For purposes of construction, Nebraska Supreme Court rules are treated like statutes.
7. ____: ____. Absent a statutory indication to the contrary, language contained in a Nebraska Supreme Court rule is to be given its plain and ordinary meaning.
8. ____: ____. Just as statutes relating to the same subject are in pari materia and should be construed together, Nebraska Supreme Court rules should be read and construed together.
9. **Rules of the Supreme Court.** A court must attempt to give effect to all parts of a Nebraska Supreme Court rule, and if it can be

avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.

10. **Rules of the Supreme Court: Appeal and Error.** An appellate court should try to avoid, if possible, the construction of a Nebraska Supreme Court rule that would lead to an absurd result.
11. **Child Support: Alimony: Rules of the Supreme Court.** The Nebraska Child Support Guidelines exclude alimony between parents from their total monthly incomes for the purpose of calculating child support obligations for their children in modification proceedings.
12. **Child Support: Rules of the Supreme Court.** In general, child support payments should be set according to the Nebraska Child Support Guidelines.
13. ____: ____. A court may deviate from the Nebraska Child Support Guidelines if their application in an individual case would be unjust or inappropriate; the court must specifically find that a deviation is warranted based on the evidence and state the reason for the deviation in the decree.
14. ____: ____. A deviation from the Nebraska Child Support Guidelines without a clearly articulated justification is an abuse of discretion.
15. ____: ____. Deviations from the Nebraska Child Support Guidelines must take into consideration the best interests of the child or children.
16. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances that (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.

Appeal from the District Court for Lincoln County: Richard A. Birch, Judge. Affirmed.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellant.

R. Bradley Dawson, of Lindemeier & Dawson, for appellee.

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

Funke, J.

The district court dissolved the marriage of Barbara F. Hotz and James P. Hotz, split custody of their three minor children; ordered James to pay child support until the parties' oldest

child, Josee Hotz, reached the age of majority; and awarded alimony to Barbara. Barbara later moved to modify the amount of child support James paid, alleging James' income had materially increased. The court declined to include James' alimony payments to Barbara in its calculation of the parties' total monthly income for the purpose of recalculating child support obligations. The court also rejected other arguments from James regarding the calculation of the parties' total monthly income and abated part of Barbara's child support obligations after Josee reaches the age of majority.

We hold that the Nebraska Child Support Guidelines (NCSG) exclude alimony between parents from their total monthly income for the purpose of calculating child support obligations for their children. Further, we find that the court did not abuse its discretion in calculating the parties' child support obligations or abating Barbara's child support payments. Therefore, we affirm.

I. BACKGROUND

In 2015, the court entered a decree dissolving the marriage of Barbara and James and awarding custody of their three minor children. The court awarded Barbara custody of Josee and James custody of their other two children. The court ordered James to pay Barbara $253 per month in child support until Josee reached the age of majority, and then Barbara to pay James $302 per month for two children and $244 per month for one child. Further, the court ordered James to pay Barbara $750 per month in alimony for 70 months.

In 2016, Barbara filed a complaint to modify the decree, seeking a change in custody, child support, and alimony. Concerning alimony and child support, the complaint alleged that James' income had increased and that the change would increase the support paid by him by more than 10 percent. At trial, the parties testified about and produced evidence of their current employment and income.

Barbara testified that she has a part-time job with a hospital service company and a part-time job at a livestock company,

working 1 day per week at each job. The evidence showed that she works about 8 hours per week, at a rate of $15.47 an hour, for the hospital service and that her monthly income from the livestock company is about $400. She also testified that she owns rental homes that are not currently income producing and runs a corporation that operates at a loss. James submitted Barbara's Social Security statement into evidence, which shows her annual earnings for the purposes of Social Security taxes. James testified that his earning capacity had decreased since the divorce decree. He submitted into evidence his personal and S corporation income tax returns from 2016.

Each party presented a demonstrative exhibit of proposed child support calculations. James calculated his gross monthly income at $3,116 and Barbara's at $3,431. Barbara calculated her gross monthly income at $1,560 and James' at $5,794. She calculated her income as $9 per hour for a 40-hour workweek.

The court accepted Barbara's calculation of James' total monthly income and determined Barbara's total monthly income based upon an earning capacity of $1,784, finding she could work 8 hours per week at $15.47 per hour and 32 hours per week at $9 per hour. The court modified its support order to require James to pay Barbara $156 per month in child support until Josee reaches the age of majority, and then Barbara to pay James $424 per month for two children and $292 per month for one child.

Both parties filed a motion to alter or amend the decision. The court denied James' motion. It ruled that it had correctly disregarded James' claimed depreciations, under Neb. Ct. R. § 4-204 (rev. 2016), and that the NCSG does not allow for the inclusion of alimony as income in child support calculations on a complaint to modify. It reasoned that Neb. Ct. R. § 4-213, read in conjunction with § 4-204, excludes alimony from total monthly income.

The court, in part, granted Barbara's motion, requesting an adjustment of her child support obligation when the parties had alternating weeks of custody, by granting an 80-percent

abatement of her obligation during the months of June, July, and August. It reasoned that the abatement was warranted because James' total monthly income is substantially higher than Barbara's and, during those months, Barbara will have equal days of custody, whereas James otherwise has full custody of the children after Josee reaches the age of majority.

James filed an appeal, and we granted his motion to bypass the Nebraska Court of Appeals.

II. ASSIGNMENTS OF ERROR

James assigns, restated and consolidated, that the district court abused its discretion in (1) failing to accurately calculate the parties' child support obligations; (2) failing to include alimony payments in the calculation of the parties' total monthly incomes; (3) calculating Barbara's earning capacity; (4) finding James failed to prove he was entitled to depreciation deductions; and (5) abating Barbara's child support obligation by 80 percent for the months of June, July, and August.

III. STANDARD OF REVIEW

[1] Modification of child support is entrusted to the discretion of the trial court.[1] An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.[2]

[2,3] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.[3] A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.[4]

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

[2] *Id.*

[3] *Connolly v. Connolly*, 299 Neb. 103, 907 N.W.2d 693 (2018).

[4] *McCullough v. McCullough*, 299 Neb. 719, 910 N.W.2d 515 (2018).

[4,5] Interpretation of the NCSG 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]

IV. ANALYSIS

1. Court Did Not Abuse Discretion in Calculating Child Support Obligations

James does not argue that the court erred in finding that a material change in circumstances warranting a modification of child support obligations has occurred. Instead, he challenges only specific findings of the court regarding the parties' total monthly incomes for the purpose of calculating their new child support obligations. Specifically, he argues that the court should have considered his alimony obligation to Barbara in calculating the parties' incomes, deducted his depreciations, and calculated Barbara's earning capacity at the hourly rate of her current employment.

(a) Alimony Obligation Between Parents Is Excluded From Calculating Total Monthly Income for Determining Child Support Obligations Between Them

James concedes that the NCSG and Nebraska case law establish that alimony payments cannot be included in the calculation of child support during the initial decree, because alimony is calculated after child support. However, he asserts that alimony payments are required to be included in the calculation of total monthly income, under Neb. Ct. R. § 4-201 and § 4-204, in modification proceedings, because alimony

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[5] *Schwarz, supra* note 1.

[6] *Cullinane v. Beverly Enters.-Neb.*, 300 Neb. 210, 912 N.W.2d 774 (2018).

payments are not specifically excluded. He also argues that such an interpretation would be more consistent with the way other states with the same model for calculating child support treat alimony payments in calculating child support obligations.

Barbara responds that § 4-213 requires that alimony payments not be included in child support calculations.

The main principle behind the NCSG is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.[7] Section 4-204 of the NCSG, titled "Total monthly income" provides:

> This is income of both parties derived from all sources, except all means-tested public assistance benefits which includes any earned income tax credit and payments received for children of prior marriages. . . .
>
> . . . .
>
> If applicable, earning capacity may be considered in lieu of a parent's actual, present income . . . . Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources.

We have stated that the "[NCSG is] very specific—all income from all sources is to be included except for those incomes specifically excluded."[8]

Section 4-213 states that the "[NCSG] intend[s] that spousal support be determined from income available to the parties after child support has been established." As James acknowledges, this court and the Court of Appeals have previously interpreted the interaction of these rules.

In *Gallner v. Hoffman*,[9] this court ordered a husband to pay alimony and child support to his wife, and after the alimony

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[7] *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); § 4-201.

[8] *Simpson v. Simpson*, 275 Neb. 152, 156, 744 N.W.2d 710, 714 (2008).

[9] *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

obligation had expired, the former husband moved to modify his child support obligation. The trial court denied the motion, finding the former wife's current income, while higher than when the decree was entered, was substantially the same as her previous income plus alimony. On appeal, we held that the trial court erroneously interpreted the NCSG by treating the former wife's prior receipt of alimony as an item of income in its assessment of the child support obligation.

We reasoned that the clear language of the NCSG, paragraph M, the precursor to § 4-213, provided that child support obligations are to be calculated prior to the calculation of alimony, so alimony could not be factored into income before the alimony was determined.[10] Thus, we concluded that because "alimony is not properly considered as income when child support is established, the cessation of alimony cannot be considered a diminution in income when determining whether there has been a material change of circumstances justifying a modification of child support."[11]

Recently, relying on our decision in *Gallner*, the Court of Appeals held that alimony is not income when considering an application to modify child support.[12] In *Roberts v. Roberts*,[13] the original decree awarded the wife alimony and the district court included this alimony in its calculation of the wife's total monthly income for the purpose of recalculating child support in a modification action. In reversing the trial court's ruling, the Court of Appeals reasoned that "if child support is calculated before alimony, such alimony should be excluded when calculating income in a modification proceeding."[14]

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[10] *Id.*

[11] *Id.* at 1003, 653 N.W.2d at 845.

[12] *Roberts v. Roberts*, 25 Neb. App. 192, 903 N.W.2d 267 (2017).

[13] *Id.*

[14] *Id.* at 202, 903 N.W.2d at 276. See, also, *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003).

James argues that this interpretation is incorrect, because during a modification proceeding, alimony has already been established and the NCSG does not specifically exclude such as income after it has been established.

[6-10] The NCSG was created by this court through a formal rulemaking process pursuant to a statutory grant of administrative authority from the Legislature.[15] For purposes of construction, Nebraska Supreme Court rules are treated like statutes.[16] Absent a statutory indication to the contrary, language contained in a Supreme Court rule is to be given its plain and ordinary meaning.[17] Just as statutes relating to the same subject are in pari materia and should be construed together, Supreme Court rules should be read and construed together.[18] A court must attempt to give effect to all parts of a Supreme Court rule, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[19] An appellate court should try to avoid, if possible, the construction of a Supreme Court rule that would lead to an absurd result.[20]

While the NCSG does not explicitly exclude alimony from child support calculations in all circumstances, we held in *Gallner* that § 4-213 clearly excludes alimony from the parties' total monthly incomes in the initial decree. If we were to accept James' interpretation of the NCSG limiting the effect of § 4-213 to this circumstance, then any decree ordering both child support and alimony obligations could be open to an

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[15] See Neb. Rev. Stat. § 42-364.16 (Reissue 2016).

[16] See *State v. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017).

[17] See *Nebraska Protective Servs. Unit v. State*, 299 Neb. 797, 910 N.W.2d 767 (2018).

[18] *Loding, supra* note 16.

[19] See *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018).

[20] See *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018).

immediate motion for modification based on the subsequently calculated alimony. Such an interpretation would be absurd in that it would render § 4-213 superfluous, beyond the short duration between the entry of a decree and a motion for modification immediately following.

[11] Accordingly, we agree with the Court of Appeals' holding in *Roberts*. We hold that the NCSG excludes alimony between parents from their total monthly incomes for the purpose of calculating child support obligations for their children in modification proceedings.

This holding is consistent with the statement of the purpose of alimony pursuant to Neb. Rev. Stat. § 42-365 (Reissue 2016): "The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate." Based on § 4-213, we have stated that the relative economic circumstances of the parties are to be tested based on the income available after child support obligations, if any, have been accounted for.[21] Immediately allowing for a modification of child support obligations based on an order of alimony would negate the fact that the alimony was determined with such obligations in mind and hinder the ability of the alimony to aid in the maintenance and support of the spouse for whom it was ordered.

We also reject James' argument that we should disregard § 4-213 as a matter of policy, based on the way other states treat alimony for calculating child support obligations. As mentioned above, the NCSG was promulgated through a formal process, including public comments and input. Thus, this is not the appropriate venue to reevaluate the prudence of the policy behind the NCSG.

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[21] *Wiedel v. Wiedel*, 300 Neb. 13, 911 N.W.2d 582 (2018).

(b) James Failed to Produce Sufficient Evidence Supporting Depreciation Deductions

James argues that the court erred in not deducting depreciation from his total monthly income because he submitted his 2016 personal and corporate tax returns into evidence and both included claimed depreciations. Barbara argues that James had the burden to prove that he was entitled to a deduction and that he failed to do so.

While the NCSG does permit for an allowance of depreciation as a deduction from total monthly income, it also provides specific instructions for proving an entitlement to the deduction and how the deduction should be calculated.[22] Further, § 4-204 provides that "[a] party claiming depreciation shall have the burden of establishing entitlement to its allowance as a deduction."

The most basic requirement for proving an entitlement to a deduction is: "Any party claiming an allowance of depreciation as a deduction from income *shall furnish* to the court and the other party copies of *a minimum of 5 years' tax returns* at least 14 days before any hearing pertaining to the allowance of the deduction."[23] In addition, § 4-204 requires that a depreciated asset must be shown to be ordinary and necessary and that the depreciation was calculated by using the "'straight-line'" method.

James submitted only his 2015 and 2016 personal and corporate income tax returns as evidence of his entitlement to an allowance of depreciation. This evidence is insufficient to warrant a deduction under the minimum of 5 years of tax returns requirement of the NCSG. Additionally, no evidence was provided that the depreciated assets were ordinary and necessary or that the depreciation was calculated by using the

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[22] See § 4-204.

[23] *Id.*

straight-line method. Therefore, the court did not abuse its discretion by not deducting James' claimed depreciations from his total monthly income.

(c) Court Did Not Abuse Its Discretion in Calculating Barbara's Earning Capacity

James contends that Barbara's earning capacity per hour for a 40-hour workweek is $15.47, because she is already making that wage at her part-time job and because she has a college degree. Barbara argues that the remainder of her earning capacity should be calculated at the minimum wage of $9 per hour and that the evidence shows she has never made more than $19,250 in a calendar year.

In determining a party's total monthly income, the NCSG provides that "[i]f 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."[24] We have stated that 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.[25] However, earning capacity should be used to determine a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts.[26]

The evidence regarding Barbara's earning capacity was limited to her current employment and her Social Security statement. Barbara conceded in her testimony and demonstrative exhibit that she was capable of working a 40-hour workweek, and there was no contrary evidence. While she is currently working 8 hours per week for the hospital service company

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[24] *Id.*

[25] *Johnson v. Johnson*, 290 Neb. 838, 862 N.W.2d 740 (2015).

[26] *Id.*

for $15.47 per hour, there was no evidence presented that she could obtain additional hours at that job. Further, there was no evidence presented that Barbara had any other job opportunities above the minimum wage, based on her education or work experience.

Based on the evidence presented at trial, we conclude that the court did not abuse its discretion in calculating Barbara's earning capacity. This assignment of error is without merit.

2. Court Did Not Abuse Its Discretion in Abating Barbara's Child Support Obligation

James argues that the court erred in abating Barbara's child support obligation during the summer, because the original decree included 6 weeks of custody for each parent during the summer and therefore changing the distribution of that 6 weeks to alternating weeks was not a material change of circumstance.

Barbara argues that the material change in circumstances was the court's modification to the parties' child support obligations that resulted in her receiving less support from James currently and increasing her obligation after Josee reaches the age of majority.

[12-15] In general, child support payments should be set according to the NCSG.[27] However, a court may deviate from the NCSG if its application in an individual case would be unjust or inappropriate.[28] The court must specifically find that a deviation is warranted based on the evidence and state the reason for the deviation in the decree.[29] A deviation without a clearly articulated justification is an abuse of discretion.[30]

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

[28] *Id.*; Neb. Ct. R. § 4-203 (rev. 2011).

[29] *Id.*

[30] *Anderson, supra* note 27.

Deviations from the NCSG must also take into consideration the best interests of the child or children.[31]

Neb. Ct. R. § 4-210 of the NCSG specifically addresses adjustments in child support related to visitation:

> If child support is not calculated under § 4-212 [joint physical custody], an adjustment in child support may be made at the discretion of the court when visitation or parenting time substantially exceeds alternating weekends and holidays and 28 days or more in any 90-day period. During visitation or parenting time periods of 28 days or more in any 90-day period, support payments may be reduced by up to 80 percent.

[16] A party seeking to modify a child support order must show a material change in circumstances that (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.[32]

The court found an adjustment was warranted under § 4-210 because James had physical custody of the parties' younger children; Josee would reach the age of majority before the coming summer; and the alternating custody during June, July, and August would substantially exceed the 28 days in a 90-day period requirement. The parties' custody during this period would be equal, so the court abated Barbara's obligation by the maximum of the 80 percent permitted. The court's finding that James has substantially higher income than Barbara implies that it is in the best interests of the children to decrease Barbara's support obligation to James during this period so that she may provide for the children while they are in her custody.

While the court had an equivalent amount of shared custody during the summer in its initial decree and Josee's reaching

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[31] *Pearson v. Pearson*, 285 Neb. 686, 828 N.W.2d 760 (2013); § 4-203.

[32] *State on behalf of Fernando L. v. Rogelio L.*, 299 Neb. 329, 907 N.W.2d 920 (2018).

the age of majority was contemplated when the decree was entered, the court made a substantial increase to Barbara's support obligation in the modification order. This modification was a material change in circumstances that justified ordering an adjustment in Barbara's support obligation. Therefore, the court did not abuse its discretion in abating Barbara's support obligation for the months of June, July, and August.

V. CONCLUSION

The NCSG excludes alimony between parents from their total monthly incomes for the purpose of calculating child support obligations for their children. We hold that the court did not abuse its discretion in calculating the parties' child support obligations or in abating Barbara's child support payments. Therefore, we affirm.

Affirmed.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Tobin D. Wolfe, respondent.

918 N.W.2d 244

Filed September 21, 2018. No. S-18-437.

Original action. Judgment of suspension.

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

Per Curiam.

INTRODUCTION

On May 2, 2018, formal charges containing 10 counts were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Tobin D. Wolfe. Respondent filed an answer to the charges on May 23. A referee was appointed on June 4. The referee conducted a hearing on July 24.

The referee filed a report on August 14, 2018. With respect to the 10 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. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communication), 3-501.5(f) (timely accounting for fees), 3-501.16(d) (refunding fees on termination of representation), 3-508.1(b) (responding to bar admission and disciplinary matters), and 3-508.4 (misconduct) (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 2 years, commencing from the date of temporary suspension, November 6, 2017, followed by 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. The parties filed a joint motion for judgment on the pleadings under Neb. Ct. R. § 3-310(L) (rev. 2014) of the disciplinary rules. 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 April 23, 2013. At all times relevant to these proceedings, he has practiced in Lincoln, Nebraska.

The substance of the referee's findings may be summarized as follows: Respondent has practiced law since 2013, including family law, and on November 6, 2017, his license to practice law in Nebraska was temporarily suspended until further order of this court. The violations arise from respondent's conduct with respect to 10 clients who filed grievances with the Counsel for Discipline between April 3 and December 6, 2017. The pertinent facts are not in dispute in this case and were admitted in respondent's answer or acknowledged in his testimony.

The referee held a hearing at which respondent testified and evidence was adduced. In a report filed August 14, 2018, the referee found that through respondent's conduct, he had breached provisions of the Nebraska Court Rules of Professional Conduct as follows:

- With respect to count I, respondent engaged in misconduct under § 3-508.4 by failing to provide a full accounting on request under § 3-501.5(f), and failing to properly and timely respond to the Counsel for Discipline under § 3-508.1(b).

- With respect to count II, respondent engaged in misconduct under § 3-508.4 by failing to provide a full accounting under § 3-501.5(f), failing to timely refund unearned fees under § 3-501.16, failing to properly communicate with his client as required by § 3-501.4, and failing to properly and timely respond to the Counsel for Discipline in violation of § 3-508.1(b).
- With respect to count III, respondent engaged in misconduct under § 3-508.4 by failing to properly communicate with his client in violation of § 3-501.4, and failing to timely respond to the Counsel for Discipline in violation of § 3-508.1(b).
- With respect to count IV, respondent engaged in misconduct under § 3-508.4 by failing to properly communicate with his client as required by § 3-501.4, failing to handle a matter with the requisite level of competence and diligence required by §§ 3-501.1 and 3-501.3, and failing to timely respond to the Counsel for Discipline as required by § 3-508.1(b).
- With respect to count V, respondent engaged in misconduct under § 3-508.4 by failing to properly communicate with his clients in violation of § 3-501.4, failing to handle a matter with the requisite level of competence and diligence required by §§ 3-501.1 and 3-501.3, and failing to timely respond to the Counsel for Discipline as required by § 3-508.1(b).
- With respect to count VI, respondent engaged in misconduct under § 3-508.4 by failing to properly communicate with his client in violation of § 3-501.4.
- With respect to count VII, respondent engaged in misconduct under § 3-508.4 by failing to properly communicate with his client in violation of § 3-501.4.
- With respect to count VIII, respondent engaged in misconduct under § 3-508.4 by failing to properly communicate with his client in violation of § 3-501.4, failing to timely furnish an accounting for fees and costs as required by § 3-501.5(f), and failing to return the client's file upon termination when requested.

- With respect to count IX, respondent engaged in misconduct under § 3-508.4 by failing to properly communicate with his client in violation of § 3-501.4 and failing to timely furnish an accounting for fees and costs as required by § 3-501.5(f).
- With respect to count X, respondent engaged in misconduct under § 3-508.4 by failing to properly communicate with his client in violation of § 3-501.4, failing to provide competent representation required by § 3-501.1, and failing to act with reasonable diligence as required by § 3-501.3.

The referee further found that with regard to each of the counts enumerated above, respondent had violated his oath of office as an attorney licensed to practice law in the State of Nebraska. See § 7-104.

With respect to the discipline to be imposed, the referee recommended suspension of respondent's license to practice law for a period of 2 years, commencing from the date of temporary suspension, November 6, 2017, followed by a period of supervision of 2 years upon readmission. The referee noted in her report that respondent had no prior instances of misconduct or discipline.

In mitigation, respondent presented evidence from medical providers and testified that he began suffering a major depressive episode in late 2016 from a mental health condition which had been previously undiagnosed. The referee found that respondent established that his symptoms played a significant role in his conduct and found that ongoing treatment and adherence to respondent's health maintenance plan would reduce the risk of further misconduct.

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 undisputed findings of the referee, we find that the above-referenced 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 §§ 3-501.1, 3-501.3, 3-501.4(a)(3) and (4), 3-501.5(f), 3-501.16(d), 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 the parties joint motion for judgment on the pleadings.

We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed, and, if so, the type of discipline appropriate 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, we evaluate each attorney discipline case 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 acts 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 offender generally, and (6) the offender'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 there were 10 separate grievances involving a wide range of misconduct, including failing to communicate with clients, failing to diligently complete work, failing to properly account for fees, failing to return client files following termination, and misstatements. When contacted by relator, respondent initially failed to respond for approximately 8 months following the initial grievance.

With respect to the discipline to be imposed, the referee recommended suspension of respondent's license to practice law for a period of 2 years, commencing from the date of temporary suspension, November 6, 2017, followed by a period of supervised probation of 2 years upon readmission. The referee compared the level of misconduct to that presented in *State ex rel. Counsel for Dis. v. Simon*, 288 Neb. 385, 848 N.W.2d 642 (2014). The respondent in *Simon* had nine counts of misconduct and a mental health issue, and this court imposed an indefinite suspension with no possibility for reinstatement for 14 months, followed by 2 years of probation with monitoring.

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 is appropriate and adopts a 2-year suspension, commencing from November 6, 2017, followed by a period of monitored probation of 2 years upon readmission. See *id*. As noted, no exceptions have been taken to this recommendation.

Respondent shall comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, he shall be subject to punishment for contempt of this court. We also direct respondent to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012), § 3-310(P), 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 2-year 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 his application for reinstatement, respondent should have the burden of establishing that he is fit to practice law under the terms of his probation, including that treatment for his depression has resulted in a meaningful and sustained recovery. Such proof shall include a showing that he has continued treatment with a qualified mental health doctor, unless such doctor releases respondent from treatment. 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) During probation, respondent shall be subject to a treatment monitoring program by the Nebraska Lawyers Assistance Program and a practice monitoring program, which should be monitored by a licensed practicing attorney who is acceptable to the Counsel for Discipline.

(2) Respondent should comply with treatment recommendations of his treating doctor as monitored by the Nebraska Lawyers Assistance Program. If at any time the assistance program believes that respondent has failed to comply with his treatment requirements, it shall report the same to the Counsel for Discipline.

(3) 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.

(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 §§ 3-501.1, 3-501.3, 3-501.4, 3-501.5(f), 3-501.16(d), 3-508.1(b), and 3-508.4 and 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 2 years, effective November 6, 2017. It is the further judgment of this court that upon completion of the period of suspension and reinstatement to the bar, respondent shall be placed on monitored probation for 2 years, subject to the terms set forth above. Respondent is also directed to pay costs and expenses in accordance with §§ 7-114 and 7-115 and §§ 3-310(P) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of suspension.

State of Nebraska, appellee, v. John L. Lotter, appellant.

917 N.W.2d 850

Filed September 28, 2018. Nos. S-17-325, S-17-338, S-17-339, S-17-1126, S-17-1127, S-17-1129.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
2. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken.
4. **Postconviction: Final Orders.** Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final, appealable order as to the claims denied without a hearing.
5. **Postconviction: Appeal and Error.** An order denying a postconviction claim is appealable even when the court reserves ruling on other claims.
6. **Postconviction: Final Orders.** An order overruling a motion for postconviction relief as to a claim is a "final judgment" as to such claim under Neb. Rev. Stat. § 29-3002 (Reissue 2016).
7. **Judgments: Final Orders: Time: Appeal and Error.** A party has 30 days from the entry of a judgment or final order to appeal the decision of a district court unless a party has filed a timely motion which terminates the appeal period.
8. **Pleadings: Judgments: Appeal and Error.** A motion for reconsideration is the functional equivalent of a motion to alter or amend a

judgment, which terminates the period in which a party must file a notice of appeal.

9. **Pleadings: Judgments: Time: Appeal and Error.** In cases involving a motion to alter or amend a judgment, a critical factor is whether the motion was filed within 10 days of the final order, because a timely motion terminates the time for filing a notice of appeal.
10. **Courts: Judgments: Time: Appeal and Error.** A motion for reconsideration does not terminate the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.
11. **Rules of the Supreme Court: Postconviction.** Postconviction proceedings are not governed by the Nebraska Court Rules of Pleading in Civil Cases.
12. **Pleadings: Time: Appeal and Error.** An untimely motion to alter or amend does not terminate the time for perfection of an appeal and does not extend or suspend the time limit for filing a notice of appeal.
13. **Legislature: Courts: Time: Appeal and Error.** When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.
14. **Postconviction: Pleadings: Final Orders: Appeal and Error.** An order ruling on a motion filed in a pending postconviction case seeking to amend the postconviction motion to assert additional claims is not a final judgment and is not appealable under Neb. Rev. Stat. § 29-3002 (Reissue 2016).
15. **Final Orders: Time: Appeal and Error.** To trigger the savings clause for premature notices of appeal under Neb. Rev. Stat. § 25-1912(2) (Reissue 2016), an announcement must pertain to a decision or order that, once entered, would be final and appealable.
16. **Postconviction: Pleadings: Time.** The Nebraska Postconviction Act contains a 1-year time limit for filing a verified motion for postconviction relief, which runs from one of four triggering events or August 27, 2011, whichever is later.
17. **Sentences.** *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), merely applied *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and did not set forth a new rule of law for sentencing.
18. **Constitutional Law: Courts.** Constitutional rights are not defined by inferences from opinions which did not address the question at issue.
19. **Sentences: Time: Appeal and Error.** *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), announced a new procedural rule that does not apply retroactively to cases already final on direct review.

Appeals from the District Court for Richardson County: Daniel E. Bryan, Jr., Judge, Retired, and Vicky L. Johnson, Judge. Appeals in Nos. S-17-325, S-17-338, and S-17-339 dismissed. Judgment and final order in Nos. S-17-1126, S-17-1127, and S-17-1129 affirmed.

Timothy S. Noerrlinger, of Naylor & Rappl, and Rebecca E. Woodman 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., Cassel, Stacy, Funke, and Papik, JJ., and Bishop and Welch, Judges.

Cassel, J.

I. INTRODUCTION

In identical, successive postconviction motions filed in three cases, John L. Lotter sought relief based on a 2016 U.S. Supreme Court decision[1] and on a death qualification issue. In separate orders filed months apart, the district court denied relief on each issue. Because Lotter did not timely appeal the denials of the death qualification issue, we lack jurisdiction over those appeals. We affirm the denials of the other claim as time barred, because the decision he relies upon is not a "newly recognized right [that] has been made applicable retroactively to cases on postconviction collateral review."[2]

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[1] *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).

[2] Neb. Rev. Stat. § 29-3001(4)(d) (Reissue 2016).

II. BACKGROUND

1. Convictions and Sentencing

Lotter's crimes are well known, and the underlying facts are set forth in our decision on Lotter's direct appeal.[3] In three separate cases against Lotter which were consolidated for trial, a jury convicted him of several crimes, including three counts of first degree murder. In accordance with the laws in effect at the time of his trial, a three-judge panel convened in February 1996 to determine whether Lotter should be sentenced to death. The panel found the applicability of three aggravating circumstances beyond a reasonable doubt and imposed the death penalty.

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.[4] Lotter's convictions became final in 1999.[5]

2. Key U.S. Supreme Court Sixth Amendment Cases

(a) *Apprendi v. New Jersey*

In 2000, the U.S. Supreme Court decided *Apprendi v. New Jersey*,[6] a landmark decision with respect to Sixth Amendment jurisprudence. In that case, a hate crime statute authorized an increase in the prescribed statutory maximum sentence based on a judge's finding by a preponderance of the evidence that the defendant acted with purpose to intimidate the victim

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[3] See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999).

[4] *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)).

[5] See *id.*

[6] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

based on the particular circumstances of the victim. The trial judge concluded that the defendant had been motivated by racial bias, and in accordance with the statute, the judge increased the defendant's sentence.

The *Apprendi* Court addressed whether a judge, rather than a jury, could find facts that increased the defendant's maximum sentence. The Court determined that the statute violated the Due Process Clause of the 14th Amendment and the 6th Amendment right to trial by jury. It declared:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."[7]

(b) *Ring v. Arizona*

Two years after *Apprendi*, the U.S. Supreme Court decided *Ring v. Arizona*.[8] *Ring* applied the *Apprendi* rule to capital sentencing schemes and determined that capital defendants are entitled to a jury determination of any fact that would increase the possible maximum punishment. The Court held, "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury."[9] *Ring*

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[7] *Id.*, 530 U.S. at 490 (quoting *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) (Stevens, J., concurring) (Scalia, J., concurring)).

[8] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[9] *Id.*, 536 U.S. at 585.

explicitly overruled one of its prior cases "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."[10]

(c) *Hurst v. Florida*

On January 12, 2016, the U.S. Supreme Court filed its decision in *Hurst v. Florida*.[11] In that case, the Court considered the constitutionality of Florida's capital sentencing scheme in light of *Ring*. Under Florida law, a jury renders an "'advisory sentence'" of life or death without specifying a factual basis for its recommendation and then the court, notwithstanding the jury's recommendation, weighs the aggravating and mitigating circumstances and enters a sentence of life imprisonment or death.[12] Thus, the trial court alone makes the findings necessary for imposition of a death sentence—that "'sufficient aggravating circumstances exist'" and that "'there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'"[13] In holding the sentencing scheme unconstitutional, the Court declared that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[14] The *Hurst* Court stated that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."[15]

3. Nebraska's Capital Sentencing Scheme

At the time of Lotter's convictions and sentences, Nebraska law provided that after a defendant was found guilty of first

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[10] *Id.*

[11] *Hurst v. Florida, supra* note 1.

[12] *Id.*, 577 U.S. at 95.

[13] *Id.*, 577 U.S. at 100.

[14] *Id.*, 577 U.S. at 94.

[15] *Id.*, 577 U.S. at 103.

degree murder, a trial judge or a three-judge panel determined whether statutory aggravating circumstances existed.[16] If such circumstances existed, the defendant faced a maximum penalty of death.[17] If aggravating circumstances did not exist, the defendant faced a maximum penalty of life imprisonment. *Ring* invalidated this procedure.

In response to *Ring*, the Nebraska Legislature enacted L.B. 1,[18] which amended Nebraska's capital sentencing statutes. The new law required that a jury determine the existence of aggravating circumstances, unless a jury is waived by the defendant.[19] It specifically stated that each aggravating circumstance needed to be proved by the State beyond a reasonable doubt.[20] If the jury rendered a verdict finding the existence of one or more aggravating circumstances, a panel of three judges would determine the sentence.[21] The panel of judges was to consider whether the aggravating circumstances as determined to exist justified imposition of a death sentence, whether mitigating circumstances existed which approached or exceeded the weight given to the aggravating circumstances, or whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases.[22] Nothing in the legislative response dictated that it would apply to sentences which had already become final upon completion of direct review.[23]

4. Fourth Postconviction Motion Proceedings

Exactly 1 year after the *Hurst* decision, Lotter filed in each case a fourth motion for postconviction relief. He set forth two

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[16] Neb. Rev. Stat. §§ 29-2520 to 29-2524 (Reissue 1995).

[17] Neb. Rev. Stat. §§ 28-105 and 28-303 (Reissue 1995).

[18] See 2002 Neb. Laws, L.B. 1.

[19] See § 29-2520(2) (Reissue 2008).

[20] See § 29-2520(4)(e) and (f).

[21] § 29-2521(1) and (3) (Reissue 2008).

[22] § 29-2522 (Reissue 2008).

[23] See L.B. 1.

grounds for relief. Lotter first alleged that Nebraska's capital sentencing scheme was unconstitutional in light of *Hurst* (claim 1). Second, Lotter alleged that the death qualification of the jury violated his rights under the 8th and 14th Amendments (claim 2).

The district court promptly conducted a "preliminary review" to determine whether an evidentiary hearing should be granted. On January 17, 2017, the court entered an order denying claim 2 as being procedurally barred. The court neither granted nor denied an evidentiary hearing on claim 1. The pertinent portion of the court's order is as follows:

> Lotter's claim for post-conviction relief on **Claim 1** is presently set for briefing from the State of Nebraska before this court determines whether a hearing is required. . . . Upon submission of the briefs, this court will determine if any further hearings will be necessary.
>
> Lotter's claim for post-conviction relief on **Claim 2**[] is denied. Lotter's request to reverse his convictions are [sic] denied.

On Friday, January 27, 2017, the district court held a hearing concerning a mandate in a previous postconviction proceeding. During the hearing, Lotter's counsel asked how to proceed with asking the court to reconsider its denial of claim 2. Counsel expressed concern that "if we file a motion for reconsideration within 10 days, there's a potential that that can be construed as a final judgment in the case and so the issues would be bifurcated and we would have to litigate this piecemeal." The court suggested that the "best path" may be to file a motion for reconsideration which "should hold it in abeyance."

On Monday, January 30, 2017, Lotter filed a "Motion for Reconsideration and to Hold in Abeyance." In the motion, Lotter asked the court to reconsider its ruling on claim 2 and to hold the motion in abeyance for hearing and decision together with the hearing and decision on claim 1. He asserted that before claim 2 is disposed of, the court should allow briefing

on whether cause existed to excuse any procedural default. Lotter further stated that "[i]n an abundance of caution, this motion is being filed in accordance with the provisions for filing a motion to alter or amend judgment under Neb. Rev. Stat. § 25-1329 [(Reissue 2016)]."

Before the district court ruled on Lotter's motion for reconsideration, Lotter filed a motion for leave to amend his postconviction motion. He sought to add an additional claim, which would allege that his direct appeal counsel was constitutionally ineffective for failing to challenge the death qualification of his jury and that his initial postconviction counsel had an actual conflict of interest which precluded counsel from asserting a claim based on ineffective assistance of direct appeal counsel (claim 3).

On February 22, 2017, the district court entered an order denying Lotter's motion for reconsideration and denying the motion for leave to amend. Identical orders were filed in each case.

On March 22, 2017, Lotter filed a notice of appeal in each case, which were docketed in this court as cases Nos. S-17-325, S-17-338, and S-17-339 (first appeal). The State moved for summary dismissal, asserting lack of jurisdiction. We overruled the motion but reserved the jurisdictional issue until plenary submission of the appeals.

On September 28, 2017, the district court denied relief on claim 1 without an evidentiary hearing. The court determined that the claim was time barred, because *Hurst* did not create a newly recognized right. The court also concluded that neither *Hurst* nor *Ring* were retroactive on collateral review. Identical orders were filed in each case. Lotter, in turn, filed a timely appeal in each case, and those appeals have been docketed in this court as cases Nos. S-17-1126, S-17-1127, and S-17-1129 (second appeal).

On our own motion, we consolidated the appeals in the first appeal with the appeals in the second appeal for purposes of oral argument and disposition.

III. ASSIGNMENTS OF ERROR

In the first appeal, Lotter assigns that the district court erred in (1) finding that claim 2 was procedurally defaulted, (2) finding that the postconviction motion could not be amended, and (3) determining the merits of claim 2 and claim 3 without an evidentiary hearing.

In the second appeal, Lotter assigns no error to an action by the district court. Rather, he assigns that (1) the Nebraska capital sentencing scheme violates *Hurst* and the 6th and 14th Amendments, (2) Nebraska's capital sentencing scheme allowing a three-judge panel to impose a death sentence violates the 8th Amendment, and (3) this court has jurisdiction over Lotter's appeal from the denial of claim 2 and claim 3.

IV. STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.[24]

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.[25]

V. ANALYSIS

1. Jurisdiction in First Appeal

We begin by addressing the jurisdictional issue raised by the State in its motion for summary dismissal. The State claimed that Lotter's appeal from the denial of claim 2 was untimely and that his notice of appeal from the denial of his motion to amend to add claim 3 was premature. Thus, the State contends that we lack jurisdiction over the first appeal.

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[24] *State v. Coble*, 299 Neb. 434, 908 N.W.2d 646 (2018).

[25] *State v. McGuire*, 299 Neb. 762, 910 N.W.2d 144 (2018).

(a) General Principles

[3-6] For an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken.[26] It is well established that within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final, appealable order as to the claims denied without a hearing.[27] An order denying a postconviction claim is appealable even when the court reserves ruling on other claims.[28] It is appealable because an order overruling a motion for postconviction relief as to a claim is a "final judgment" as to such claim under Neb. Rev. Stat. § 29-3002 (Reissue 2016).[29]

[7-9] A party has 30 days from the entry of a judgment or final order to appeal the decision of a district court unless a party has filed a timely motion which terminates the appeal period.[30] A motion for reconsideration is the functional equivalent of a motion to alter or amend a judgment, which terminates the period in which a party must file a notice of appeal.[31] In cases involving a motion to alter or amend a judgment, a critical factor is whether the motion was filed within 10 days of the final order, because a timely motion terminates the time for filing a notice of appeal.[32]

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[26] *State v. Hudson*, 273 Neb. 42, 727 N.W.2d 219 (2007).

[27] See, *State v. Determan*, 292 Neb. 557, 873 N.W.2d 390 (2016); *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014); *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014); *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011); *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011); *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

[28] See, *State v. Determan, supra* note 27; *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[29] See *State v. Hudson, supra* note 26.

[30] See Neb. Rev. Stat. § 25-1912 (Reissue 2016).

[31] See *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[32] See *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013).

(b) Lotter's Arguments

Lotter advances two reasons to support his contention that his appeal as to the denial of claim 2 was timely. He also argues that we have jurisdiction over claim 3. We address the arguments separately.

(i) Motion Was Not Timely

[10] Lotter's motion, filed 13 days after the district court denied Lotter's claim 2, did not terminate or extend the time to appeal that denial. A motion for reconsideration does not terminate the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.[33] 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 appeal period under Neb. Rev. Stat. § 25-1329 (Reissue 2016).[34] In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and must seek substantive alteration of the judgment.[35] Here, the motion did not terminate the time for an appeal, whether characterized as a motion for reconsideration (which does not terminate the time for appeal) or a motion to alter of amend (which must be filed within 10 days in order to terminate the appeal time).

Lotter contends that his motion was timely under the circumstances. He asserts that when the court advised him to file a motion for reconsideration, the court enlarged the time for filing the motion for reconsideration as authorized under Neb. Ct. R. Pldg. § 6-1106(b)(1). Lotter quotes the following part of § 6-1106(b):

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[33] See *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000).

[34] *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 296 Neb. 501, 894 N.W.2d 308 (2017).

[35] *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order[.]

But we conclude the rule is inapplicable for two primary reasons.

[11] First, the rule of pleading that Lotter relies upon does not apply to this proceeding. Postconviction proceedings are not governed by the Nebraska Court Rules of Pleading in Civil Cases.[36]

[12,13] Second, even if the rule did apply, the pertinent statute does not allow for an extension of time. Lotter's discussion of the rule omitted the portion of § 6-1106(b) stating that "[t]he court may not extend the time for taking any action specified in any statute, except to the extent and under the conditions stated in the statutes." Section 25-1329 mandates that "[a] motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment."[37] An untimely motion to alter or amend does not terminate the time for perfection of an appeal and does not extend or suspend the time limit for filing a notice of appeal.[38] Allowing an untimely motion to alter or amend would have the effect of extending the time for filing an appeal. But when the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.[39]

Lotter's motion did not terminate the time for filing an appeal from the January 17, 2017, order. The appeal time expired 30 days after the entry of the order. Thus, the notice

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[36] *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

[37] § 25-1329.

[38] See *Fitzgerald v. Fitzgerald, supra* note 32.

[39] *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998).

of appeal filed on March 22 was not timely to challenge the denial of claim 2.

(ii) Order Was Not New Judgment

Lotter next argues that the February 22, 2017, order substantially altered the January 17 order and constituted a new judgment. The February order accomplished two things. First, it denied Lotter's motion for reconsideration of the denial of claim 2. Second, it denied Lotter's motion for leave to amend his postconviction motion to add claim 3. Because Lotter filed a notice of appeal within 30 days of that order, he contends his appeal is timely as to both claim 2 and claim 3. We consider each.

a. Claim 2

Lotter claims that the February order substantively altered its previous order, because it ruled on the merits of claim 2. The court stated that it denied claim 2 "for reasons set out in its January 17 . . . order" and that it denied the motion for reconsideration of that ruling. Thus, the February order did not alter the court's reasons for its denial of claim 2. To the extent the court discussed whether claim 2 had any merit, it did so in the context of ruling on the motion for leave to amend to add claim 3. We conclude Lotter's appeal as to claim 2 was not timely. The court's February order, which denied Lotter's untimely motion to alter or amend the judgment, was itself not an appealable order.[40]

b. Claim 3

Lotter also argues that we have jurisdiction over claim 3, the claim that the court denied leave to add. To the extent his argument applies to the first appeal, we disagree.

[14] An order ruling on a motion filed in a pending postconviction case seeking to amend the postconviction motion to assert additional claims is not a final judgment and is not

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[40] See *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994).

appealable under § 29-3002.[41] We have explained that the overruling of a motion for leave to amend in order to add a claim is not a ruling on the merits of the proposed claim, but, rather, is an order precluding the assertion of an additional claim.[42] At the time the court denied leave to amend, Lotter's claim 1 remained pending. Under the general rule, the denial of Lotter's motion to amend was not a final judgment.

Lotter also argues that we have jurisdiction because the district court ruled on the merits of claim 3. In declining to allow the motion for leave to amend, the court provided three reasons. The first reason was that the motion to amend was filed after the court already denied claim 2. Second, the court stated that claim 3 would be time barred. Third, the court stated that claim 3 was a "derivative claim" based on claim 2 and that the court could have easily denied claim 2 on its merits. But the court's discussion touching on the merits of claim 2 and, thus, claim 3 was mere surplusage. After the court determined that claim 2 was procedurally barred, it was unnecessary for the court to engage in any further analysis as to whether the claim would otherwise have merit. This surplusage does not create jurisdiction.

[15] Lotter argues that we have jurisdiction because his premature notice of appeal as to claim 3 related forward to the date of entry of the final judgment. But this argument depends upon Lotter's assertion that the court decided the merits of claim 3. It is true that § 25-1912(2) provides:

> A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

However, "to trigger the savings clause for premature notices of appeal under § 25-1912(2), an announcement must pertain

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[41] *State v. Hudson, supra* note 26.

[42] See *id.*

to a decision or order that, once entered, would be final and appealable."[43] Because the court did not reach the merits of claim 3, its February 22, 2017, order did not announce a "decision or final order" within the meaning of § 25-1912(2).

At this point, we recognize that our analysis in *State v. Robertson*[44] does not directly apply in this situation. There, the court considered amendment in the context of a timely filed motion to alter or amend a judgment. Moreover, the motion there was filed after an order disposing of all of the defendant's postconviction claims, all of which were premised on ineffective assistance of counsel. Here, Lotter's motion for leave to amend was filed in connection with a motion that could not be considered as a timely motion to alter or amend a judgment. Further, claim 1 remained pending. Under this circumstance, the general rule applies. It necessarily follows that our jurisdiction regarding the denial of amendment to assert claim 3 lies only in the context of the second appeal following the entry of judgment disposing of claim 1.

For all of the above reasons, we lack jurisdiction over the first appeal. Therefore, we do not consider any arguments directed to the merits of claim 2.

2. Second Appeal

(a) Refusal to Allow Addition of Claim 3

Our disposition of the first appeal naturally leads to the conclusion that in the second appeal, we have jurisdiction of the denial of leave to amend to add claim 3. But in Lotter's appellate brief, he did not assign error to the denial of that motion. As we have said many times, 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

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[43] *Lindsay Internat. Sales & Serv. v. Wegener*, 297 Neb. 788, 795, 901 N.W.2d 278, 282 (2017).

[44] *State v. Robertson, supra* note 36.

court.[45] Because Lotter's brief in the second appeal failed to assign error to the denial of the motion for leave to amend, we decline to address the argument.

(b) Merits of Claim 1

The crux of the second appeal concerns the district court's denial of claim 1. Lotter argues that Nebraska's capital sentencing scheme is unconstitutional under the 6th, 8th, and 14th Amendments to the U.S. Constitution and under *Hurst*. But we will not resolve his arguments if his motion is time barred under § 29-3001(4).

[16] The Nebraska Postconviction Act contains a 1-year time limit for filing a verified motion for postconviction relief, which runs from one of four triggering events or August 27, 2011, whichever is later.[46] The triggering events are:

> (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[.][47]

Lotter claims that his motion is not time barred, because it was filed within 1 year of the *Hurst* decision. Thus,

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[45] See *State v. McGuire, supra* note 25.

[46] *State v. Harrison*, 293 Neb. 1000, 881 N.W.2d 860 (2016).

[47] § 29-3001(4).

Lotter appears to be relying on the triggering event found in § 29-3001(4)(d). But *Hurst* will save Lotter's otherwise untimely motion only if it initially recognized a constitutional claim and that newly recognized right is applicable retroactively to cases on collateral review. And his argument based on the Eighth Amendment can be timely only to the extent it is based on *Hurst*.

[17] We do not read *Hurst* as announcing a new rule of law. Rather, *Hurst* applied the analysis of *Ring* to Florida's sentencing scheme. In the introductory paragraph of *Hurst*, the Court stated that Florida's sentencing scheme was unconstitutional because: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."[48] The Court stated that it "granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*."[49] It later declared that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's."[50] The *Hurst* Court stated, "In light of *Ring*, we hold that [the defendant's] sentence violates the Sixth Amendment."[51] And the Court overruled two of its prior decisions "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty."[52] The opinion concluded by stating that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."[53] In our view, *Hurst* merely applied *Ring* and did not set forth a new rule of law for sentencing.

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[48] *Hurst v. Florida, supra* note 1, 577 U.S. at 94.

[49] *Id.*, 577 U.S. at 97.

[50] *Id.*, 577 U.S. at 98.

[51] *Id.*, 577 U.S. at 99.

[52] *Id.*, 577 U.S. at 102.

[53] *Id.*, 577 U.S. at 103.

We are not persuaded by Lotter's and amici's attempt to distinguish *Hurst* from *Ring*. Lotter and amici contend that *Ring* was limited to the Sixth Amendment jury trial right and identity of the fact finder, while *Hurst* also implicates the proof beyond a reasonable doubt requirement. Lotter maintains that *Hurst* clarified the weighing of facts in aggravation and mitigation must be made by a jury. Lotter and amici read too much into *Hurst*.

[18] The analysis in *Hurst* made fleeting references to the burden of proof and weighing of aggravating and mitigating circumstances. The analysis began by citing *Alleyne v. United States*[54] for the proposition that the Sixth Amendment right to trial by jury, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt."[55] Then, in rejecting an argument made by Florida, the Court recognized that under the Florida sentencing statute, "[t]he trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'"[56] We cannot transform these isolated references in the majority's analysis into a holding that a jury must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. The *Hurst* Court said no such thing. "Constitutional rights are not defined by inferences from opinions which did not address the question at issue."[57] Like *Ring*, the *Hurst* decision focused on the jury's role in finding an aggravating circumstance. Later, the author of *Hurst* essentially said as much: "In *Hurst v. Florida*, . . . we held that process, 'which required the judge

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[54] *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

[55] *Hurst v. Florida, supra* note 1, 577 U.S. at 97.

[56] *Id.*, 577 U.S. at 100 (emphasis in original).

[57] *Texas v. Cobb*, 532 U.S. 162, 169, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001).

alone to find the existence of an aggravating circumstance,' to be unconstitutional."[58]

Most federal[59] and state[60] courts agree that *Hurst* did not hold a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances. The 10th Circuit aptly observed: "[T]he Supreme Court's holding in *Hurst* only referenced the [finding of aggravating circumstances] . . . . The Court thus did not address whether the second of the required findings—that mitigating circumstances do not outweigh the aggravating circumstances—is also subject to *Apprendi*'s rule."[61] This view is not universal.[62] One opinion expressing a contrary view called the meaning of *Hurst* "contestable."[63] But we see no ambiguity. The plain language of *Hurst* reveals no holding that a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances. And this court has previously concluded that neither *Apprendi* nor *Ring* require that the determination of mitigating circumstances, the

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[58] *Truehill v. Florida*, 583 U.S. 938, 939, 138 S. Ct. 3, 199 L. Ed. 2d 272 (2017) (Sotomayor, J., dissenting from denial of certiorari; Ginsburg and Breyer, JJ., join).

[59] See, *Underwood v. Royal*, 894 F.3d 1154 (10th Cir. 2018); *Runyon v. U.S.*, 228 F. Supp. 3d 569 (E.D. Va. 2017); *Garza v. Ryan*, No. CV-14-01901-PHX-SRB, 2017 WL 105983 (D. Ariz. Jan. 11, 2017) (unpublished decision).

[60] See, e.g., *Ex Parte Bohannon*, 222 So. 3d 525 (Ala. 2016), *cert. denied* 580 U.S. 1101, 137 S. Ct. 831, 197 L. Ed. 2d 72 (2017); *Leonard v. State*, 73 N.E.3d 155 (Ind. 2017); *Evans v. State*, 226 So. 3d 1 (Miss. 2017), *cert. denied* ___ U.S. ___, 138 S. Ct. 2567, 201 L. Ed. 2d 1104 (2018); *Jeremias v. State*, 412 P.3d 43 (Nev. 2018); *State v. Mason*, 153 Ohio St. 3d 476, 108 N.E.3d 56 (2018).

[61] *Underwood v. Royal, supra* note 59, 894 F.3d at 1184.

[62] See, e.g., *Rauf v. State*, 145 A.3d 430 (Del. 2016); *Smith v. Pineda*, No. 1:12-cv-196, 2017 WL 631410 (S.D. Ohio Feb. 16, 2017) (unpublished decision).

[63] *Rauf v. State, supra* note 62, 145 A.3d at 435 (Strine, C.J., concurring; Holland and Seitz, JJ., join).

balancing function, or the proportionality review be undertaken by a jury.[64]

[19] Even if we found that *Hurst* did announce a new law, it would not apply retroactively to Lotter. As we concluded above, *Hurst* merely applied *Ring*. And it is well established that *Ring* does not apply retroactively to cases on collateral review. The U.S. Supreme Court declared that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."[65] And in one of Lotter's previous postconviction appeals, we explained in great detail why *Ring* did not apply retroactively to his case.[66]

Likewise, *Hurst* has no retroactive application to cases on collateral review. Because *Hurst* is tethered to *Ring*, we see no reason why *Hurst* would apply retroactively on collateral review when *Ring* does not. In considering an identical issue raised in Lotter's petition for habeas corpus, the Nebraska federal district court reached the same conclusion.[67] Lotter appealed that decision, but the Eighth Circuit denied his application for a certificate of appealability[68] and the U.S. Supreme Court denied his petition for certiorari.[69] We observe that several federal circuit courts of appeal have found that *Hurst* does not apply retroactively to cases on collateral review.[70]

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[64] See *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

[65] *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

[66] *State v. Lotter, supra* note 4.

[67] *Lotter v. Britten*, 4:04CV3187, 2017 WL 744554 (D. Neb. Feb. 24, 2017) (unpublished decision).

[68] *Lotter v. Britten*, case No. 17-2000, 2017 WL 5015176 (8th Cir. July 31, 2017) (unpublished decision).

[69] *Lotter v. Frakes*, 583 U.S. 1103, 138 S. Ct. 926, 200 L. Ed. 2d 205 (2018).

[70] See, *Rhines v. Young*, 899 F.3d 482 (8th Cir. 2018); *In re Coley*, 871 F.3d 455 (6th Cir. 2017); *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017); *Lambrix v. Secretary, Florida Dept. of Corrections*, 851 F.3d 1158 (11th Cir. 2017), *cert. denied* 583 U.S. 883, 138 S. Ct. 217, 199 L. Ed. 2d 142; *In re Jones*, 847 F.3d 1293 (10th Cir. 2017).

Other federal courts agree.[71] Most state courts have reached the same conclusion.[72] And we are not swayed by Delaware's decision to give retroactive effect to *Rauf v. State*,[73] its opinion interpreting *Hurst*.[74]

Although Lotter filed his motion for postconviction relief within 1 year of the *Hurst* decision, that decision is not a "newly recognized right [that] has been made applicable retroactively to cases on postconviction collateral review."[75] Accordingly, Lotter's claim 1 is time barred.

VI. CONCLUSION

We conclude that we lack jurisdiction over Lotter's first appeal. Because we agree with the district court that the claim raised in Lotter's second appeal is barred by the limitation period set forth in § 29-3001 and that subsection (4)(d) does not extend the limitation period, we affirm the court's decision.

Appeals in Nos. S-17-325, S-17-338, and S-17-339 dismissed.
Judgment and final order in Nos. S-17-1126, S-17-1127, and S-17-1129 affirmed.

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

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[71] See, *Taylor v. Dunn*, No. 14-0439-WS-N, 2018 WL 575670 (S.D. Ala. Jan. 25, 2018) (unpublished decision); *Styers v. Ryan*, No. CV-12-02332-PHX-JAT, 2017 WL 3641454 (D. Ariz. Aug. 24, 2017) (unpublished decision); *Gapen v. Robinson*, No. 3:08-cv-280, 2017 WL 3524688 (S.D. Ohio Aug. 15, 2017) (unpublished decision).

[72] See, *Reeves v. State*, 226 So. 3d 711 (Ala. Crim. App. 2016), *cert. denied* 583 U.S. 979, 138 S. Ct. 22, 199 L. Ed. 2d 341 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied* 583 U.S. 1019, 138 S. Ct. 513, 199 L. Ed. 2d 396; *State v. Jackson*, No. 2017-T-0041, slip op. 2018 Ohio 2146, 2018 WL 2676465 (Ohio App. June 4, 2018) (unpublished decision).

[73] *Rauf v. State, supra* note 62.

[74] See *Powell v. Delaware*, 153 A.3d 69 (Del. 2016).

[75] § 29-3001(4)(d).

City of Sidney, Nebraska, appellee, v. Municipal Energy Agency of Nebraska, appellant.

917 N.W.2d 826

Filed September 28, 2018. No. S-17-471.

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 observed the witnesses and accepted one version of the facts over another.
3. **Nebraska Power Review Board: Arbitration and Award: Contracts.** Where contractual issues are intertwined with a rate dispute, such contractual issues are within the jurisdiction of an arbitration board convened under Neb. Rev. Stat. § 70-1301 et seq. (Reissue 2009).
4. **Nebraska Power Review Board: Arbitration and Award: Notice.** Under Neb. Rev. Stat. § 70-1306 (Reissue 2009), an arbitration board is authorized to permit amendments to a notice, substantive or not, at any time in the arbitrative proceedings.
5. **Public Utilities: Proof.** The purchaser of energy has the burden of proving that the transmission rate it is being charged is unfair, unreasonable, or discriminatory.
6. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
7. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
8. **Contracts: Substantial Performance.** To establish substantial performance under a contract, any deviations from the contract must be relatively minor and unimportant.

9. ____: ____. Substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform its part of the contract, (2) the results of the endeavor are beneficial to the other party, and (3) such benefits are retained by the other party.
10. ____: ____. Substantial performance is a relative term, and whether it exists is a question to be determined in each case with reference to the existing facts and circumstances.
11. **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 Public Power Review Board. Reversed.

John M. Guthery, Derek A. Aldridge, and Richard D. Sievers, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Stephen M. Bruckner and Alexander D. Boyd, of Fraser Stryker, P.C., L.L.O., for appellee.

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

Funke, J.

This is an appeal from an arbitration board's decision under Neb. Rev. Stat. § 70-1301 et seq. (Reissue 2009). The City of Sidney, Nebraska, initiated this dispute against its wholesale energy provider, Municipal Energy Agency of Nebraska (MEAN), regarding its monthly transmission rate charges. The board ruled that MEAN breached the parties' "Service Schedule M" (SSM) supplemental agreement, by unnecessarily and unilaterally changing the transmission path for the electric power and energy it provided to Sidney and by charging Sidney for the increased transmission rates. Because of these breaches, the board ruled that the transmission rate MEAN charged Sidney was excessive, unfair, and unreasonable.

On our de novo review, we conclude that the increased monthly transmission rate charges were not incurred arbitrarily

by MEAN but, instead, were required for continued performance of the SSM, after the parties learned they had insufficient contractual rights to complete the transmission path to Sidney. We hold that MEAN substantially complied with the SSM in transmitting energy to Sidney and that MEAN was permitted to charge Sidney the increased transmission rate under the SSM. Therefore, we reverse the decision of the arbitration board.

I. BACKGROUND

1. Relevant Entities

Sidney is a political subdivision and the operator of the retail electric system within its municipality and Fort Sidney, which serves approximately 3,900 customers. Sidney's peak energy need ranges from 12 megawatts (MW) in the winter to 18.5 MW in the summer.

MEAN is a Nebraska political subdivision and a not-for-profit wholesale energy provider, created under Nebraska's Municipal Cooperative Financing Act.[1] It is composed of over 60 member communities—in Nebraska, Iowa, Colorado, and Wyoming—who have signed an Electrical Resources Pooling Agreement, which is the master agreement that governs all supplemental contracts between the parties. MEAN supplies its members' wholesale energy by contracting for generation rights, with other members and third-party energy providers, and transmission rights, with third-party transmission service providers. MEAN is governed by a board of directors and a management committee, both of which consist of appointed representatives from each member community.

MEAN has served as Sidney's primary wholesale energy supplier since 1982. At all relevant times, MEAN has served Sidney's energy needs through the Sidney West switchyard (Sidney West). Sidney West is composed of several substations

[1] Neb. Rev. Stat. § 18-2401 et seq. (Reissue 2012).

and facilities owned by different entities: The Western Area Power Administration (WAPA) owns a substation containing its 115 kilovoltage (kV) bus and attached transmission lines; Sidney owns transmission lines and a 115 kV/13.2 kV transformer, which are located within WAPA's substation and connect to the national power grid only through WAPA's 115 kV bus; and Tri-State Generation and Transmission Association, Inc. (Tri-State), owns a substation containing a 230 kV bus, a 230 kV/115 kV transformer, and transmission lines connecting its bus and transformer to WAPA's 115 kV bus.

WAPA is a federal power marketing administration within the U.S. Department of Energy. WAPA allocates federally generated hydroelectric energy to municipalities and other political subdivisions. WAPA also operates as a wholesale energy provider and transmission service provider, through its Loveland Area Project (LAP) Network Integrated Transmission System (NITS). Additionally, WAPA contracts with other transmission service providers as a tariff administrator to ensure compliance with Federal Energy Regulatory Commission regulations and monitor electronic tag (e-tag) registration in "OASIS," the electronic system for registering transmission paths and scheduling energy transmissions across those paths. E-tags are electronic transaction records that document the planned flow of energy across one or more transmission systems in the wholesale market.

The Missouri Basin Power Project (MBPP) owns the Laramie River Station (LRS), a power-generating company, and transmission lines used to transmit energy from LRS. One of the owners of MBPP is Basin Electric Power West (BEPW). Through a displacement agreement with BEPW, MEAN has rights to 18 MW of energy from LRS and MBPP's transmission lines connecting to Sidney. The displacement agreement makes WAPA the tariff administrator for BEPW and MEAN regarding their transmissions on the MBPP system.

2. Contractual Relationship Between Sidney and MEAN

In 1995, Sidney accepted bids for its wholesale energy needs and resolicited bids in 1996. During the 1996 bid solicitation, MEAN's bid tied for the lowest, and Sidney chose to award MEAN the contract because of the parties' long history and Sidney's ability to participate in MEAN's governance, as a member community. From 1996 until 2001, Sidney and MEAN entered into a series of short-term supplemental agreements, under which MEAN provided Sidney its energy requirements in excess of WAPA's approximately 2 MW energy allocation to Sidney.

After winning the bid in 1996, MEAN and Tri-State entered into the "Sidney Facilities Service Agreement" (Tri-State Agreement), which enabled MEAN to transmit 7 MW of energy through the portions of Sidney West "own[ed], operate[d], and maintain[ed]" by Tri-State for $2,367.40 per month, with the option to increase the capacity at the cost of $338.18 for each of the MW transmitted per month. With this agreement, MEAN was able to transmit LRS-generated energy to Sidney through MBPP, which connects to Sidney West at Tri-State's 230 kV bus.

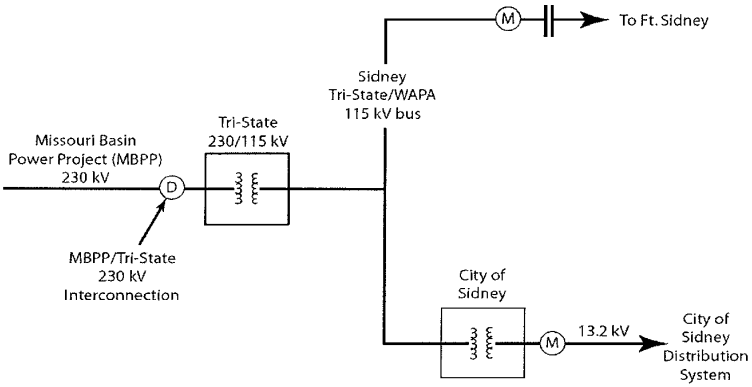
In 2005, MEAN's manager of electric operations was contacted by WAPA concerning the transmission arrangement MEAN used to serve Sidney. He informed WAPA that MEAN served Sidney using Tri-State's transformer, under the Tri-State Agreement, which he believed WAPA found acceptable. He later informed Sidney that if Sidney could no longer rely solely on the Tri-State Agreement for its energy transmission, then Sidney would have to be put on WAPA's LAP NITS for transmission at a nearly $300,000 annual transmission rate increase.

In 2007, MEAN's manager of electric operations encouraged Sidney to enter into the SSM, instead of continuing with its then-current supplemental agreement, ending in 2011. He

explained several benefits of the SSM to Sidney: long-term energy rate stability, saving Sidney over $100,000 in 2008 alone for its current agreement; savings of more than $1.6 million in 2008, compared to full tariff service with Tri-State; and extending Sidney's long-term relationship with MEAN as a participating member in MEAN's governance. He also stated that Sidney's energy rates were lower than other MEAN members, in part because of the low transmission costs enabled by the Tri-State Agreement.

In 2008, the parties entered into the SSM, effective from February 1, 2008, until at least 2041. The SSM is a standard form agreement used with other members of MEAN and includes attachments specific to the member community. It requires MEAN to provide Sidney its energy requirements, less WAPA allocations, and Sidney to pay MEAN for such energy under the provisions of exhibit B, the rate schedule. The SSM also states that the energy supplied by MEAN shall be delivered to the "Point of Delivery" (POD) specified in exhibit A, which may be modified only "by a revised Exhibit A signed by an authorized officer of [Sidney] and accepted by MEAN."

Exhibit A includes the following diagram:



D = Point of Delivery

From 1996 until December 1, 2014, under each of the parties' supplemental agreements, MEAN provided Sidney's energy requirements through its generation rights in LRS and transmission rights on MBPP's transmission lines, which connected to Sidney's facilities in Sidney West through Tri-State's and WAPA's facilities. The only fee for transmission charged to Sidney by MEAN under this transmission path was the $2,367.40-per-month base fee in the Tri-State Agreement.

3. Policy Changes Regarding Energy Transmissions

(a) MEAN Policy Changes

In 2013, MEAN entered into a settlement with the Southwestern Power Pool to compensate it for MEAN's unreserved use of its facilities, which is the use of a facility to transmit energy without any contractual rights to do so. Tariff administrators establish the penalties for unreserved use of facilities, which generally include compensating the owner of the facility for any use at double the rate normally charged. MEAN's board of directors decided to pay the costs of this settlement by socializing the amount across all of its members, even though Sidney and other members had not directly benefited from the unreserved use.

In response to the incident with the Southwestern Power Pool, MEAN's executive director proposed a directive implementing a culture of compliance for MEAN to the board of directors, which it approved. Consequently, there was an expectation that MEAN would do whatever was necessary to comply with all regulations. By 2013, MEAN had begun extensively reviewing energy contracts to ensure they were complying with applicable regulations.

(b) WAPA Changes to Use of E-Tags on MBPP Lines

As Sidney's energy provider, MEAN scheduled all e-tags for the transmission of its generated energy resources to

Sidney on OASIS. Historically, e-tags were very general in that MEAN was required to specify only the start and end points of an entire transmission path and label it as grandfathered.

In January 2013, however, WAPA informed MEAN that it intended to discontinue the use of grandfathered e-tags effective March 26, 2013. As a result, MEAN was now required to schedule each transmission segment along the complete path through specific e-tags. These specific e-tags were required to specify the start and end points of each transmission segment, the transmission service provider that owned the segment, and the capacity level of the energy. The capacity level of energy is rated on a 1-to-7 scale. Level 7 is the highest priority, the last level to be curtailed in the case of overscheduling, classified as "firm" capacity.

OASIS rejects a registered e-tag if there is insufficient capacity on a particular segment of the transmission line or if it does not recognize the registering entity as having a contractual right for its scheduled transmission. Conversely, when an entity had used a grandfathered e-tag, OASIS' system for verifying whether the registering entity had sufficient contractual rights to transmit energy across each segment of a complete transmission path was bypassed.

Upon announcing the change, Raymond Vojdani, a transmission policy advisor at WAPA, informed MEAN that its transmission capacity on the MBPP line to Sidney West would be reduced to 4 MW of firm capacity, from the 18 MW of firm capacity available with the grandfathered e-tag. Vojdani also suggested that MEAN's transmission path to Sidney, under the displacement agreement, would consist of the following three segments: the LRS generating facility to the MBPP transformer converting energy to 230 kV, BEPW LRS>LRS 230; MBPP's transformer to the Stegall, Nebraska, switchyard, LAPT LRS 230>SGW; and the Stegall switchyard to Sidney West, BEPW SGE>SCSW.

4. MEAN's Internal Response to WAPA's Changes

In December 2013, MEAN internally discussed a problem with its transmission path for Sidney within Sidney West. MEAN found that the three-segment path, provided by Vojdani, was insufficient to deliver energy to Sidney, because it resulted in a gap within Sidney West, and that it could only create a complete transmission path by adding a fourth segment, LAPT SCSW>SCSW. "LAPT" referred to the Loveland Area Power Transmission, which encompassed WAPA's 115kV bus located within Sidney West.

Rather than scheduling transmissions to Sidney with this fourth segment, MEAN used point-to-point transmission capacity (PtP) to create a complete transmission path. PtP is the purchase of transmission rights for a single segment of a transmission system, but it must be purchased for the peak MW capacity required at any point regardless of whether or not the entity needs such capacity at all times. MEAN relied on 10 MW of its existing organizational PtP and acquired additional PtP at a cost of over $30,000 in 2013 and 2014.

MEAN initially attributed the gap in its transmission path to Tri-State's 230 kV/115 kV transformer. They asked Vojdani whether a Tri-State-to-Sidney West, TSGT SCSW>SCSW, e-tag could be created, under the Tri-State Agreement, to resolve the gap, but Vojdani stated that no e-tag across Sidney West should be required, because all parties were aware of MEAN's agreement to use Tri-State's 230 kV/115 kV transformer. During this same period, Billy Cutsor, a MEAN employee, provided Vojdani with incorrect information regarding the number of MW MEAN could transmit through Tri-State's facilities, under the Tri-State Agreement. Based upon the incorrect information, Vojdani recommended that Sidney be placed on LAP NITS so that MEAN could transmit a sufficient amount of energy to Sidney to fulfill Sidney's needs. After this recommendation, MEAN targeted placing Sidney on LAP NITS on October 1, 2014.

Still having issues with creating a complete transmission path to Sidney, MEAN contacted Tri-State in February 2014. Tri-State offered various e-tag alternatives, but each proved ineffective. Tri-State suggested using the TSTG SGW>SCSW 230 e-tag, but it did not work, because it contained the same gap within Sidney West. MEAN requested that Tri-State fill the gap in its path by creating an e-tag representing its contractual rights under the Tri-State Agreement, suggesting TSTG SCSW 230>SCSW 115, but this also did not work.

Tri-State then suggested using the LAPT SCSW>SCSW e-tag. However, MEAN expressed concern that this e-tag would indicate it was using WAPA's system, which Vojdani confirmed. Subsequently, MEAN, Tri-State, and Vojdani scheduled a conference call to discuss the e-tag issue further. Based on the call, MEAN concluded that WAPA's 115 kV bus was the gap in its transmission path to Sidney and that it would need to contract with WAPA to create a complete transmission path using WAPA's bus.

In June 2014, MEAN began working on an application to WAPA to determine whether there was sufficient capacity on LAP NITS to serve Sidney's energy needs. MEAN submitted its application to WAPA on July 21.

5. MEAN Communications With Sidney and Change to Transmission Path

In the spring of 2014, Cutsor mentioned to a Sidney employee that some issues had arisen with the transmission arrangement MEAN used to serve Sidney, explaining what had changed and some options for solving the issue. Then, in July 2014, Cutsor sent an email to another Sidney employee explaining that the use of e-tags had recently become more transparent, that the Federal Energy Regulatory Commission now monitored e-tags, and that a complete transmission path to Sidney would require additional transmission service. Cutsor recommended that Sidney obtain LAP NITS and cancel the

Tri-State Agreement effective October 1, 2014, which would result in about a $500,000 annual increase in transmission fees. During a subsequent conference call in July, MEAN communicated that WAPA would not impose any penalty for the unreserved use of its facilities if Sidney obtained LAP NITS service by October 1.

In August 2014, MEAN provided Sidney with a price comparison for Tri-State and LAP NITS, the only entities with substations at Sidney West. MEAN determined that the use of LAP NITS would cost $576,000 per year and that full tariff service with Tri-State would cost about $630,000 per year. Sidney responded that it would be examining its options further before accepting MEAN's proposal. Later, MEAN informed Sidney that Tri-State's full tariff service would not include rights to WAPA's 115 kV bus and that WAPA offered only full tariff service on LAP NITS, not a limited contract for the 115 kV bus only.

Both MEAN and WAPA estimated that keeping the existing transmission path with MBPP and adding PtP to transmit energy across WAPA's bus would be a similar or higher cost than obtaining LAP NITS full tariff service. Further, PtP would be subject to curtailing when there was insufficient capacity on WAPA's 115 kV bus and would continue to provide Sidney with only 4 MW firm energy. Conversely, WAPA informed MEAN that as part of the full tariff service with LAP NITS, Sidney could be provided with its full energy needs at firm capacity by WAPA's generating sources. MEAN also learned from WAPA that LAP NITS could transmit energy to Sidney independent of the rights in the Tri-State Agreement and over various lines, which would reduce the risk of interruptions.

During a meeting in September 2014, MEAN discussed with Sidney the changes in 2013 that led to the identification of the gap in the transmission path, how the Tri-State Agreement was insufficient to close the gap, and its final

determination that obtaining LAP NITS and canceling the Tri-State Agreement, effective October 1, 2014, would be the best option to provide Sidney a complete transmission path. Sidney, however, refused to accept any rate change until 60 days after MEAN provided it notice pursuant to the correct SSM procedure. The next week, MEAN advised Sidney regarding the use of "non-firm" energy transmission and the higher costs of doing so with PtP and explained how LAP NITS costs were calculated.

On September 25, 2014, MEAN sent formal notice to Sidney of its intent to implement the changes, which would affect Sidney's transmission charges, on December 1. On that same day, MEAN sent a notice to Tri-State terminating the Tri-State Agreement, effective as of December 1.

In October 2014, WAPA informed MEAN that WAPA could have charged Sidney for the unreserved use of its 115 kV at double the rate going back several years but opted not to do so. WAPA also informed MEAN that it would provide an initial discount to Sidney for obtaining LAP NITS.

Effective December 1, 2014, Sidney's energy needs began being served by LAP NITS. Due to a billing error, MEAN did not start billing Sidney for the LAP NITS charges until March 2015. Over the next 12 months, WAPA phased in the increased costs for Sidney's service on LAP NITS. Once the full charges for LAP NITS were phased in, Sidney's transmission costs had increased from $28,408.80 per year to approximately $576,000 per year.

After Sidney was placed on LAP NITS, WAPA took over the scheduling of e-tags to transmit energy to Sidney. According to an unexecuted contract between MEAN and WAPA and communications with WAPA, MEAN concluded that WAPA schedules Sidney's energy through the Archer, Nebraska, switchyard, which connects directly to WAPA's 115 kV bus in Sidney West. However, LAP NITS connects to Sidney West with four different transmission sources, two of which connect to Tri-State's 230 kV bus.

6. Proceedings Before Arbitration Board

In early 2015, Sidney sent MEAN a notice of election to dispute charges, under § 70-1304. The parties failed to settle the dispute, and arbitration proceedings were initiated, under § 70-1306. Sidney filed an amended notice at the first meeting with the arbitration board that alleged MEAN had breached the SSM by charging an unfair, unreasonable, and discriminatory transmission rate; the SSM by unilaterally changing the POD; and the implied covenant of good faith and fair dealing by acting in a manner that injured Sidney. The arbitration proceedings occurred in March 2017.

(a) Transmission Gap in Sidney West

MEAN called several of its employees to testify about the gap in the transmission path identified in Sidney West. The employees testified that they had concluded WAPA's 115 kV bus was the gap in the transmission path at Sidney West. MEAN staff admitted that neither WAPA nor the Federal Energy Regulatory Commission had threatened to penalize Sidney or MEAN for unreserved use of WAPA's facilities. However, they stated that MEAN had to obtain contractual rights to use WAPA's bus, because using WAPA's bus without a contract violated the regulatory commission's regulations and MEAN's culture-of-compliance directive. They also testified that once Vojdani became aware of the issue, he acknowledged that WAPA could have penalized MEAN for its unreserved use of WAPA's facilities but would not do so if Sidney obtained sufficient rights.

Sidney called an expert who testified that there was no gap in the transmission path MEAN had been using to serve Sidney, because "[b]us transfers are not charged for in general . . . ." MEAN's expert agreed that the bus did not create a gap in transmission service by stating that the convention in the "west" is that there is no charge for energy crossing a substation if it enters and exits at the same voltage, as a professional

courtesy. Instead, he stated that an entity has to pay only for the use of a transformer to change voltage levels, which generally covers the expense of going across a bus.

MEAN's expert also acknowledged that there was no path for WAPA's Sidney West facilities posted on OASIS. Pursuant to the Federal Energy Regulatory Commission regulations, all transmission paths are to be registered on OASIS along with the total transfer capability and the available transfer capability. However, MEAN's expert qualified his statement by stating that only line segments needed to be registered. Additionally, Vojdani testified that LAP NITS would include access to transmission facilities like its 115 kV bus.

Vojdani testified that WAPA first became aware of a problem with MEAN's transmission path to Sidney in February 2014, as a result of MEAN's questions regarding its problems with its transmission path. Vojdani stated that at that time, he realized WAPA's 115 kV bus was the last segment of the transmission path to Sidney and that WAPA needed to be compensated for the use of its bus, because the Tri-State Agreement did not provide such a right. He testified that he informed MEAN of this during the February 2014 conference call with MEAN and Tri-State staff. Vojdani also stated that WAPA considered penalizing MEAN for its unreserved use of WAPA's 115 kV bus but decided not to do so.

(b) Compliance With Exhibit A

Sidney employees provided testimony regarding their understanding of exhibit A and MEAN's actions in placing Sidney on LAP NITS. They testified that the favorable and stable transmission rate provided by MEAN under the Tri-State Agreement was a primary motivation in Sidney's entering the SSM. Sidney employees testified that they believed exhibit A represented a contractual requirement that MEAN transmit Sidney's energy through the MBPP line and the Tri-State facilities, under the Tri-State Agreement. They also stated that Sidney never consented to amending exhibit A and

that MEAN unilaterally decided to place Sidney on LAP NITS and cancel the Tri-State Agreement, without providing Sidney with any alternative options.

Sidney's expert testified that the POD in exhibit A was located at the fence of Tri-State's substation at Sidney West on the MBPP line and that MEAN was in breach of exhibit A because WAPA had no right to deliver energy on MBPP's line. He stated that typically, a transmission line owned by one entity would connect to a transmission line at the fence line of another entity's facilities so that the first entity would not have to enter the second's facilities to service its transmission line. The expert acknowledged that the diagram of Sidney West in evidence did not show a change in line ownership at the fence line to Tri-State's substation but explained that it was likely because the diagram was created by WAPA and not Tri-State or MBPP.

MEAN's expert testified that MEAN had not breached exhibit A, because the POD was Tri-State's 230 kV bus and LAP NITS had transmission lines connecting to the bus and rights to transmit energy through it. He explained that a POD is the end point of transmission service and is generally an entire substation but, occasionally, a bus if there is an internal voltage transfer within a substation. The expert, and Vojdani, testified that a POD cannot be located on a transmission line itself, because energy cannot be forced to travel along a specific path; instead, energy travels on the path of least resistance, which could be any transmission line regardless of ownership. Sidney's expert contested that WAPA did not have the ability to transmit energy to serve Sidney across Tri-State's transformer.

MEAN staff detailed their several communications with Sidney staff regarding the issue and recommending the option it had determined would be the most cost-effective solution, discussed above. They also detailed the price comparisons that they had made, and shared with Sidney staff, in reaching their conclusion regarding the most cost-effective solution.

MEAN's expert agreed with the recommendation of MEAN staff that the lowest cost option for Sidney was being placed on LAP NITS and canceling the Tri-State Agreement.

(c) Charges Under LAP NITS

MEAN staff testified that under the SSM, transmission charges are to be passed through to the customer at the cost charged by the third party. They admitted that as of the hearing, MEAN still had not executed an agreement with WAPA placing Sidney on LAP NITS, but that Sidney was receiving and being charged for energy and transmission on LAP NITS. They explained that WAPA charges customers based on the number of MW transferred through LAP NITS, not by the distance energy is transmitted.

MEAN staff testified that WAPA calculated the charges for all of MEAN's members under the same formula and passed the single charge to MEAN. They testified that MEAN then used the same formula as WAPA to determine each of its community's charges, which it passed on to each community without markup. MEAN staff stated that Sidney's transmission costs for using LAP NITS are about 10 percent of its total energy costs, which is the same average transmission cost ratio for all 54 of MEAN's members with an SSM agreement. MEAN staff also testified that Sidney's transmission costs under the Tri-State Agreement alone were extremely low, amounting to transmission costs of less than 1 percent of total energy costs.

7. Arbitration Board's Decision

The arbitration board concluded that MEAN breached the SSM because it had unilaterally changed the POD and charged Sidney the increased transmission rate. Consequently, it ruled that the transmission rate MEAN was charging Sidney for electric wholesale service to Sidney was excessive, unfair, and unreasonable. The board ruled that it was not authorized to terminate or rescind the SSM, under § 70-1314, so it set the fair, reasonable, and nondiscriminatory rate for

transmission charges at $2,367.40 per month, the rate charged before MEAN's breach. The board did not make any finding regarding the alleged breach of the implied covenant of good faith and fair dealing.

The board ruled that the POD in exhibit A was located on the MBPP line at the fence of the Tri-State substation and that MEAN had breached exhibit A, because WAPA had no rights on the MBPP line, could not use Tri-State's transformer to serve Sidney, and served Sidney from the Archer switchyard at 115 kV. It found that MEAN changed the path without consulting with Sidney and that Sidney did not consent to the change.

The board determined that MEAN's breach of exhibit A damaged Sidney because changing the transmission path was unnecessary. It ruled there was no gap in the transmission path to Sidney by making the following findings: The transmission path had been sufficient before December 2014, and neither WAPA nor the Federal Energy Regulatory Commission required the change; both parties' experts testified that there was no cost to use WAPA's bus; and the evidence showed that Tri-State had the right to use WAPA's 115 kV bus at no charge. The board determined that the entirety of Vojdani's testimony was not entitled to weight, because it was partially based on incorrect facts from Cutsor.

The board also ruled that MEAN breached the SSM's requirement that it charge Sidney energy rates that were fair, reasonable, and nondiscriminatory. It determined that the rate was unfair, because it interpreted the SSM to require MEAN to contract for a complete transmission path to Sidney at its own expense, and discriminatory, because MEAN's board of directors inconsistently socialize transmission costs.

MEAN appealed the decision of the arbitration board to the Nebraska Court of Appeals, under § 70-1326. We then granted MEAN's petition to bypass the Court of Appeals.[2]

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

II. ASSIGNMENTS OF ERROR

On appeal, MEAN assigned—reordered, restated, and consolidated—that the arbitration board erred in (1) concluding that it had subject matter jurisdiction to hear breach of contract claims; (2) allowing Sidney to amend its notice of dispute; (3) finding WAPA's facilities did not create a "'gap'" in the transmission path to Sidney, because they could be used without charge; (4) finding LAP NITS was unnecessary and not the lowest cost alternative to transmit energy to Sidney; (5) finding that MEAN breached the SSM by changing the POD; (6) finding that MEAN breached the SSM by passing unfair, unreasonable, and discriminatory transmission charges to Sidney; (7) receiving exhibit 100 into evidence; and (8) altering and modifying the parties' contract in setting the fair, reasonable, and nondiscriminatory rate for transmission service.

III. 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.[3] Despite our 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 observed the witnesses and accepted one version of the facts over another.[4]

IV. ANALYSIS

1. Arbitration Board Had Subject Matter Jurisdiction

MEAN argues the arbitration board, as a statutorily created body, lacked subject matter jurisdiction to decide Sidney's contract-based claims. Instead, it argues the statutes expressly limit the arbitration board's jurisdiction to deciding rate dispute

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[3] § 70-1327; *In re Application of Northeast Neb. Pub. Power Dist.*, 300 Neb. 237, 912 N.W.2d 884 (2018).

[4] *Id.*

claims by determining whether the rate charged is adequate, fair, reasonable, and nondiscriminatory.

[3] We recently considered whether an arbitration board, created under § 70-1301 et seq., had jurisdiction to consider breach of contract and breach of an implied covenant of good faith and fair dealing claims, in *In re Application of Northeast Neb. Pub. Power Dist.*[5] We stated that "[t]he Legislature clearly contemplated the existence of power contracts" in the statutes and that rate disputes are often intertwined with contractual issues of the rights and obligations regarding the rate.[6] Accordingly, we held that where "contractual issues are intertwined with a rate dispute, such contractual issues are within the arbitration board's jurisdiction."[7]

Section 70-1302 explicitly states that a board's authority to "resolve wholesale electric rate disputes [includes] rate disputes relating to transmission and delivery of electrical energy." Therefore, the board had subject matter jurisdiction to consider whether MEAN breached the SSM or the implied covenant of good faith and fair dealing to the extent that such breaches resulted in transmission rate charges that are unfair, unreasonable, and discriminatory.

2. Arbitration Board Did Not Err in Allowing Sidney to File Amended Notice

MEAN contends that the arbitration board erred in allowing Sidney to file an amended notice, because § 70-1301 et seq. does not provide a mechanism for amending a notice of dispute.

When a purchaser elects to dispute a wholesale electric charge, § 70-1304 requires that the purchaser "shall give notice in writing to the supplier stating such election. The

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[5] *In re Application of Northeast Neb. Pub. Power Dist., supra* note 3.

[6] *Id.* at 248, 912 N.W.2d at 892.

[7] *Id.*

notice shall fully describe the basis for the dispute and set forth a detailed statement of disputed issues and the relief sought by the purchaser." Section 70-1318 states that "[t]he arbitration board shall be bound by the rules of evidence applicable in district court." Section 70-1306 provides the default procedural rules governing the arbitration, stating, in part, the following:

> Except as otherwise provided in sections 70-1301 to 70-1329, the Commercial Arbitration Rules of the American Arbitration Association, as amended and in effect March 1, 1977, shall be used to the extent that they are determined by the arbitration board to be applicable to the procedures set forth in sections 70-1301 to 70-1329.

The Commercial Arbitration Rules address the ability of a party to amend its claim, or notice in this case. Rule R-6(b) provides that "[a]fter the arbitrator is appointed, . . . no new or different claim may be submitted except with the arbitrator's consent."[8] This provision's grant of authority to the arbitrator to allow substantive changes to the claims before him or her necessarily includes the lesser power to permit nonsubstantive changes.

[4] Section 70-1301 et seq. does not otherwise provide for amendments of a notice or prohibit such. Accordingly, we find that under § 70-1306, an arbitration board is authorized to permit amendments to a notice, substantive or not, at any time in the arbitrative proceedings.

At the arbitration board's first meeting, the board ruled that the Commercial Arbitration Rules would be inapplicable regarding the rules of evidence but made no similar ruling regarding procedural matters. Sidney later moved to file an amended notice of election to dispute, and the board considered whether the arbitration rules would permit Sidney to amend its notice. The arbitration board ultimately found that it

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[8] American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures R-6(b) at 13 (Oct. 1, 2013).

had the power to allow Sidney to amend its notice and ruled that Sidney could, after concluding that the issues presented in the amended notice were not a substantial deviation from those in the original notice.

Because the arbitration board had the authority to allow Sidney to amend its notice and did allow the amendment, this assignment of error is without merit.

3. Sidney's Claims

The board did not consider Sidney's implied covenant of good faith and fair dealing claim. In addition, Sidney did not file a motion for rehearing or a cross-appeal on this issue, so we do not consider it.

Sidney's breach of contract claims, in the limited context of this dispute, depend on showing that MEAN's breach resulted in an unfair, unreasonable, or discriminatory rate. The board determined that there was no gap in the transmission path serving Sidney, so it ruled that MEAN's unilateral and unnecessary change to the transmission path, in breach of exhibit A, was unfair to Sidney to the extent that it increased Sidney's transmission rate. The board also found that the rate increase to Sidney was unfair because the SSM required MEAN to bear that expense and discriminatory because MEAN inconsistently socialized transmission costs. Upon our de novo review, we find that the arbitration board erred in its ultimate conclusions on the breach of contract claims and certain underlying factual findings.

(a) MEAN's Change to Transmission Path Substantially Complied With Exhibit A

(i) MEAN Could Not Transmit Energy Across WAPA's Facilities Without Contractual Rights

The crux of this claim is whether WAPA's 115 kV bus constituted a gap in the transmission path serving Sidney. As the

arbitration board found, if there was no gap, then MEAN's action of placing Sidney on LAP NITS was unnecessary. However, if there was a gap, at least some additional cost was required for performance of the SSM.

MEAN contends that the arbitration board erred in determining WAPA's facilities did not constitute a gap in the transmission path. It contends that Vojdani testified to telling MEAN that MEAN could not transmit energy across WAPA's 115 kV bus without contractual rights to do so and that the Tri-State Agreement did not provide such rights. Further, it argues that the fact that WAPA had not charged for the usage of its facilities in the past did not preclude it from penalizing for that unreserved use or charging for any future use.

Sidney contends that there was no gap in the transmission path. It argues that MEAN staff admitted that a complete transmission path could be created with the LAPT SCSW>SCSW e-tag, which proved that the Tri-State Agreement itself provided MEAN the right to use WAPA's facilities and that no charge was necessary—based on both experts' testimony. Sidney also argues that the board found Vojdani's testimony was not entitled to weight, because it was based on the incorrect information about the Tri-State Agreement provided to him by Cutsor.

We disagree with Sidney and the arbitration board that Vojdani's testimony was not entitled to weight. Vojdani testified there were two *independent* bases for placing Sidney on LAP NITS: (1) MEAN had insufficient firm capacity on the MBPP line and insufficient total capacity on the Tri-State facilities to serve Sidney, and (2) MEAN had no right to transmit energy across WAPA's 115 kV bus. Vojdani's testimony regarding insufficient capacity on the Tri-State facilities was clearly based on erroneous information from Cutsor. However, as Cutsor acknowledged, that incorrect information had no relevance to Vojdani's determination that MEAN lacked any right to transmit energy across WAPA's bus. Accordingly, we find that Vojdani's testimony regarding

such is entitled to significant weight based on his employment with WAPA.

The communications between MEAN, Tri-State, and WAPA while troubleshooting the transmission issue and the testimony of MEAN staff also support a conclusion that the WAPA bus constituted a gap in the transmission path. Vojdani and MEAN staff testified that they were unaware of any contractual insufficiency in the transmission path to Sidney before the grandfathered e-tag was discontinued. After grandfathered e-tags were discontinued, however, the evidence shows MEAN was unable to complete a transmission path without relying on PtP or the LAPT SCSW>SCSW e-tag.

While MEAN initially believed the gap was caused by Tri-State's transformer, its understanding evolved as a result of Tri-State's being unable to offer any solution to the gap other than recommending MEAN use the LAPT SCSW>SCSW e-tag, which Vojdani confirmed would express a contractual right to use WAPA's bus. On a conference call to discuss the issue further, Vojdani informed MEAN that it could not schedule a complete transmission path to Sidney without using WAPA's 115 kV bus and that MEAN had no contractual right to do so. MEAN staff testified that they obtained LAP NITS for Sidney to acquire the right to transmit energy to Sidney across WAPA's 115 kV bus.

The board discounted Cutsor's testimony that the WAPA bus was the gap in transmission service, because he also testified that the gap was the Tri-State transformer. This statement, however, stood in contradiction to his identification of the WAPA bus as the gap during at least two other portions of his testimony and his description of the development of his understanding regarding the gap.

Sidney argues that Tri-State's suggestion that MEAN use the LAPT SCSW>SCSW e-tag was either an acknowledgment that the Tri-State Agreement assigned MEAN a license to use WAPA's facilities or that the suggestion itself assigned MEAN the right to do so. The Tri-State Agreement, however,

provides MEAN a right to use only those facilities that Tri-State "owns, operates, and maintains." There is no language granting or assigning any right to use WAPA's facilities at Sidney West or even mentioning WAPA. Additionally, Tri-State's suggestion that MEAN schedule its transmissions on WAPA's facilities cannot be construed as a contractual assignment of any right that Tri-State may have had.

Both MEAN's and Sidney's experts testified that transmitting energy across a bus at the same voltage level is *generally* not charged for as a professional courtesy in the "west" region of the country. However, neither expert claimed to do any work or to have specific knowledge of the customs in the Rocky Mountain region, where the parties and the relevant division of WAPA are located. Accordingly, regardless of the accuracy of these statements, they provide no insight regarding WAPA's policies, as a tariff administrator, concerning the use of facilities at the same voltage level or WAPA's practices, as a transmission service provider, in charging for the use of its own facilities. In addition, Vojdani explicitly testified that the transmission across its facilities to serve Sidney at Sidney West would require a contractual right and compensation to do so. This testimony was uncontested and more persuasive than the experts' generalities.

Sidney also argues that WAPA's 115 kV bus is not an asset that WAPA can charge for the use of, because the bus was not a posted path on OASIS. The arbitration board agreed that the failure to list the bus as a posted path was inconsistent with the claim that WAPA could charge for the use of the bus. However, MEAN's expert qualified his testimony on this subject by stating that registering the available transfer capability is applicable only to line segments. We also find the limited testimony on this issue contradicted by the undisputed testimony that WAPA had registered the LAPT SCSW>SCSW e-tag.

Based on the preceding evidence, we conclude, on our de novo review, that there was a gap in the transmission path

serving Sidney's energy at the WAPA 115 kV bus and that it was necessary for MEAN to acquire contractual rights for any future use.

We reject Sidney's attempt to fault MEAN for acting in compliance with federal regulations that prohibit the unreserved use of transmission facilities. While it is undisputed that MEAN alerted WAPA to its unreserved use of WAPA's facilities, MEAN did so in a good faith attempt to obtain a valid transmission path to serve Sidney. The actions of MEAN staff were also motivated by the directive of MEAN's board of directors, which Sidney is represented upon, implementing a culture of compliance. The evidence shows that MEAN could have incurred an unreserved-use penalty of approximately $1.16 million annually for scheduling transmission on WAPA's bus.

Further, although WAPA had not charged MEAN for using its bus for 18 years, Sidney provides no support for its contention that WAPA would have been precluded from charging MEAN for that unreserved use or any future use. Vojdani testified that he considered penalizing MEAN for its use of the bus, but did not because of MEAN's active and immediate action to correct the issue once it discovered it, but that any future use of WAPA facilities required compensation. Additionally, the evidence shows Sidney was fully informed of the unreserved-use issue before being placed on LAP NITS.

(ii) LAP NITS Was Lowest Cost Transmission Path

MEAN argues that LAP NITS was the most cost-effective solution to create a complete transmission path to Sidney. It asserts that it diligently considered alternate options but that each would have cost more and been unable to provide Sidney with all of its energy at firm capacity.

WAPA's 115 kV bus constituted a gap in the transmission service to Sidney, and Sidney's facilities connected only to WAPA's bus, so a solution had to be implemented in order for

Sidney to continue receiving energy. Accordingly, the parties' arguments concerning whether the existing transmission path could have been utilized by simply waiving any firm energy requirement imposed by the SSM are without merit. Instead, the limited options available to create a complete transmission path to Sidney included obtaining rights to WAPA's bus, connecting Sidney's facilities to the facilities of an entity other than WAPA, or making Sidney self-sufficient regarding energy generation.

[5] MEAN admitted that it did not consider using Sidney's existing generators as an option to serve Sidney's energy needs. However, Sidney admitted the energy rate from its generators was substantially higher than under the rate schedule, there would have been substantial costs to fix and make its generators compliant with federal regulations, and at full capacity, the generators could produce only 8 MW of energy. The evidence does not suggest the cost of fixing the existing generators or acquiring sufficient additional generators and facilities to produce the other 8 MW of energy Sidney needs. There was also no evidence about the costs or ability of Sidney to build facilities that could connect directly to those owned by Tri-State or another entity. Sidney had the burden of proving that the transmission rate charged by MEAN was unfair, unreasonable, or discriminatory.[9] Thus, Sidney failed to prove these to be viable alternatives to LAP NITS.

The record shows that MEAN considered several alternative options to LAP NITS for serving Sidney. MEAN staff testified that WAPA would not offer any service less than full tariff service, that full tariff service with Tri-State would still require LAP NITS, and that PtP service over WAPA's bus would have cost more than LAP NITS and been less reliable. MEAN's expert also testified that he examined whether other entities could have served Sidney's energy needs and concluded that

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[9] See *In re Application of Northeast Neb. Pub. Power Dist., supra* note 3.

service from any other entity would have been infeasible because each would have run into at least three points requiring additional transmission contracts.

Based on the evidence presented, we conclude that LAP NITS was the lowest cost solution for transmitting energy to Sidney.

(iii) Sidney Is Responsible for Costs of Transmission Rights at Sidney West

MEAN contends that the arbitration board erred in finding the POD was located on the MBPP transmission line at the fence of Tri-State's facilities and not on Tri-State's 230 kV bus. MEAN argues that the language of the SSM defines a POD as the "outlet of the interconnected transmission system," which cannot logically be located on a transmission line, and that based on its nature, energy cannot be forced on a specific transmission line. It also argues that the SSM does not require it to transmit Sidney's energy along any specific path. Instead, it asserts that the POD is relevant only because it represents the change in the possession of energy and that the SSM makes Sidney responsible for all transmission costs after the POD.

Sidney argues that exhibit A depicts the POD at the MBPP and Tri-State interconnect on the MBPP line, which testimony established was at the fence around Tri-State's substation. It argues that exhibit A ensured MEAN would transmit Sidney's energy on the MBPP line at 230 kV and across the Tri-State transformer. Sidney also argues that the contract requires MEAN to contract, at its own expense, for all transmission rights necessary to reach Sidney's facilities.

[6,7] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.[10]

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[10] *Frohberg Elec. Co. v. Grossenburg Implement*, 297 Neb. 356, 900 N.W.2d 32 (2017).

A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[11] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[12]

The SSM defines the POD as that point "at the outlet of the interconnected transmission system . . . at which MEAN is obligated to deliver, and [Sidney] is obligated to accept delivery of, [energy]." Exhibit A places the symbol indicated as the POD on the MBPP line prior to a place identified as Tri-State's 230 kV/115 kV transformer. The POD is identified as the "MBPP/Tri-State 230 kV Interconnection."

The clear and unambiguous meaning of the SSM's definition of the POD is that it is the point where the MBPP line ends—the outlet—and connects to the facilities owned by Tri-State. Sidney argues that the contract would have specified the 230 kV bus if it had intended for the bus to be the POD, as opposed to the interconnect which was actually listed. In fact, there is no 230 kV bus depicted on exhibit A.

The contract is ambiguous regarding where the interconnect between MBPP and Tri-State is located. While Sidney's expert testified that the interconnect is generally located at the fence line of the substation being entered, he acknowledged that there was no change of possession depicted on the diagram in evidence. Nevertheless, it is not necessary to determine the exact location of the POD, whether it is on the transmission line or the specific breaker of Tri-State's 230 kV bus that the MBPP line connects to, because the contract makes the POD relevant only regarding the change of ownership of energy. Therefore, it is sufficient to conclude that the contract places all of Tri-State's facilities on Sidney's side of the point of delivery.

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[11] *Id.*

[12] *Id.*

The contract contains no provision specifying a generating source or transmission path required to serve Sidney or any reason for requiring a specific path. However, the placement of the POD in exhibit A does constitute a requirement that MEAN deliver energy to the interconnect of the MBPP and Tri-State facilities. While MEAN argues that it is impossible to actually ensure energy would be transmitted on the MBPP line, there is nothing in the contract that would support deviating from the clear language describing the POD. Instead, MEAN's argument, at best, supports an interpretation that the POD in exhibit A was established for the purely administrative purpose of allocating ownership of the energy and separation of costs.

Sidney argues, and the arbitration board decided, that the SSM requires MEAN to contract for all facilities necessary to connect to Sidney's facilities at its own expense.

Section 5.01 of the SSM states: "MEAN shall furnish, install, lease, contract for and maintain, at its own expense, all equipment and facilities necessary for connecting electric lines and facilities to [Sidney's] facilities at the [POD], including stepdown transformers where service is supplied at [Sidney's] distribution voltage, unless [Sidney] otherwise provides such facilities."

Section 5.04 of the SSM, "[Sidney's] Lines and Equipment," states that "[a]ll lines, substations and other electrical facilities . . . located on [Sidney's] side of the [POD] shall be furnished, installed and maintained by [Sidney]."

The SSM also requires Sidney to pay MEAN for energy in accordance with the provisions of the rate schedule and states that any additional charges for supplying energy through an intervening agency's system, incurred beyond the service included in the rate schedule, will be paid by MEAN and billed to Sidney. The rate schedule specifies that "[t]ransmission service charges . . . for delivery of [Sidney's entire energy needs in excess of its WAPA allocation] shall be billed at the transmission service provider's then-current transmission rates."

The provisions of the standard form SSM regarding the POD indicate that the POD is typically located at the facilities owned by the city that MEAN is contracting with. In this case, however, exhibit A places the POD at a place requiring at least some contractual rights with intervening transmission service providers to get the energy to Sidney's facilities. Because the contract states that MEAN will contract for the facilities necessary to connect to Sidney's facilities, the arbitration board determined that the right to transmit energy across WAPA's bus to Sidney's facilities was MEAN's responsibility to acquire at its own expense. It was also persuaded by the fact that the contract did not state that Sidney had any requirement to contract for facilities in the article discussing facilities.

However, a complete reading of § 5.01 provides that MEAN is only responsible for contracting facilities connecting "to [Sidney's] facilities *at the* [*POD*]." While the SSM only discusses requirements for Sidney to provide and maintain facilities on its side of the POD, the contract also clearly envisions circumstances where Sidney will be responsible for reimbursing MEAN for transmission charges incurred to deliver its energy. The arbitration board's reading of the contract ignores both the qualifying language regarding MEAN's responsibility to bear the expense for acquiring transmission rights and renders all language regarding Sidney's responsibility to pay for transmission cost superfluous.

The SSM discusses the POD only as a mechanism for shifting ownership of the energy, which also shifts the responsibility for the transmission. Accordingly, we find that the plain language of the SSM allows MEAN to contract for transmission rights on Sidney's side of the POD and pass those expenses on to Sidney. Therefore, the SSM allowed MEAN to contract for transmissions right within Sidney West and pass those expenses to Sidney.

(iv) Transmission Path With LAP NITS Is in Substantial Performance of Exhibit A

MEAN argues that its delivery of energy to Sidney through LAP NITS is in substantial compliance with the SSM. It asserts that LAP NITS was required to complete a transmission path to Sidney and that once Sidney was on LAP NITS, the Tri-State Agreement was an unnecessary additional expense. Further, it asserts that the SSM does not require it to deliver energy on any specific path, so its delivery through a new path at a higher capacity level and without unnecessary expenses complies with the SSM.

Sidney argues that exhibit A required MEAN to deliver its energy through the MBPP line and the Tri-State facilities, because that path was highly favorable to Sidney, and that MEAN's change to the POD caused it to incur the additional transmission charges. However, its argument is prefaced on its conclusion that there was no gap in the transmission path.

[8-10] To establish substantial performance under a contract, any deviations from the contract must be relatively minor and unimportant.[13] Substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform its part of the contract, (2) the results of the endeavor are beneficial to the other party, and (3) such benefits are retained by the other party.[14] Substantial performance is a relative term, and whether it exists is a question to be determined in each case with reference to the existing facts and circumstances.[15]

Based on the facts of this case, we conclude that the specific transmission line the POD was placed on is irrelevant

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[13] *RM Campbell Indus. v. Midwest Renewable Energy*, 294 Neb. 326, 886 N.W.2d 240 (2016).

[14] *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995).

[15] *Id.*

to MEAN's performance under the SSM; instead, the POD is relevant only to the extent that, as we stated above, it places all financial risk for transmitting energy through Sidney West on Sidney. Thus, we need not consider where the new POD is located specifically, beyond concluding its placement on the interconnect of a transmission line to a facility in Sidney West would be of the same effect.

Sidney elicited extensive testimony regarding the extremely low transmission rate enabled by the transmission path memorialized in exhibit A and Sidney's belief that exhibit A was an agreement with MEAN that ensured a continuation of this low rate. However, the SSM does not protect Sidney from any changes to its transmission path from the third parties who own facilities in Sidney West. Instead, unlike the "Service Schedule J," a previous supplemental agreement which placed all facilities in Sidney West on MEAN's side of the POD and required MEAN to maintain the Tri-State Agreement, the SSM placed the Tri-State facility on Sidney's side of the POD. This change required Sidney to accept all financial risks for changes with the Tri-State Agreement.

Before the SSM was executed, Cutsor specifically informed Sidney that the Tri-State Agreement was terminable at will and that the consequence of termination by Tri-State would be a $300,000 increase in transmission costs. While aware of this issue, Sidney chose to not continue with the previous arrangement which placed all facilities in Sidney West on MEAN's side of the POD and required MEAN to maintain the Tri-State Agreement. By executing the SSM, Sidney accepted the full financial burden of the ever-looming possibility that Tri-State could terminate its favorable transmission path. While the expense for transmitting energy across WAPA facilities was unforeseen, it was another risk for which Sidney accepted financial responsibility.

As we concluded above, Sidney's facilities connect only to WAPA's 115 kV bus, which created a gap in the transmission path to Sidney, and MEAN billed Sidney for the costs of the

lowest cost option to close the gap, placing Sidney on LAP NITS, pursuant to the SSM. Under exhibit A, Sidney had the financial risk for an issue with WAPA's facilities and had to incur this expense. After placing Sidney on LAP NITS, MEAN was able to continue transmitting energy to Sidney as required by exhibit A, if Sidney waived any firm capacity requirements. Thus, Sidney's increased transmission costs did not result from a change in the transmission path but, instead, were incurred because it accepted the financial risk for WAPA's facilities within Sidney West.

Only after Sidney was scheduled to incur the costs to close the gap on its side of the POD with LAP NITS did MEAN decide to change the transmission path required in exhibit A. This change offered substantial benefits to Sidney, which it has since retained. First, Sidney saves the monthly costs of the Tri-State Agreement, which provided rights that were unnecessarily duplicative to transmission rights provided by LAP NITS. Second, Sidney receives all of its energy at firm capacity and has additional protection against curtailment, because WAPA has several lines connecting to Sidney West. Third, LAP NITS includes generation and transmission resources to Sidney, which allows MEAN to redirect LRS and MBPP resources to lower energy rates for all members.

Because Sidney's increased transmission costs resulted solely from its agreement to bear the financial risk for transmission right changes in Sidney West and because MEAN's decision to use a new transmission path only benefited Sidney and MEAN, we conclude its decision to change the transmission path was a good faith effort to perform its duty under the SSM. Thus, we hold that MEAN substantially complied with the SSM and actually provided Sidney benefits by changing the POD.

While Sidney argues, and the board concluded, that MEAN acted in bad faith by unilaterally changing the POD, the evidence presented shows that MEAN's unilateral action to place Sidney on LAP NITS was required because of the use of the

WAPA 115 kV bus. We are not unsympathetic to the consequences of the parties' mistake of fact regarding the transmission path and the fact that MEAN may have been able to better communicate the issue to Sidney. However, the record shows numerous communications from MEAN to Sidney from July through October 2014, in which MEAN communicated the issue with the transmission path, how it arose, a recommendation for the best solution, justification for its recommendation, the consequences of inaction, and the results of obtaining LAP NITS.

Sidney staff responded that they would make their own independent investigations, but the record does not show that Sidney did so. Further, Sidney refused to accept the changes on the schedule WAPA required to avoid unreserved-use penalties, which MEAN complied with and seemingly convinced WAPA to accept. While Sidney staff testified that MEAN had provided them with no alternatives, the record does not support that testimony. Instead, MEAN exercised its right to incur additional transmission expenses on Sidney's behalf only after Sidney had made no suggestions for alternative options and expressed an unwillingness to accept that a material change in circumstances had occurred.

We conclude that Sidney's rate dispute based on its allegation that MEAN changed the POD in breach of the SSM is without merit. Thus, the arbitration board erred in finding that MEAN breached exhibit A of the SSM to Sidney's detriment.

(b) MEAN Did Not Breach SSM by Charging Unfair, Unreasonable, or Discriminatory Transmission Rate

The arbitration board made two findings that supported a conclusion that MEAN breached the SSM by charging an unfair, unreasonable, or discriminatory transmission rate: (1) The contract required MEAN to acquire any transmission rights necessary to connect to Sidney's facilities at its own expense, and (2) MEAN inconsistently passed through transmission

charges. As discussed above, the plain language of the SSM made Sidney responsible for all transmission costs on its side of the POD. Therefore, the arbitration board erred in concluding that MEAN was required to pay the transmission costs incurred from LAP NITS.

MEAN argues that it cannot socialize the transmission costs incurred solely to transmit energy to Sidney, because doing such would result in discriminatory charges to its other members. It argues that the charges passed through to Sidney were fair because they are incurred exclusively for Sidney's benefit, reasonable because they are based on the number of MW transmitted to Sidney, and nondiscriminatory both because they are calculated the same by WAPA and MEAN as the charges for every member on LAP NITS and because they were consistent with the average transmission cost ratio for all MEAN members on LAP NITS.

Sidney argues that MEAN should have socialized the cost of its LAP NITS, because MEAN has socialized other communities' transmission costs and MEAN is now benefiting from Sidney's no longer using the LRS and MBPP resources. It also argues that the transmission costs MEAN charges it is discriminatory because its transmission cost ratio had been 1 percent but is now 10 percent of total energy costs.

The arbitration board cited MEAN's socialization of the LRS and MBPP resource costs, the Southwestern Power Pool settlement costs, and the PtP costs for serving Sidney's transmission needs after the 2013 e-tag changes to conclude that MEAN could have socialized the increased transmission costs to Sidney. However, we find that each of these circumstances is distinguishable from the LAP NITS expenses incurred to solely benefit Sidney.

First, the LRS and MBPP resources were obtained for the benefit of all MEAN members, not just Sidney. MEAN obtained about 28 MW of energy from LRS in the early 1980's. The Electrical Resources Pooling Agreement explicitly authorizes MEAN to purchase generation capacity, upon

approval by the member communities, for the benefit of members. Sidney and the arbitration board seem to presume that because some of these resources served Sidney for 18 years, Sidney is entitled to them, or that they were acquired solely for Sidney's benefit. The board of directors approved the acquisition of these resources and the socialization of their costs to obtain lower energy rates for all of the member communities, so socializing the costs to obtain them across all members was nondiscriminatory.

Second, the costs of the Southwestern Power Pool settlement and PtP used to serve Sidney for 10 months represent expenses incurred because of the actions of MEAN staff, so it is reasonable to socialize them as an organizational expense. While Sidney might not have directly benefited from the unreserved use that led to the Southwestern Power Pool settlement, MEAN staff were responsible for the scheduling of that unreserved use. Accordingly, this expense may be traced to the actions of MEAN as an organization, just as an unreserved-use penalty for the use of WAPA's 115 kV bus for Sidney could have been. In recognition of this organizational risk, the board of directors passed the culture-of-compliance directive to help ensure that the organization would not again incur such expenses.

Additionally, the PtP costs were seemingly incurred because MEAN staff did not act timely in addressing the issue with Sidney's transmission path. MEAN was unable to e-tag a complete path to Sidney for nearly 20 months. It took MEAN staff almost 11 months to even determine what the problem was and another almost 5 months to start working with Sidney on a solution. The record does not establish how MEAN's transmitting energy to Sidney for 10 of the 20 months but the costs of the PtP for the other 10 months, while serving Sidney exclusively, is attributable to an organization expense of MEAN's insufficient response to the problem. Despite the arbitration board's findings, the evidence shows that the PtP was acquired to sell excess organizational energy to lower

energy rates. The fact that the PtP benefited Sidney exclusively for a justifiable reason did not entitle Sidney to exclusively benefit from the service for the remainder of the SSM. Therefore, the arbitration board erred in ruling that MEAN could have socialized the costs for transmitting energy to Sidney on LAP NITS.

The evidence also shows that the costs of LAP NITS was fair, reasonable, and nondiscriminatory. Sidney is paying for transmission service that solely benefits Sidney and is necessary to transmit Sidney's energy. As MEAN argues, the fact that Sidney had benefited from low transmission costs because of its location historically does not entitle it to such benefit in perpetuity. The evidence shows that WAPA charges all customers based on MW used, not distance traveled. Accordingly, the charges were reasonably based on MEAN's usage of LAP NITS and nondiscriminatory because all LAP NITS customers are charged under the same formula.

4. We Do Not Consider MEAN's Remaining Assignments of Error

The arbitration board and the parties considered exhibit 100 relevant to establishing whether (1) Tri-State had a right to use WAPA's 115 kV bus and (2) WAPA had a right to use Tri-State's transformer to transmit energy to serve Sidney. Regardless of whether or not Tri-State had a right to use WAPA's bus, there was no evidence that it ever assigned such a right to MEAN for transmitting Sidney's energy. Further, we concluded that MEAN has substantially complied with the SSM even if it transmits Sidney's energy from the Archer switchyard to WAPA's 115 kV bus directly without going through Tri-State's facilities. Accordingly, even if exhibit 100 was inadmissible, it had no relevance to our decision.

MEAN's remaining assignments of error concern the remedy ordered by the arbitration board. Because we hold that the arbitration board erred by ruling in favor of Sidney, we need not address the remaining assignments of error.

[11] An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.[16]

V. CONCLUSION

We conclude that Sidney's increased transmission rate was incurred due to its unauthorized use of WAPA's facilities. Sidney's current transmission costs are approximately 10 percent of Sidney's total energy costs, which is the same average transmission cost ratio for all of MEAN's members. We further conclude that MEAN's actions to gain authorized access to WAPA's facilities, in order to ensure stable energy to Sidney, substantially complied with the requirements of the SSM and that MEAN properly passed the increased transmission rate to Sidney, pursuant to the terms of the SSM. Therefore, we reverse the decision of the arbitration board.

Reversed.

Wright and Kelch, JJ., not participating.

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[16] *Eadie v. Leise Properties*, 300 Neb. 141, 912 N.W.2d 715 (2018).

State of Nebraska, appellee, v. Veronica P. Avina-Murillo, appellant.

917 N.W.2d 865

Filed September 28, 2018. No. S-17-1302.

1. **Motions for New Trial: Time.** Where there is no factual dispute, the timeliness of a motion for new trial presents a question of law.
2. **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.
3. ____: ____. 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.
4. **Motions for New Trial: Verdicts: Time.** According to Neb. Rev. Stat. § 29-2103(3) (Reissue 2016), a motion for new trial based on the grounds set forth in Neb. Rev. Stat. § 29-2101(1) through (4) or (7) (Reissue 2016) shall be filed within 10 days after the verdict was rendered unless such filing is unavoidably prevented.
5. **Trial: Juries: Verdicts.** A jury's action cannot become a verdict until it is finally rendered in open court and received and accepted by the trial judge.
6. **Motions for New Trial: Verdicts: Time.** Unless one of the two statutory exceptions applies, a motion for new trial filed more than 10 days after the verdict has no effect.
7. **Motions for New Trial: Words and Phrases.** "[U]navoidably prevented" as used in Neb. Rev. Stat. § 29-2103 (Reissue 2016) refers to circumstances beyond the control of the party filing the motion for new trial.
8. **Motions for New Trial: Time: Appeal and Error.** A motion for new trial not filed in conformity with the statutory requirements as to time may not be considered by an appellate court on review.

9. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.
10. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
11. **Effectiveness of Counsel: Conflict of Interest.** The right to effective assistance of counsel entitles the accused to his or her counsel's undivided loyalties, free from conflicting interests.
12. **Effectiveness of Counsel: Proof.** Generally, 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, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
14. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
15. **Effectiveness of Counsel: Conflict of Interest: Presumptions.** Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.
16. **Effectiveness of Counsel: Conflict of Interest: Presumptions: Case Disapproved.** *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018); *State v. Armstrong*, 290 Neb. 991, 863 N.W.2d 449 (2015); and *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012), are disapproved to the extent they can be read to always require a presumption of prejudice where counsel's conflict of interest does not involve multiple representation.
17. **Trial: Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Affirmed.

Christopher J. Roth, of Forney Roth, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Cassel, J.

INTRODUCTION

After being convicted by a jury and sentenced in a criminal case, Veronica P. Avina-Murillo brings this direct appeal. We cannot review the denial of her motion for new trial, because the motion was not timely. We review her ineffective assistance claims, stemming from her initial trial counsel's allegedly unethical conduct—which she characterizes as a conflict of interest. A central question is whether the *Strickland v. Washington*[1] standard applies or whether prejudice should be presumed. On these facts, we conclude that *Strickland* applies and that the record is insufficient to resolve her claims. We affirm.

BACKGROUND

The State charged Avina-Murillo with negligent child abuse resulting in serious bodily injury based on events occurring on April 2, 2015. On that day, J.P.'s mother took 6-month-old J.P. to Avina-Murillo's house to be watched. While there, J.P. began to act abnormally. A doctor later diagnosed J.P. with abusive head trauma.

The district court conducted a jury trial. Prior to the introduction of evidence, the court sustained the State's motion to sequester all of the witnesses.

During opening statements, Avina-Murillo's counsel advised the jury that it would hear from J.P.'s parents. Counsel outlined the parents' testimonies:

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

> [The parents] are going to testify that their child was not fine the morning that she was dropped off. The parents are going to tell you that they took their child to the hospital multiple times and were given different answers by different individuals at the hospitals weeks prior to April 2nd[, 2015].
>
> . . . .
>
> The parents will testify that . . . Avina[-Murillo] was not with the child seconds to minutes before. . . . The parents will testify that their child was not with . . . Avina[-Murillo] during that time.
>
> The parents will testify contrary to what you just heard, actually. The parents will testify that when mother came to pick child up, child was sleeping like any other time. Mom — Mother spoke to [Avina-Murillo] for some time, 10, 15 minutes, nothing, child's sleeping. Mom then drives to house. . . . [S]he will tell you 10 to 15 minutes more driving. We're not at 30 minutes.
>
> She will then testify that when she walked into the house, Dad wasn't there. Dad came in shortly thereafter, but some more time passed, ten minutes. They then talked about their day and about whatever else. They'll both tell you this. More time passes.
>
> Approximately — approximately, 45 minutes to an hour later, the baby wakes up. They notice baby is not as they would expect at that point. They go to — well, to see their — wasn't the ER, but it was to see a physician before they were transferred. The evidence you will hear is not like the preview you were just given.

According to the evidence, at approximately 8 a.m. on April 2, 2015, J.P.'s mother took J.P. to Avina-Murillo's house. J.P., who is Avina-Murillo's niece, appeared to be fine. But at approximately 10 a.m., Avina-Murillo noticed that J.P. looked listless, that "her eyes did not look normal," and that "[s]he was touching her right ear quite a bit." A detective testified that Avina-Murillo told him J.P. "became lethargic, moaning, and

. . . the eyes would move in opposite directions." According to the detective, Avina-Murillo indicated to him that she knew there was something wrong with J.P. at that point in time. But she did not believe it was anything serious or grave.

According to Avina-Murillo, J.P. had exhibited similar behavior "[d]ays before." In mid-March 2015, J.P. experienced vomiting and diarrhea. J.P.'s parents took her to the emergency room two or three times, and J.P. was diagnosed with a viral illness. But during a followup visit 2 to 3 days prior to April 2, J.P. looked well and was no longer vomiting.

Avina-Murillo called J.P.'s mother to let her know that J.P. "was not acting right." She told J.P.'s mother that she believed J.P. was sick like J.P. had been earlier and that J.P. might have "gotten some air in her ear." In response, J.P.'s mother told Avina-Murillo to administer Tylenol for ear pain and to put cotton in J.P.'s ear with a little bit of "vapor rub." After Avina-Murillo did so, J.P. drank her bottle and fell asleep. After noon, J.P.'s mother arrived to take J.P. home.

At approximately 4:50 p.m., J.P.'s parents took J.P. to a doctor. At that time, J.P. was lethargic, crying, and inconsolable. She had symptoms indicating increased pressure in the brain. Intracranial pressure can cause brain damage and is a potentially life-threatening injury. A CT scan revealed a subdural hematoma, i.e., bleeding on the inside of the brain. The CT scan showed both newer and older bleeding. Newer bleeding is bleeding typically within the past 24 hours, while older bleeding is generally 48 to 72 hours old or older.

A child abuse pediatrician believed that J.P. most likely suffered a rotational or shaking injury. A different doctor testified that the injury revealed on the CT scan would have required significant force and that symptoms would have appeared "fairly shortly after onset of this type of bleeding." The defense's expert opined that it was not possible to determine the specific time that an acute subdural hematoma occurred.

During the trial, the district court made a record after an issue arose. The court recounted that there was a no contact

order prohibiting Avina-Murillo from communicating with J.P., that there was an order of sequestration as to any witnesses, and that the State had listed J.P.'s parents as witnesses. The prosecutor then stated that over the lunch hour, Avina-Murillo and her counsel were observed having lunch together with J.P. and J.P.'s parents.

Avina-Murillo's counsel offered a different version of events. He explained that at some point while he, his assistant, Avina-Murillo, and Avina-Murillo's husband were having lunch, J.P.'s parents entered the restaurant. According to counsel, "Nothing between them was discussed." But counsel stated that after talking to Avina-Murillo and in order "to essentially keep this clean," the defense would not call either parent to testify.

The court and Avina-Murillo's counsel then engaged in a colloquy regarding the voluntariness of the decision not to call the parents as witnesses. Avina-Murillo's counsel informed the court that he had spoken to Avina-Murillo "before Your Honor came out" and that the decision not to call J.P.'s parents as witnesses was Avina-Murillo's free and voluntary act.

Later, while the jury was deliberating, the court held another hearing at the State's request regarding the lunch incident. Video acquired from the restaurant contradicted what Avina-Murillo's counsel reported to the court. The video showed defense counsel, his assistant, Avina-Murillo, J.P., and J.P.'s parents all surrounding the same table, having lunch together. The State requested that sanctions be ordered against defense counsel for encouraging the violation of the no contact order and for giving the court false information.

On Friday, September 29, 2017, the jury returned a guilty verdict, and we describe in more detail below the procedures employed by the court. On that date, the court signed a "Judgment on Conviction," but this document did not impose any sentence. It was not filed until October 3.

On Wednesday, October 11, 2017, Avina-Murillo moved for a new trial. The motion alleged that irregularities in the

proceedings occurred and that Avina-Murillo was prevented from having a fair trial.

In November 2017, the court imposed a sanction against Avina-Murillo's counsel for intentionally misleading the court as to events occurring during the trial. As a sanction, the court filed a formal complaint with the Nebraska Supreme Court's Counsel for Discipline.

On December 14, 2017, Avina-Murillo, through new counsel, filed an amended motion for new trial. She alleged an irregularity in the proceedings, including the lunch incident and the decision not to call J.P.'s parents as witnesses. Avina-Murillo claimed that her right to due process was violated when she was unable to present an adequate defense to the jury.

The court held a hearing on the motion and received several affidavits. Avina-Murillo stated in an affidavit that after her counsel had a meeting with the judge and the prosecutor, her counsel told her that J.P.'s parents were "no longer able to testify." She stated that when, back in the courtroom, the court asked her counsel about J.P.'s parents' testifying, it was her understanding J.P.'s parents were unable to testify and she was unaware she had the choice to call them as witnesses. She stated that she would have called the parents as witnesses if she had known she had the option, because she believed their testimonies would have helped her case.

The court also received affidavits from J.P.'s parents that were nearly identical in substance. J.P.'s parents stated that Avina-Murillo's counsel told them that there would be "problems or a big scandal" if they took the witness stand and that "the best thing to do would be to not take the witness stand." They stated that their testimonies would have been consistent with prior statements to police and the prosecutor. They would have testified that J.P. was vomiting and very sleepy in the 7 days before April 2, 2015. They "would have testified about the different statements from the doctors regarding the cause of [J.P.'s] conditions and medical issues, which includes the fact that two doctors had told [them]

that [J.P.'s] issues were not caused by a shaking injury." They would have testified that due to J.P.'s blood condition, any shaking of her would have caused bruising where the shaker grabbed her. Further, J.P.'s parents would have testified that they did not believe Avina-Murillo was responsible for J.P.'s condition.

The court denied Avina-Murillo's motion for new trial. The court stated that it did not see any exculpatory evidence in the affidavits and that information in the affidavits "appear[ed] to be evidence that was presented . . . at the trial." The court then proceeded to sentencing and imposed a sentence of probation.

Through the same counsel who filed the amended motion for new trial, Avina-Murillo timely appealed. We granted her petition to bypass review by the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Avina-Murillo assigns that for several reasons, the district court erred in denying her motion for new trial. She also asserts that her trial counsel was ineffective when he (1) decided not to call J.P.'s parents as witnesses, (2) failed to move for a mistrial, (3) failed to withdraw due to an ethical conflict of interest, and (4) failed to consult with Avina-Murillo about those decisions.

STANDARD OF REVIEW

[1] We have often said that in a criminal case, a motion for new trial is addressed to the discretion of the trial court, and that unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[2] But although we have not said so before in so many words, where there is no factual dispute, the timeliness of a motion for new trial presents a question of law.[3]

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[2] See, e.g., *State v. Hairston*, 298 Neb. 251, 904 N.W.2d 1 (2017).

[3] See, *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993); *Parker v. State*, 164 Neb. 614, 83 N.W.2d 347 (1957).

[2,3] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[4] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[5]

ANALYSIS

Motion for New Trial

Twelve days after the jury returned its verdict, Avina-Murillo filed a motion for new trial. Some 2 months after that, she filed an amended motion. As the State correctly argues, neither motion was timely.

[4] Statutes set forth the grounds and time limits for filing a motion for new trial.[6] Avina-Murillo's original motion for new trial alleged grounds under § 29-2101(1) and (4), and her amended motion set forth grounds under § 29-2101(1) and (7). According to § 29-2103(3), a motion for new trial based on the grounds set forth in § 29-2101(1) through (4) or (7) "shall be filed within ten days after the verdict was rendered unless such filing is unavoidably prevented . . . ." This court has long held that § 29-2103 by its terms is mandatory.[7]

[5] The time limitation for filing a motion for new trial runs from rendition of the verdict. A statute provides that when the jury has agreed upon its verdict, the jury must be "conducted into court" and may be polled at the request of either the prosecuting attorney or the defendant before the verdict is accepted.[8] A jury's action cannot become a verdict until it is

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[4] *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018).

[5] *Id.*

[6] See Neb. Rev. Stat. §§ 29-2101 and 29-2103 (Reissue 2016).

[7] *State v. Thompson, supra* note 3.

[8] Neb. Rev. Stat. § 29-2024 (Reissue 2016).

finally rendered in open court and received and accepted by the trial judge.[9]

With that understanding, we summarize what happened. The record shows that on September 29, 2017, the jury returned to the courtroom and responded "[y]es" to the court's question whether it had reached a verdict. The court clerk read the verdict in open court. After reading the verdict, the clerk asked if it was the jury's "unanimous, final verdict." The foreperson responded, "Yes." The court then asked if there was any request to poll the jury. There was not. The court sent the jury out and stated that it "will accept the verdict of the jury and find and enter a judgment of guilty against [Avina-Murillo] in this matter." It added, "The Court will order [Avina-Murillo] to appear for a sentencing" and specified the date and time. The court announced the revocation of Avina-Murillo's bond and placed her in the sheriff's custody.

As this summary demonstrates, the verdict was finally rendered in open court and received and accepted by the trial judge on September 29, 2017. On appeal, Avina-Murillo makes two arguments to avoid this conclusion.

First, she argues that the verdict was not accepted until the filing of the "Judgment on Conviction" on October 3, 2017. But despite the court's use of the word "will," it is clear that the jury rendered its verdict and the court accepted the verdict in open court on September 29. On that date, the court also completed and signed the "Judgment on Conviction."

Avina-Murillo's reliance on the filing date is misplaced. Technically, the document was not a "judgment." We have held that the judgment in a criminal case is the sentence.[10] The document here did not impose a sentence. It merely memorialized what had already transpired. The delay in filing of the document did not affect the legal significance of the events that already had occurred in open court.

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[9] *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017).

[10] See *id.*

[6] Consequently, Avina-Murillo did not file her initial motion within 10 days after the verdict was rendered. Unless one of the two statutory exceptions applies, a motion for new trial filed more than 10 days after the verdict has no effect.[11]

Second, Avina-Murillo attempts to invoke one of the exceptions. She urges us to find that she was "unavoidably delayed in her filing"[12] under § 29-2103(3). It does not appear from the record that the district court considered the timeliness of her motion. We note that neither motion claimed that Avina-Murillo was "unavoidably prevented" from filing it within 10 days after the verdict was rendered.[13]

[7] "[U]navoidably prevented" as used in § 29-2103 refers to circumstances beyond the control of the party filing the motion for new trial.[14] The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground.[15]

Nothing in the record would allow us to find that Avina-Murillo was unavoidably prevented from filing her motion on time. Thus, her attempt to invoke the statutory exception fails.

[8] Because both of her arguments fail, we cannot address the district court's ruling on the motion. A motion for new trial not filed in conformity with the statutory requirements as to time may not be considered by an appellate court on review.[16] Even where a trial court has considered the merits of an untimely motion for new trial, we have stated that such a motion was not properly before us.[17] Because Avina-Murillo

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[11] See *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994), *abrogated in part on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

[12] Reply brief for appellant at 2.

[13] See § 29-2103(3).

[14] *State v. Thompson*, 246 Neb. 752, 523 N.W.2d 246 (1994).

[15] *State v. Hawkman*, 198 Neb. 578, 254 N.W.2d 90 (1977).

[16] *State v. Thompson, supra* note 3.

[17] See *id.*

did not file a timely motion for new trial, we do not consider her assignments of error relating to the overruling of the motion.

Ineffective Assistance of Counsel

Through different counsel, Avina-Murillo argues that in several respects, her initial trial counsel was ineffective. Her arguments all relate to the lunch incident and its aftermath.

[9,10] The law requires her to assert these issues now, but we may not be able to decide them on direct appeal. 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.[18] 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.[19]

[11] Avina-Murillo's claims are premised on her trial counsel's having a conflict of interest. The right to effective assistance of counsel entitles the accused to his or her counsel's undivided loyalties, free from conflicting interests.[20] Specifically, she claims that counsel performed deficiently when he (1) decided not to call J.P.'s parents as witnesses after informing the jury of those witnesses' testimonies during opening statements, (2) failed to move for a mistrial, (3) failed to withdraw due to an ethical conflict of interest, and (4) failed to consult with Avina-Murillo about those decisions. According to Avina-Murillo, her counsel was placed in a situation in which he had divided loyalties and had to choose between loyalty to himself and loyalty to his client.

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[18] *State v. Vanness, supra* note 4.

[19] *Id.*

[20] *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018).

[12-14] Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland*,[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, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[23] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[24] 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.[25]

[15] But the *Strickland* Court recognized that prejudice is presumed in some situations. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance."[26] In such situations, prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost" and the impairments to the right to counsel "are easy to identify."[27] The *Strickland* Court then cited to *Cuyler v. Sullivan*[28] and stated that "a similar, though more limited, presumption of prejudice" applies "when counsel is burdened by

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[21] *Strickland v. Washington, supra* note 1.

[22] *State v. Cotton, supra* note 20.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Strickland v. Washington, supra* note 1, 466 U.S. at 692.

[27] *Id.*

[28] *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

an actual conflict of interest."[29] In that situation, "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests."[30] The *Strickland* Court specified that "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'"[31]

At this juncture, it is necessary to recognize that there are several types of conflicts of interest that could arise. An attorney may concurrently represent clients with conflicting interests (multiple representation). An attorney could successively represent clients with conflicting interests (successive representation). Or the interests of the client may conflict with the attorney's personal interests (personal interest conflict). "Not all conflicts of interest that affect the attorney's 'duty of loyalty' have the same consequences, and they are not all suited to *Cuyler*'s stringent rule."[32] Multiple representation conflicts tend to present the most problems, because whatever path the attorney takes will likely harm the interests of at least one client. On the other hand, when the attorney has a personal conflict, the attorney can still fulfill his or her duty of loyalty to the client, although doing so may be to the detriment of the attorney's personal interest.

Where a conflict of interest involves multiple representation, the U.S. Supreme Court has provided clear guidance. Automatic reversal is appropriate where defense counsel is improperly forced to represent codefendants over counsel's timely objection.[33] The Court held in *Cuyler* that where there is no timely objection, "a defendant who shows that a conflict

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[29] *Strickland v. Washington, supra* note 1, 466 U.S. at 692.

[30] *Id.*

[31] *Id.*

[32] *Beets v. Scott*, 65 F.3d 1258, 1269 (5th Cir. 1995).

[33] See *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978).

of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."[34] The Court later explained that the purpose of the *Cuyler* exception is "to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel."[35]

But the law has evolved regarding whether the presumed prejudice standard should apply to other conflict of interest situations. The Fifth Circuit concluded that the presumed prejudice standard applied only to multiple representation conflicts and that a court should apply the *Strickland* standard when the conflict involves counsel's self-interest.[36] Subsequently, in dicta contained in *Mickens v. Taylor*,[37] the U.S. Supreme Court observed that federal courts of appeals had applied *Cuyler* "'unblinkingly' to 'all kinds of alleged attorney ethical conflicts.'" But the *Mickens* Court cautioned that "the language of [*Cuyler*] itself does not clearly establish, or indeed even support, such expansive application."[38] In *Mickens*, the Court explicitly left open whether *Cuyler* should be extended to cases of successive representation.

Our own case law post-*Mickens* does not reveal a clear standard for ineffective assistance of counsel claims involving conflicts of interest. In 2006, we discussed *Mickens* and stated that "prejudice will be presumed only if the conflict has significantly affected counsel's performance, thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown."[39] In the 2006 case, the alleged conflict involved

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[34] *Cuyler v. Sullivan, supra* note 28, 446 U.S. at 349-50.

[35] *Mickens v. Taylor*, 535 U.S. 162, 176, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). See *Strickland v. Washington, supra* note 1.

[36] See *Beets v. Scott, supra* note 32.

[37] *Mickens v. Taylor, supra* note 35, 535 U.S. at 174, quoting *Beets v. Scott, supra* note 32.

[38] *Mickens v. Taylor, supra* note 35, 535 U.S. at 175.

[39] *State v. Aldaco*, 271 Neb. 160, 167-68, 710 N.W.2d 101, 108 (2006).

defense counsel's prior representation of the victim's brother (a successive representation) and we determined on direct appeal that there was no actual conflict nor any basis for a presumption of prejudice. Two years later, in a postconviction appeal, we were confronted with a claim that appellate counsel had a conflict due to a close personal relationship with trial counsel and consequently failed to argue that trial counsel provided ineffective assistance.[40] We stated: "Ordinarily, such a conflict arises when an attorney is representing multiple defendants. This court, however, has previously defined 'actual conflict' broadly. The term therefore encompasses any situation in which a defense attorney faces divided loyalties such that regard for one duty tends to lead to disregard of another."[41] We resolved the issue by determining that the defendant failed to show the trial court erred in concluding that the two attorneys had no personal relationship.

Two of our decisions, both involving postconviction proceedings, warrant more indepth discussion. In *State v. Edwards*,[42] Christopher A. Edwards alleged, among other things, that his counsel failed to provide a meaningful defense due to his friendship with a material prosecution witness. After Edwards' trial, his counsel represented this witness in a criminal prosecution. We stated the following with respect to *Mickens*:

> [T]he U.S. Supreme Court stated that the "actual conflict" inquiry is not separate from a performance inquiry: "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." Thus, we have stated that when an actual conflict exists, there is no need to show that the conflict resulted in actual prejudice to the defendant (meaning no need to show the outcome of the proceeding was affected). But the substantive analysis is the same. If the

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[40] See *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[41] *Id.* at 442, 747 N.W.2d at 429.

[42] *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

> 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 and against the defendant's interests, prejudice is presumed.[43]

We proceeded to discuss conflicts of interest resulting from successive representation. Ultimately, we reversed the decision and remanded the cause for an evidentiary hearing on the issue.

Upon our remand in *Edwards*, the trial court held an evidentiary hearing.[44] During the hearing, counsel denied a friendship with the witness. Counsel testified that before he agreed to represent the witness, he researched whether the representation would cause a conflict of interest. He was advised that such representation would not affect Edwards' case, even though there were still briefs to be written for Edwards' direct appeal. The trial court determined that counsel did not have an actual conflict of interest. Upon Edwards' appeal, we stated that "[t]he record simply does not support a finding that [counsel] had such a loyalty to [the witness] that would have tempted him at trial to act against Edwards' interests."[45] We agreed that counsel did not have an actual conflict of interest at the time he served as Edwards' trial counsel.

We addressed a personal interest conflict in *State v. Armstrong*.[46] We began by stating that counsel performed deficiently and that "[d]efense counsel's interest in avoiding criminal or ethical sanctions was in conflict with [the defendant's] interest in presenting the strongest defense possible."[47] With regard to the prejudice component, we first set forth the *Strickland* standard of "a reasonable probability that but for counsel's deficient performance, the result of the proceeding

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[43] *Id.* at 406-07, 821 N.W.2d at 701.

[44] See *State v. Edwards*, 294 Neb. 1, 880 N.W.2d 642 (2016).

[45] *Id.* at 22, 880 N.W.2d at 655.

[46] *State v. Armstrong*, 290 Neb. 991, 863 N.W.2d 449 (2015).

[47] *Id.* at 1015, 863 N.W.2d at 467.

would have been different."[48] Next, we stated that prejudice is presumed if the defendant shows conflicting loyalties pointed in opposite directions and counsel acted against the defendant's interests. We then stated, "[E]ven if we do not apply such presumption, we easily conclude that actual prejudice resulted from counsel's deficient performance."[49] Ultimately, we applied *Strickland* to resolve the prejudice component, stating: "Under the totality of the circumstances presented at trial, the decision would reasonably likely have been different but for counsel's error leading to the absence of the testimony of [the defendant's] wife and son-in-law."[50] In the conclusion portion of our opinion, we stated that the defendant "met both prongs of his burden under *Strickland*."[51]

Two of our recent cases presented alleged conflicts of interest raised on direct appeal. In the context of a multiple representation, we determined that the record was insufficient to review the claim.[52] In a case involving a personal interest conflict, we stated that "[i]f 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."[53] But in that case, we found that the defendant validly waived the conflict of interest.

[16] The State seeks guidance as to the applicable standard, but we decline to adopt a bright-line rule as to whether *Cuyler* or *Strickland* applies to personal interest conflicts.[54]

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[48] *Id.* at 1016, 863 N.W.2d at 467.

[49] *Id.* at 1016, 863 N.W.2d at 468.

[50] *Id.* at 1020, 863 N.W.2d at 470.

[51] *Id.*

[52] See *State v. Vanness, supra* note 4.

[53] *State v. Cotton, supra* note 20, 299 Neb. at 674-75, 910 N.W.2d at 128.

[54] See, *Strickland v. Washington, supra* note 1; *Cuyler v. Sullivan, supra* note 28.

In most such cases, the more burdensome *Strickland* standard should apply. The Fifth Circuit explained that "[b]ecause the scope of the duty of loyalty with respect to attorney self-interest is inherently vague and overlaps with professional effectiveness, *Strickland* ought to set the constitutional norm of adequate representation."[55] But we can envision a situation in which the conflict is so serious that the defendant should be relieved of the obligation to show a reasonable probability that the outcome of the trial would have been different. Thus, we think the better approach is to determine the appropriate standard on a case-by-case basis. We disapprove of *State v. Cotton*,[56] *State v. Armstrong*,[57] and *State v. Edwards*[58] to the extent they can be read to always require a presumption of prejudice where counsel's conflict of interest does not involve multiple representation.

Because the alleged personal interest conflict here does not rise to the level of demanding a presumption of prejudice, we apply the *Strickland* standard. As we recited above, in order to prevail under *Strickland*, Avina-Murillo must show that her counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law and a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[59]

Both parties contend, for different reasons, that the record on direct appeal is sufficient to resolve Avina-Murillo's ineffective assistance of counsel claims. They direct us to affidavits received during the hearing on the motion for new trial. During oral arguments, the State conceded that such evidence can and should be considered for purposes of the ineffective

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[55] *Beets v. Scott, supra* note 32, 65 F.3d at 1271.

[56] *State v. Cotton, supra* note 20.

[57] *State v. Armstrong, supra* note 46.

[58] *State v. Edwards, supra* note 42.

[59] See *State v. Cotton, supra* note 20.

assistance of counsel claims, regardless of the timeliness of the motion for new trial.

But in considering this evidence, we are mindful that it was not tested in an adversarial way. Although the court received the affidavits, it did not conduct an evidentiary hearing. Thus, the State did not have a chance to cross-examine the affiants about their statements. And the affidavits merely presented Avina-Murillo's and the parents' unchallenged version of events. Conspicuously absent is counsel's side of the story. Thus, we cannot say that the undisputed facts are sufficient to conclusively determine whether Avina-Murillo's initial trial counsel did or did not provide effective assistance. Too much depends on speculation, assumptions, inferences, or untested affidavits. We will not presume prejudice based on mere speculation.[60]

[17] Rarely do we find on direct appeal that a defendant established a claim of ineffective assistance of trial counsel. In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.[61] On only two occasions have we, on direct appeal, found that trial counsel's actions could not be justified as a part of any plausible trial strategy.[62] In *State v. Rocha*,[63] where counsel failed to move to sever a sexual assault charge from child abuse charges, we stated that we could conceive of no strategic reason for counsel's failure to act and that such failure undermined our confidence in the outcome of the trial. In *State v. Faust*,[64] we concluded that counsel provided ineffective assistance "by failing to object to a significant amount

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[60] *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

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

[62] See, *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013); *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[63] *State v. Rocha, supra* note 62.

[64] *State v. Faust, supra* note 62, 265 Neb. at 870, 660 N.W.2d at 868.

of improper negative character evidence." Because the jury was presented with inadmissible evidence that was inflammatory and had an increased potential for jury confusion, we could not ascertain "whether the defendant was convicted for committing the elements of the crime charged or whether the jury determined guilt because the defendant was a generally aggressive or violent person and, thus, more likely to commit the crime."[65] But finding ineffective assistance on direct appeal is the exceptional case, and for good reason. Failing to call a witness promised during opening statement simply does not reach that level. There are many legitimate reasons why this could occur. Although the record suggests that a personal interest conflict may have been involved, it does not conclusively establish cause and effect.

Based on the record before us, we cannot conclusively determine as a matter of law that counsel's alleged deficient performance did or did not cause Avina-Murillo prejudice. As noted, there is a strong presumption that counsel acted reasonably, and we decline to speculate as to the trial strategy, if any, behind counsel's decisions.

Further, we disagree with the State that evidence of guilt was overwhelming. We recognize that because this case involved a negligent child abuse charge, the State needed to prove beyond a reasonable doubt only that Avina-Murillo negligently caused or permitted J.P. to be (1) placed in a situation that endangered her life or physical or mental health, (2) cruelly punished, or (3) deprived of necessary care.[66] But we cannot say conclusively that the outcome would have been the same had the jury heard from J.P.'s parents, as it had been told it would. Avina-Murillo's other allegations of ineffectiveness—counsel's failure to move for a mistrial, move to withdraw, or consult with Avina-Murillo regarding the actions about which she complains—are all premised on the same alleged conflict as

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[65] *Id.* at 871, 660 N.W.2d at 868-69.

[66] See Neb. Rev. Stat. § 28-707(1) (Cum. Supp. 2014).

the decision not to call the parents as witnesses. The claims rise or fall together.

Ultimately, we are missing necessary facts to conclusively determine whether counsel performed deficiently and whether there is a reasonable probability that absent such deficient performance, the result of the proceeding would have been different. We conclude that the record is insufficient on direct appeal to resolve Avina-Murillo's claims of ineffective assistance of counsel.

CONCLUSION

We do not consider Avina-Murillo's arguments regarding the overruling of her motion for new trial, because the motion was untimely. Applying the *Strickland* standard, we determine that the record is insufficient to resolve Avina-Murillo's claims that she received ineffective assistance of counsel due to her initial trial counsel's personal interest conflict. We therefore affirm Avina-Murillo's conviction and sentence.

Affirmed.

Papik, J., not participating.

State of Nebraska, appellee, v. Edward Hood, appellant.

917 N.W.2d 880

Filed October 5, 2018. No. S-17-637.

1. **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.
2. **Effectiveness of Counsel: Appeal and Error.** 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.
3. **Criminal Law: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the error was harmless beyond a reasonable doubt.
4. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.
5. **Trial: Evidence.** The erroneous admission of evidence is generally harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
6. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel 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.

7. **Effectiveness of Counsel: Proof: Appeal and Error.** When making an ineffective assistance of counsel claim on direct appeal, allegations of prejudice are not required. However, a defendant must make specific allegations of the conduct that he or she claims constitutes deficient performance.
8. **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.
9. **Effectiveness of Counsel: Proof.** To show deficient performance under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant claiming ineffective assistance of counsel must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
10. **Criminal Law: Intoxication: Mental Competency.** As a matter of law, voluntary intoxication is not a complete defense to a crime, even when it produces psychosis or delirium.
11. **Criminal Law: Insanity: Intent.** Although there is but one type of insanity which will support a finding of not guilty or not responsible by reason of insanity, there are a variety of mental conditions which bear upon the ability to form a specific intent.
12. **Drunk Driving: Blood, Breath, and Urine Tests.** Evidence of a driver's refusal to submit to a warrantless blood draw is admissible in a prosecution for driving under the influence.
13. **Criminal Law: Evidence.** A death certificate, standing alone, is not competent evidence of the cause of death in a controversy where the cause of death is a material issue.
14. **Criminal Law: Appeal and Error.** Harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.
15. **Appeal and Error.** It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires a reversal.

Appeal from the District Court for Garden County: Derek C. Weimer, Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Snyder, Chaloupka & Longoria, P.C., L.L.O., for appellant.

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

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

Funke, J.

Edward Hood appeals from his convictions for motor vehicle homicide, manslaughter, driving under the influence of alcohol causing serious bodily injury, and refusal to submit to a preliminary breath test. The court sentenced Hood to consecutive terms totaling between 73 and 75 years' imprisonment. We affirm the judgment of the trial court.

BACKGROUND

In December 2013, a two-vehicle, head-on collision occurred on U.S. Highway 26 in Garden County near Oshkosh, Nebraska. Hood was driving one of the vehicles; the driver of the other vehicle died at the scene, and the passenger of that vehicle survived after being in a coma for 9 days and sustaining extensive injuries.

After the accident, an off-duty Nebraska State Patrol trooper who came upon the accident asked Hood what happened and Hood said that just prior to the accident, he was looking out the window at a large flock of birds and when he looked back at the road, he suddenly observed a car in front of him. A trained emergency medical technician and volunteer firefighter who attended to Hood later testified he smelled a "[v]ery strong" odor of alcohol coming from Hood.

Garden County Deputy Sheriff Dwight Abbott helped Hood into the front seat of Abbott's cruiser and drove Hood to a local hospital. Abbott did not arrest or restrain Hood at that time. Abbott testified that during the drive, he smelled alcohol coming from Hood and noticed Hood's speech was slow and

his eyes were bloodshot. Hood told Abbott that the accident happened "real fast" after he "looked out the window and saw the birds."

Meanwhile, officers at the scene continued to investigate the accident. There was evidence that Hood's vehicle had swerved across the oncoming lane of traffic and drove off that side of the roadway for about 60 feet, then crossed all the way back through his lane and past the shoulder line, and then made a heavy overcorrection and turned back across his lane and entered the oncoming lane of traffic. The victim who was driving pulled onto the shoulder to attempt to evade Hood, but Hood's vehicle was traveling "completely sideways" when its front passenger side struck the front driver's side wheel of the other vehicle. There was no indication that Hood ever applied the brakes.

Garden County Chief Deputy Sheriff Randy Ross testified that he opened Hood's vehicle and smelled a sweet, alcoholic odor. Ross located a bottle of brandy, which was two-thirds full, in a bag behind the center console. Ross relayed this information to Abbott, and Abbott questioned Hood about the accident while they were at the hospital.

Abbott asked Hood if he had been drinking. Hood replied that "he drank four beers last night" and said that "last night was a hard night." Abbott asked Hood to take a preliminary breath test, and after Hood refused, Abbott placed Hood under arrest for driving under the influence. Abbott read Hood the "Post-Arrest Chemical Test Advisement Form" and then asked Hood to submit to a blood test. Hood refused, stating he was a recovering heroin addict and "doesn't do needles."

Hood was then turned over to medical personnel. Tracy Ray, a physician assistant at the hospital, examined and treated Hood. Ray was initially at the accident scene, but then went to the hospital in order to treat those injured in the accident. Ray testified that Hood had bloodshot eyes, slurred speech, and alcohol on his breath. Ray drew blood from Hood, with Hood's consent, as part of a diagnostic evaluation. Law enforcement

subsequently subpoenaed the hospital and obtained Hood's blood and urine samples.

Prior to trial, Hood filed a motion to suppress the blood and urine samples collected by the hospital. The court granted Hood's motion and suppressed the subpoenaed evidence. During trial, Hood made an oral motion in limine based on the U.S. Supreme Court's decision in *Birchfield v. North Dakota*[1] to preclude the State from introducing evidence of Hood's refusal to submit to a blood test to prove the remaining charges. The court overruled Hood's motion based on this court's decision in *State v. Rask*,[2] which held that Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2016) permits evidence of refusal to prove driving under the influence (DUI) charges.

At trial, during direct examination of Ross, the State offered the victim's death certificate into evidence. The document carried the seal of the Nebraska Department of Health and Human Services and was signed by the Garden County Attorney, indicating that the victim's death was caused by "Whole [B]ody Severe Trauma" as the result of a "Two Vehicle Collision" on Highway 26 and that her death occurred at 2:52 p.m. on December 7, 2013. The court received the exhibit over Hood's objection regarding his right to confront the author of statements made in the death certificate.

The jury convicted Hood of motor vehicle homicide, manslaughter, and driving under the influence of alcohol causing serious bodily injury, and the court later found Hood guilty of refusal to submit to a preliminary breath test. Following a presentence investigation, and after the court received evidence of Hood's two prior DUI convictions from Florida and New Mexico, the district court sentenced Hood to serve consecutive terms of 49 to 50 years for motor vehicle homicide, 19 to 20 years for manslaughter, and 5 years for driving under the

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[1] *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).

[2] *State v. Rask*, 294 Neb. 612, 883 N.W.2d 688 (2016).

influence of alcohol causing serious bodily injury. The court gave Hood credit for time served, ordered Hood to pay a $100 fine for refusal to submit to a preliminary breath test, and revoked Hood's operator's license for a period of 15 years.

Hood filed a notice of appeal, the trial court appointed appellate counsel, and we moved the case to our docket.[3]

ASSIGNMENTS OF ERROR

Hood assigns, restated, that (1) the performance of Hood's trial counsel was deficient and unfairly prejudiced Hood's right to a fair trial, (2) the district court erred as a matter of law in admitting evidence of Hood's refusal to submit to a blood test, and (3) the district court violated Hood's right to confrontation by admitting the victim's death certificate without sponsoring testimony.

STANDARD OF REVIEW

[1,2] 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.[4] 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.[5]

[3-5] In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the error was harmless beyond a reasonable doubt.[6] Harmless error review looks to the basis on which the jury actually rested

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

[4] *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018).

[5] *Id.*

[6] *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

its verdict. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.[7] The erroneous admission of evidence is generally harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.[8]

ANALYSIS

Hood Failed to Show That Trial Counsel's Performance Was Deficient as Matter of Law

Hood argues that his trial counsel should have pursued a defense based on the theory that Hood had diminished mental capacity. Hood asserts that he may have been suffering from a mental illness and used alcohol as self-medication. He suggests that following the collision, he was acting confused and erratic and was making strange and nonsensical statements, and that therefore, he was possibly suffering from psychosis, schizophrenia, or bipolar disorder. Hood claims that "the record contained evidence that, if fully developed, would have supported a defense based on diminished capacity"[9] and that Hood could have argued he had been rendered unable to distinguish right from wrong.

The State argues that Hood's allegations are insufficient, because Hood did not allege that he actually lacked the ability to distinguish right from wrong, but merely asserted that "trial counsel did not explore the potential application"[10] of a diminished capacity defense. The State argues the record refutes Hood's ineffective assistance of counsel allegations.

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[7] *Id.*

[8] *Id.*

[9] Brief for appellant at 12.

[10] *Id.*

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.[11]

[6] However, the fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[12] 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.[13] 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.[14]

[7,8] When making an ineffective assistance of counsel claim on direct appeal, allegations of prejudice are not required.[15] However, a defendant must make specific allegations of the conduct that he or she claims constitutes deficient performance.[16] 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.[17] A claim insufficiently stated is no different than a claim not stated at all.[18]

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[11] *Cotton, supra* note 4.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

[16] *Id.*

[17] *Cotton, supra* note 4.

[18] *Id.*

[9] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[19] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[20] 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.[21] 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.[22] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[23] 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.[24] We will not second-guess trial counsel's reasonable strategic decisions.[25]

In support of his argument that trial counsel should have pursued a diminished capacity defense, Hood claims there is evidence that he was in a state of confusion at the scene and after the accident. Hood points to the testimony of Ray, the physician assistant, who observed Hood to have "delayed cognitive responses" and stated that when he asked Hood a question, "there was a period of time before he would give me an answer." Ray said that meant that Hood was confused, because "anytime we have somebody that has repetitive questions or inaccurate answers to the same question, that's a state of confusion for some reason."

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

[20] *Cotton, supra* note 4.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] See *State v. Foster*, 300 Neb. 883, 916 N.W.2d 562 (2018).

Additionally, Hood referred to the fact that his explanation of watching a flock of birds just prior to the accident "made no sense, and was given to multiple officers."[26] For example, Ross testified that "[Hood] told me he was just looking at the birds that were flying overhead and I believe during that meeting he, he told us that it was God's time for her to go," referring to the deceased victim.

Hood does not allege that the facts of this case would have satisfied an insanity defense based on Neb. Rev. Stat. § 29-2203 (Reissue 2016). The fact that a defendant has some form of mental illness or defect does not by itself establish insanity.[27] Section 29-2203 was amended to provide that "insanity does not include any temporary condition that was proximately caused by the voluntary ingestion, inhalation, injection, or absorption of intoxicating liquor, any drug or other mentally debilitating substance, or any combination thereof."[28]

[10] Hood does not argue his counsel should have pursued a defense based on intoxication under Neb. Rev. Stat. § 29-122 (Reissue 2016). Section 29-122 states in part:

> Intoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense unless the defendant proves, by clear and convincing evidence, that he or she did not (1) know that it was an intoxicating substance when he or she ingested, inhaled, injected, or absorbed the substance causing the intoxication or (2) ingest, inhale, inject, or absorb the intoxicating substance voluntarily.

Voluntary intoxication is not a complete defense to a crime, even when it produces psychosis or delirium.[29]

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[26] Brief for appellant at 12.

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

[28] § 29-2203(4). See 2011 Neb. Laws, L.B. 100, § 2.

[29] *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011).

[11] Instead, Hood argues that evidence of his diminished mental capacity could have rebutted evidence that he acted with criminal intent.[30] We have held that separate and apart from an insanity defense, a defendant may, with appropriate evidence, try to defeat the charge filed against him or her by proving that at the time the offense occurred, the defendant lacked the ability to intend the voluntary and probable consequences of his or her act.[31] In *State v. Vosler*,[32] we noted that "although there is but one type of insanity which will support a finding of not guilty or not responsible by reason of insanity, there are a variety of mental conditions which bear upon the ability to form a specific intent."

However, we agree with the State that the record affirmatively shows that Hood's mental capacity was not a factor in the collision. For example, during the hearing on Hood's motion to suppress, Ray testified that he evaluates a patient's competency prior to conducting a blood draw, that he advised Hood of his rights and found Hood to be capable of consenting, and that Hood consented to a blood draw. In addition, Ray testified that Hood asked for a telephone to call his mother and told his mother that he "needed a lot of money and he was in trouble." Further, Hood was able to provide his medical history to Ray and was able to inform a State Patrol trooper that he believed he had suffered a broken ankle.

The record related to Hood's sentencing also demonstrates that Hood did not have a viable diminished capacity defense. The district court reviewed Hood's presentence investigation report and considered Hood's "mentality" and whether he "contemplated causing serious harm" in determining Hood's sentence. The court reviewed evidence of Hood's difficult upbringing and family history, problems with substance abuse

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[30] See *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984).

[31] *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *Vosler, supra* note 30.

[32] *Vosler, supra* note 30, 216 Neb. at 468, 345 N.W.2d at 811.

from an early age, criminal record, and unsuccessful participation in state programs. The court did not conclude that Hood lacked the ability to distinguish between right and wrong. Rather, the court described Hood as a "recidivis[t] drunk driver" and stated:

> [Y]ou absolutely meant to get in the car. You absolutely meant to do that and once you made that decision, once that decision was made . . . it was game on for every other driver on the road and [the victims] didn't ask to play. They were involuntary actors in your decision to drink and to drive. It was your choice. . . . You choose to drink. You choose to drive and these poor people happened to be in the wrong place at the wrong time.

We also note that pursuant to Neb. Rev. Stat. § 29-1823 (Reissue 2016), the court had the authority to determine Hood's competency. The court had the case from 2014 to 2017, and the record does not show that the State, Hood, or Hood's counsel requested a competency evaluation. The most likely explanation as to why Hood's mental capacity was not explored is because a diminished capacity defense would have lacked merit.

We find the record refutes the allegations that the performance of trial counsel was deficient. The testimony of Ray and the unchallenged comments of the court at sentencing provide that counsel's decision not to pursue the mental capacity issue was not inconsistent with the conduct of a lawyer with ordinary training and skill. There is no basis from the record to conclude that Hood's mental capacity at the time of the accident would have negated his criminal liability.

Furthermore, we find that Hood's generalized allegations of deficient performance are insufficient. Hood alleged in a conclusory fashion that raising a diminished capacity defense "would have favorably impacted his criminal liability."[33] But Hood did not allege that he actually lacked capacity for a

[33] Brief for appellant at 14.

specific reason. Rather, Hood's claim is that based on his behavior, he might have been suffering from psychosis, schizophrenia, or bipolar disorder. Absent specific allegations, Hood's ineffective assistance of counsel claim effectively becomes a discovery motion to determine whether evidence favorable to a defendant's position actually exists.[34]

We conclude that the record refutes Hood's claim and that his claim is insufficiently raised. Therefore, Hood has failed to state a claim that the performance of his trial counsel was deficient as a matter of law. This assignment of error is without merit.

Evidence of Driver's Refusal to Warrantless Blood Draw Is Admissible in DUI Prosecution

Hood's second assignment of error argues that *Birchfield* categorically prohibits the use of evidence in a DUI prosecution that a defendant refused to consent to a warrantless blood draw.[35] Hood argues that even though the crash in this case occurred years before *Birchfield*, Hood's trial occurred after *Birchfield* became law, and that as a result, the jury should not have been permitted to consider evidence that Hood refused to submit to Abbott's request for a blood test. Hood argues the jury should not have been allowed to "infer guilt in such ambiguous circumstances, particularly involving the exercise of a constitutional right."[36]

Hood's argument runs headlong into § 60-6,197(6), which states, "[r]efusal to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be admissible evidence in any action for a violation of section 60-6,196 . . ." The district court acknowledged that in *Rask*, we found that § 60-6,197(6) "is a broad rule, without exception—it states

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[34] See, *Foster, supra* note 25; *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

[35] See *Birchfield, supra* note 1.

[36] See *State v. Gauthier*, 174 Wash. App. 257, 265, 298 P.2d 126, 131 (2013).

only that a refusal is admissible to prosecute a DUI"[37] and held that under § 60-6,197(6), even uninformed refusals to submit to a chemical test are admissible for the purpose of proving DUI charges. We determined that a defendant's refusal to submit to a chemical test is evidence of the circumstances surrounding a DUI charge and said that a refusal showed the "'defendant's conduct, demeanor, statements, attitudes, and relation toward the crime.'"[38]

Hood's brief does not address § 60-6,197(6) and does not assert that § 60-6,197(6) is unconstitutional, and the State does not argue that we should interpret Hood's argument as a constitutional challenge to the statute. The record further indicates that Hood has not preserved an argument regarding the constitutionality of § 60-6,197(6), either facially or as applied to Hood, because Hood did not file a notice of constitutional question pursuant to Neb. Ct. R. App. P. § 2-109(E) (rev. 2014).

Because Hood does not question the constitutionality of § 60-6,197(6), in addressing his assignment of error, we find it appropriate to reiterate our decision in *Rask* in light of the U.S. Supreme Court's decision in *Birchfield*. We did not rely upon *Birchfield* in our decision in *Rask*, because the case was briefed and argued prior to *Birchfield*. We take this opportunity to discuss the *Birchfield* decision and its implications on Nebraska law in the context of the evidentiary concern raised by Hood.

In *State v. McCumber*,[39] we considered the extent to which portions of § 60-6,197 have been invalidated by the U.S. Supreme Court's decision in *Birchfield*. Unlike Hood's case, *McCumber* involved a conviction on a charge of refusing to submit to a blood test. We held that the defendant's conviction

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[37] *Rask, supra* note 2, 294 Neb. at 620, 883 N.W.2d at 695.

[38] *Id*. at 621, 883 N.W.2d at 696 (quoting *State v. Meints*, 189 Neb. 264, 202 N.W.2d 202 (1972)).

[39] *State v. McCumber*, 295 Neb. 941, 893 N.W.2d 411 (2017).

for refusal under § 60-6,197 was unconstitutional as applied to him based on *Birchfield*, because the only basis offered by the State to demand a blood test from the defendant was that he could be searched incident to a lawful arrest for drunk driving or that he had consented to a blood test under Nebraska's implied consent laws.[40] However, we held that § 60-6,197 is facially constitutional, because there are circumstances under which a conviction for refusal under § 60-6,197 would be valid even after *Birchfield*. We explained that a charge for refusal to submit to a chemical test could be valid if law enforcement has obtained a warrant to conduct a blood draw or if exigent circumstances exist such that there is no time to secure a warrant.[41] Therefore, *Birchfield* limited the legal force and effect of § 60-6,197 only to the extent that warrantless blood draws and prosecutions of a refusal to submit to a warrantless blood draw cannot be justified as part of a search incident to arrest or based on implied consent.

In *State v. Hoerle*,[42] we examined in detail *Birchfield* and its implications on Nebraska law. We explained that *Birchfield* did not categorically prohibit a warrantless blood draw based on a driver's actual consent and that a court must consider the totality of the circumstances to determine whether a driver's consent to a blood test was freely and voluntarily given.[43] We acknowledged that warrantless blood draws based on a search incident to arrest or implied consent could not be constitutionally justified, but concluded that the good faith exception applies to pre-*Birchfield* blood draws of this nature.[44]

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[40] *Id.*

[41] *Id.*

[42] *State v. Hoerle*, 297 Neb. 840, 901 N.W.2d 327 (2017), *cert. denied* 584 U.S. 977, 138 S. Ct. 1986, 201 L. Ed. 2d 248 (2018).

[43] *Id.*

[44] *Id.* See, also, *State v. Nielsen, ante* p. 88, 917 N.W.2d 159 (2018); *State v. Hatfield*, 300 Neb. 152, 912 N.W.2d 731 (2018).

Though we have not yet specifically addressed the propriety of admitting evidence of a driver's refusal in a criminal DUI proceeding post-*Birchfield*, the *Birchfield* Court shed light on the issue when it stated that "[o]ur prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. . . . Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them."[45] As a result, we do not read the *Birchfield* Court's decision as placing restrictions on the use of evidence of a driver's refusal in a DUI proceeding.

The *Birchfield* Court was primarily concerned with the heightened privacy interests implicated by blood tests, which are more physically invasive than breath tests and provide law enforcement a sample that can be preserved and processed to provide more information about an individual than is provided by a breath test.[46] After recognizing the substantial privacy concerns presented by blood draws and concluding the search incident to arrest exception does not apply to warrantless blood tests, the Court considered whether implied consent statutes qualified as a consent exception to the requirement for a warrant. The Court stated that "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads"[47] and concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."[48] The Court did not go on to conclude, as Hood argues, that the Fourth Amendment prohibits the use of evidence of a defendant's refusal in a

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[45] *Birchfield, supra* note 1, 136 S. Ct. at 2185.

[46] See *id.*

[47] *Id.*, 136 S. Ct. at 2185.

[48] *Id.*, 136 S. Ct. at 2186.

DUI criminal proceeding, particularly where the defendant has not been charged with the crime of refusal and no blood draw has taken place.

Several state courts have been confronted with the very issue raised by Hood and have acknowledged that the Fourth Amendment does not bar the admission of evidence of refusal to submit to a warrantless blood draw.[49] For example, the Supreme Court of Vermont reasoned that criminalizing refusal poses qualitatively different Fourth Amendment concerns than merely allowing evidence of the refusal at a criminal DUI trial.[50] Even though the State is permitted to use a defendant's refusal as circumstantial evidence of guilt, a defendant has a full opportunity to explain the basis for refusal to the jury.

In this case, the State argued that Hood refused because "[h]e knows he's in trouble." Based on the record, Hood could have rebutted this argument by explaining that he refused because he is a recovering heroin addict and "doesn't do needles" and that he later offered to provide Abbott a blood sample but Abbott declined.

[12] In summary, *Birchfield* itself clarified that the propriety of evidentiary consequences for a driver's refusal to submit to a blood draw should not be questioned. If Hood's position were the law, no drunk driver would ever submit to a blood test. Therefore, consistent with our decision in *Rask*, we join the courts which have concluded that evidence of a driver's refusal to submit to a warrantless blood draw is admissible in a DUI prosecution. Hood's assignment of error is without merit.

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[49] See, *State v. Rajda*, 208 Vt. 324, 196 A.3d 1108 (2018); *MacMaster v. State*, 344 Ga. App. 222, 809 S.E.2d 478 (2018); *State v. Storey*, 2018 NMCA 009, 410 P.3d 256 (2017); *Fitzgerald v. People*, 394 P.3d 671 (Colo. 2017), *cert. denied* 583 U.S. 872, 138 S. Ct. 237, 199 L. Ed. 2d 122.

[50] See *Rajda, supra* note 49.

Court's Error in Admitting Death Certificate Without Supporting Testimony Was Harmless

In his third assignment of error, Hood claims the district court erred in admitting a death certificate, without a supporting witness, in a case wherein the time, place, and manner of death are necessary elements of the charged offenses. Hood argues that statements made in the death certificate were testimonial in nature and that therefore, he had a right to confront the author of the statements.

During direct examination of Ross, the State detoured from questioning Ross to offer the victim's death certificate into evidence. The following exchange took place:

> [State]: Your Honor, the State would also see[k] to offer the Certificate of Death of [the victim]. It is authenticated. It does have a seal here.
>
> THE COURT: [Defense counsel?]
>
> [Defense counsel]: Judge, objection, confrontation.
>
> THE COURT: The objection is overruled. The court will receive Exhibit 49.

The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Hood argues the Sixth Amendment required exclusion of the death certificate based on the U.S. Supreme Court's decision in *Crawford v. Washington*,[51] which generally held that an out-of-court testimonial statement of an unavailable declarant is not admissible at a criminal trial unless a defendant had a prior opportunity to cross-examine the declarant. Hood argues that statements made by the Garden County Attorney in the victim's death certificate were testimonial in nature and that the court had not found the Garden County Attorney to be unavailable to provide testimony.

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[51] *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[13] Nebraska has historically not followed the rule which permits a death certificate to be received in evidence as presumptive evidence of the facts stated therein.[52] This court has held, even in the civil context where the confrontation clause is not at issue, that a death certificate, standing alone, is not competent evidence when offered as proof of the cause of death in a controversy where the cause of death is a material issue.[53]

In *Vanderheiden v. State*,[54] we extended this rule to the criminal context based on a Confrontation Clause rationale. We found that "death certificates are made ex parte without a hearing and without the right of cross-examination" and found that the certificate was not admissible to prove the cause of death.[55]

In *Skinner v. Jensen*,[56] we applied the rule from *Vanderheiden* to a habeas corpus proceeding in which the relator challenged the sufficiency of evidence produced at a preliminary hearing. The relator was being held on a charge of manslaughter, and the only evidence to establish the death or cause of death of the victim was a death certificate. We found that the death certificate was not competent evidence and that therefore, there was insufficient evidence to sustain a finding that manslaughter had been committed, and we noted that the State could file a new complaint and present additional evidence at a future hearing.[57]

Based on our prior line of cases, we determine that the trial court erred in admitting the victim's death certificate without

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[52] See *McNaught v. New York Life Ins. Co.*, 145 Neb. 694, 18 N.W.2d 56 (1945).

[53] *McNaught, supra* note 52; *Omaha & C. B. Street R. Co. v. Johnson*, 109 Neb. 526, 191 N.W. 691 (1922).

[54] *Vanderheiden v. State*, 156 Neb. 735, 57 N.W.2d 761 (1953).

[55] *Id*. at 744, 57 N.W.2d at 767.

[56] *Skinner v. Jensen*, 178 Neb. 733, 135 N.W.2d 134 (1965).

[57] *Id.*

supporting testimony from the author, regardless of whether the statements made in the death certificate were testimonial in nature or whether the Confrontation Clause required exclusion of the evidence. We determine, however, the court's error was harmless beyond a reasonable doubt, because the time, place, and cause of the victim's death were not contested issues in this case; the death certificate was cumulative of other evidence on these issues; the jury's guilty verdict was surely unattributable to the court's error; and there was properly admitted evidence to support the jury's finding.

[14,15] Our harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.[58] It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires a reversal.[59] When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.[60]

There was no dispute that one of the victims in this case was deceased. Nor was there a dispute about the time and place of the victim's death. Ross testified that when he arrived on the scene, a man yelled at him to get over to the victim's vehicle and said he thought "the driver was gone but the passenger was still alive and breathing." Ross went to the victim's vehicle and found that the driver had no pulse, so he focused on the passenger. Ross testified that he told Ray that officers had "one critically injured on their way to the hospital, one fatality and one with a broken ankle." A chief deputy sheriff, who was also at the scene of the collision, testified that after leaving the scene, officers went to the funeral home with the deceased victim.

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[58] *State v. Tyler P.*, 299 Neb. 959, 911 N.W.2d 260 (2018).

[59] *Id.*

[60] *Id.*

There was also no dispute about the cause of the victim's death. Hood's vehicle collided with the front driver's side of the deceased victim's vehicle. Ross testified that after the accident, the deceased victim's body was "in a state of brokenness." Defense counsel did not focus on whether a death occurred based on the collision, but on whether the collision was the result of Hood's intoxication or whether Hood accidentally lost control of his vehicle due to distracted driving.

Although the State offered the death certificate into evidence, the State did not expressly rely on the death certificate to establish a fact in issue. Hood correctly described the admission of the death certificate as a "detour[]"[61] from the other evidence presented. The State never referred back to the death certificate after it was admitted. We agree with the State that the death certificate was cumulative of other evidence of the time, place, and cause of the deceased victim's death. We therefore conclude that the court's admission of the death certificate was harmless beyond a reasonable doubt. This assignment of error is without merit.

CONCLUSION

We conclude that Hood failed to state an ineffective assistance of counsel claim as a matter of law. Further, we conclude that evidence of a driver's refusal to submit to a warrantless blood draw is admissible in a DUI prosecution. Lastly, we conclude that the trial court's error in admitting the victim's death certificate without supporting testimony was harmless beyond a reasonable doubt. We therefore affirm Hood's convictions and sentences.

Affirmed.

Freudenberg, J., not participating.

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[61] Brief for appellant at 9.

State of Nebraska, appellee, v. John R. Leahy III, appellant.

917 N.W.2d 895

Filed October 5, 2018. No. S-17-1047.

1. **Sentences: Appeal and Error.** Whether a defendant is entitled to credit for time served and in what amount are questions of law, subject to appellate review independent of the lower court.
2. ____: ____. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. ____: ____. 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.
6. ____. Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.
7. **Judges: Plea Bargains: Sentences.** A judge is not bound to give a defendant the sentence recommended by a prosecutor under a plea agreement.

Appeal from the District Court for Hitchcock County: David W. Urbom, Judge. Affirmed.

Richard Calkins, of Calkins Law Office, for appellant.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

Heavican, C.J., Cassel, Stacy, Funke, and Papik, JJ., and Bishop and Welch, Judges.

Papik, J.

John R. Leahy III was serving a criminal sentence in Colorado when he was extradited to Nebraska to face charges here. Approximately 19 months later, Colorado authorities granted Leahy parole. After he was convicted of kidnapping and manslaughter in Nebraska, the district court determined he was not entitled to credit for time served prior to his parole in Colorado. Leahy now appeals the denial of credit for time served, the admission of an exhibit the district court received in the course of determining whether and to what extent he was entitled to credit for time served, and the consecutive nature of his sentences. Having found no reversible error in any aspect of the district court's sentencing of Leahy, we affirm.

BACKGROUND

Charges Against Leahy.

In June 2015, the State filed an information charging Leahy with first degree murder for killing Austin Wright in the perpetration of a kidnapping or attempted kidnapping. Pursuant to a plea agreement, Leahy pleaded no contest to an amended information charging him with kidnapping and manslaughter. In accordance with the plea agreement, Leahy also pleaded no contest to an amended information in a separate case, charging him with possession of methamphetamine with intent to deliver. As agreed, the State recommended concurrent sentences for all charges in both cases.

According to the factual basis supplied by the State at the plea hearing, Leahy and Wright were acquaintances, and Wright stayed briefly at Leahy's residence beginning February 26, 2014. On March 7, Wright's mother contacted Leahy. She had not seen Wright for several days and asked Leahy where he was. Leahy told Wright's mother that Wright had shown up high "on something" at Leahy's residence and that Wright could not stay there anymore. On March 8, Leahy told Wright's mother that he had dropped Wright off near a motel in McCook, Nebraska, that day. On March 9, Wright's mother filed a missing person's report.

On March 13 and 20, 2014, police interviewed Leahy. At that time, Leahy told officers that he had dropped Wright off near a motel in McCook. A search of Leahy's residence on April 9 uncovered 26.82 grams of methamphetamine and a cell phone video of Leahy and Wright arguing about debts that Wright owed Leahy for drugs, among other things. The video was date stamped March 6.

The day after the search, Leahy asked to talk to police. He admitted that under the pretense of going to McCook, he and another passenger took Wright in his car, that he forced Wright to cover his head with a sweatshirt, that he drove the car on a circuitous route intended to confuse Wright, and that he left Wright alone in an isolated rural area with no means of transportation. Before leaving, Leahy pointed Wright in the general direction of the nearest town, 8 miles away. The nearest inhabited dwelling was over 1½ miles in nearly the opposite direction.

After Leahy recounted those details, officers went to the area Leahy said he had left Wright. Nearby, officers found Wright's naked body and some of his clothing. Authorities identified Wright using dental records, and an autopsy and forensic testing showed that he died of hypothermia sometime between early March 2014 and the date of discovery on April 11.

The district court accepted Leahy's pleas of no contest.

Initial Sentencing Hearing.

After the district court accepted Leahy's pleas, it continued sentencing for preparation of a presentence investigation report (PSR). At the subsequent sentencing hearing, a dispute arose regarding the time-served calculation in the PSR. Leahy was serving a 3-year sentence in Colorado when he was charged in Nebraska for the current offenses. He was transported to Nebraska to await trial according to the interstate Agreement on Detainers, see Neb. Rev. Stat. § 29-759 (Reissue 2016), and began his incarceration in Nebraska on May 7, 2015. While still detained in Nebraska, Leahy was paroled by the State of Colorado on November 28, 2016. The PSR as initially prepared is not in the record, but arguments by counsel at the hearing suggest that it indicated Leahy was entitled to credit for all of the time he was detained in Nebraska prior to his convictions and sentencing.

At the hearing, the State contended that Leahy should not receive credit for time he was detained in Nebraska prior to Colorado's grant of parole on November 28, 2016. Leahy's counsel did not dispute that Leahy was paroled by Colorado on November 28, but argued that Leahy should receive credit for any time he spent incarcerated in Nebraska awaiting trial on Nebraska charges. The district court scheduled another hearing to address credit for time served.

Additional Hearing Addressing Credit for Time Served.

At the next hearing, the State offered exhibit 51, which included a signed cover letter from a technician at the Colorado Department of Corrections, "Time/Release Operations." The letter stated that Leahy was paroled from the Colorado Department of Corrections on November 28, 2016.

Leahy's counsel objected on foundation and hearsay, noting that he had not had the opportunity to question the author of the document. Leahy's counsel further argued that Leahy may have completed his Colorado sentence earlier if he had

not been transported to Nebraska but that there was no way to know for certain, because no one was present to explain exhibit 51. The district court ultimately overruled Leahy's objection and received exhibit 51.

In a subsequent written order, the district court ruled that Leahy would not receive credit toward his Nebraska sentences for the time beginning May 7, 2015, and ending November 28, 2016, because his Colorado sentence was still running during that period. However, the district court did allow Leahy credit for time he served after he was paroled by the Colorado Department of Corrections.

Sentencing Order.

Almost 2 weeks after issuing its written order on the issue of time served, the district court held a sentencing hearing. At the hearing, the parties presented arguments, including aggravating and mitigating information from the PSR. The PSR reflected that Leahy was 22 years old at the time of the current offenses, that he was single with no children, that he left school after completing the 10th grade, and that at the time of his arrest for the current offenses, he had been employed at a drilling company full time for 7 or 8 months.

According to the PSR, Leahy was diagnosed with bipolar disorder as a youth but has never treated the condition with medication. Leahy reported that his mental health is good, though he admitted attempting suicide several times after his mother died. Leahy had used marijuana daily since age 12. Beginning at age 14, Leahy used methamphetamine intermittently until 2013, when he began using it every day. Leahy admitted to having a problem with drugs and to selling illegal drugs.

Leahy's criminal history began when he was convicted of pharmaceutical drug possession at age 14. Subsequently, Leahy was convicted of assault, minor in possession, failure to appear, two felony drug possession charges, and false reporting. Regarding Wright, Leahy reported that he felt

"horrible" and never anticipated that Wright would die. He stated that he believed he deserved to "serve time just for what he did wrong, but not made an example of." He expressed an intent to take advantage of educational opportunities during his incarceration.

At the sentencing hearing, Leahy apologized for his actions. He admitted that he initially lied about Wright's whereabouts, but he asked the district court to consider that he had since been honest and accepted responsibility through his no contest pleas.

Before pronouncing the sentences, the district court explicitly stated that it had considered all of the customary factors enumerated in sentencing. The district court proceeded to reference information it obtained from the PSR. It remarked specifically on Leahy's age, education, employment, criminal history, and use of drugs. Noting Leahy's role in covering Wright's head and taking him on a circuitous route in Leahy's car before leaving him alone in a rural area, the district court observed that but for Leahy's actions, Wright would still be alive. The district court stated that lesser sentences than the ones to be imposed would depreciate the seriousness of Leahy's crimes and promote disrespect for the law.

The district court sentenced Leahy to 24 to 30 years' imprisonment for kidnapping and 18 to 20 years' imprisonment for manslaughter. It ordered the sentences to run consecutively to each other and to the sentence of 8 to 10 years' imprisonment that Leahy received in a separate case for the conviction of possession of methamphetamine with intent to deliver.

ASSIGNMENTS OF ERROR

Leahy assigns, rephrased, that the district court erred (1) in denying him credit for the time served in the Hitchcock County jail before November 28, 2016; (2) in receiving exhibit 51 over his objection; and (3) in imposing excessive sentences by sentencing him to consecutive terms of imprisonment for the various convictions.

STANDARD OF REVIEW

[1] Whether a defendant is entitled to credit for time served and in what amount are questions of law, subject to appellate review independent of the lower court. See *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

[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).

ANALYSIS

Credit for Time Served.

Leahy contends that he should have received credit for all the time he spent detained in Nebraska awaiting trial and sentencing on his Nebraska charges. Leahy argues that because he was detained in a Nebraska jail awaiting the disposition of the Nebraska charges, that entire time should be credited to his Nebraska sentences.

Leahy's argument, however, fails to account for the statute that governs whether and to what extent he is entitled to credit for time served or cases interpreting and applying that statute. Neb. Rev. Stat. § 83-1,106(1) (Reissue 2014) states:

> Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services, the county board of corrections, or, in counties which do not have a county board of corrections, the county sheriff.

(Emphasis supplied.)

In prior cases interpreting and applying § 83-1,106(1), it has been held that if a defendant is serving a sentence on a

conviction for one offense while awaiting trial and sentencing on an unrelated offense, he or she is not entitled to credit for time served on the sentence for the unrelated offense. For example, in *State v. Baker*, 250 Neb. 896, 553 N.W.2d 464 (1996), a defendant was sentenced to a term of imprisonment for being a felon in possession of a firearm and, on that same day, charged with other offenses arising out of an unrelated murder. Even though the defendant was detained while awaiting trial and sentencing on the charges arising out of the murder, we held that he was not entitled to credit on his eventual sentence for the charges arising out of the murder so long as he was continuing to serve his sentence for being a felon in possession of a firearm. *Id.*

Similarly, in *State v. McLeaney*, 6 Neb. App. 807, 578 N.W.2d 68 (1998), in a case much like this one, the Nebraska Court of Appeals held that an individual who was serving a Missouri sentence and was transported to Nebraska to face charges was not entitled to credit for time spent awaiting trial and sentencing in Nebraska. The Court of Appeals cited *Baker* and explained that § 83-1,106(1) "provides for credit for the time the offender is forced to be in custody *as a result of the criminal charge for which sentence is imposed*." *State v. McLeaney*, 6 Neb. App. at 810, 578 N.W.2d at 70 (emphasis in original). Because the defendant in *McLeaney* was in custody because of the sentence in Missouri, the Court of Appeals concluded he was not entitled to credit for time served. We have subsequently cited the Court of Appeals' opinion in *McLeaney* with approval. See *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

As *Baker* and *McLeaney* demonstrate, what matters in the credit for time served analysis is not whether Leahy was detained in Nebraska and awaiting trial and sentencing on Nebraska charges, but, rather, whether he was forced to be in custody *because of those charges*. As long as Leahy was serving a sentence on another conviction while awaiting trial and sentencing on the Nebraska charges, he was not forced to be

in custody because of the Nebraska charges and is thus not entitled to credit for time served on his Nebraska sentences under § 83-1,106(1).

On the question of whether Leahy was serving a sentence on another conviction while detained in Nebraska, there does not appear to be much of a dispute. Leahy concedes that he was serving a sentence in Colorado at the time he was transported to Nebraska to face charges here. Under Colorado law, Leahy would have continued to receive credit for time served on his Colorado sentence even while detained in Nebraska. Like Nebraska, Colorado has adopted the interstate Agreement on Detainers, which provides that time being served on a sentence continues to run while the prisoner is being made available for trial as required by the agreement. See Colo. Rev. Stat. Ann. § 24-60-501 (West 2015). See, also, *Pleasant v. Tihonovich*, 647 P.2d 236 (Colo. 1982) (holding prisoner serving Colorado sentence was entitled to credit for time he was in New Mexico pursuant to interstate Agreement on Detainers).

While Leahy does not dispute that he was earning credit on his Colorado sentence until being paroled, he does assert that he may have been granted parole earlier had he not been transported to Nebraska. Leahy appears to take the position that he should receive credit for time served for any days he was detained in Nebraska after the date that Colorado authorities *would have paroled him* had he remained there. Leahy, however, cannot direct us to anything in the credit for time served statutes that would require courts to engage in the type of counterfactual inquiry he envisions in order to calculate credit for time served. Indeed, we have said that the credit for time served to which a defendant is entitled is "an absolute and objective number that is established by the record." *State v. Clark*, 278 Neb. 557, 562, 772 N.W.2d 559, 563 (2009). The calculation of credit for time served would quickly lose any absolute and objective quality if sentencing courts were required to determine when a sentence would have ended as opposed to when it actually did.

Since Leahy was in custody because of his Colorado sentence up until he was paroled on November 28, 2016, the district court correctly denied him credit for time spent in custody prior to that date.

Exhibit 51.

Leahy also argues that the district court erred by receiving exhibit 51 in the course of one of the hearings regarding the credit for time served issue. Leahy objected to the exhibit at the hearing on foundation and hearsay grounds. On appeal, he argues that the exhibit should not have been admitted, because foundation was lacking and because its admission denied him his right to confrontation guaranteed by the Sixth Amendment to the U.S. Constitution.

Initially, we note that it is difficult to discern how the district court's receipt of exhibit 51 worked to Leahy's detriment. The only assertion in exhibit 51 that the court appeared to rely on was the fact that Leahy was paroled on November 28, 2016. Leahy, however, does not contest that he was paroled on this date. Moreover, if anything, the district court's receipt of information indicating the date of Leahy's parole *benefited* Leahy, because the district court granted Leahy credit for time served after he was paroled on his Colorado sentence.

In any event, Leahy's arguments fail to account for the fact that exhibit 51 was received in the sentencing phase of the case. At the time exhibit 51 was received, Leahy's pleas had already been accepted. The only thing left to be done at that point was to impose Leahy's sentences, and the district court received exhibit 51 at a hearing set for the purpose of determining whether Leahy would be entitled to credit for time served on that sentence.

We have held that the traditional rules of evidence are relaxed during the sentencing phase and that evidence may be presented as to any matter that the court deems relevant to the sentence. See *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011). Exhibit 51 related to whether and to

what extent Leahy was entitled to credit for time served and could thus be considered by the district court. In addition, even if we assume that Leahy's objection to exhibit 51 on hearsay grounds was sufficient to preserve his argument that consideration of exhibit 51 violated his right to confrontation, we have held that the right to confrontation is inapplicable to sentencing proceedings. See *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009). See, also, *U.S. v. Powell*, 650 F.3d 388 (4th Cir. 2011) (collecting cases from federal circuit courts holding that Confrontation Clause does not apply at sentencing). The district court did not err by receiving exhibit 51.

Excessive Sentences.

Finally, Leahy assigns that the district court erred in imposing excessive sentences. Leahy does not dispute that the sentences imposed were within statutory limits. Rather, he challenges the consecutive nature of his sentences. We conclude that the district court did not commit reversible error in ordering that Leahy's sentences be served consecutively.

[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). 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. *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. Steele*, 300 Neb. 617, 915 N.W.2d 560 (2018).

Leahy acknowledges that the district court expressly stated these considerations. However, he contends that the district court did not properly weigh the factors or fully consider them, especially as they apply to the decision to impose Leahy's sentences consecutively rather than concurrently. In particular, Leahy argues that the district court neglected to consider his mentality, the motivation for the offenses, and the degree of violence involved, which, he contends, all amounted to mitigating factors. We disagree with Leahy's characterization of the district court's analysis.

Our review of the record shows that the district court properly considered and applied the necessary sentencing factors. In sentencing Leahy, the district court reviewed the information, both aggravating and mitigating, in the PSR. It also heard detailed arguments from counsel. As noted, the district court specifically stated that it had considered all of the customary factors enumerated in sentencing. It then discussed specific facts pertaining to a majority of those factors. We do not find an abuse of discretion in the court's consideration of the sentencing factors.

[6,7] Nor do we find that the district court abused its discretion in making Leahy's sentences consecutive. Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively. *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018). Pursuant to the plea agreement, the State recommended that the district court impose concurrent sentences for Leahy's offenses. As Leahy concedes, however, a judge is not bound to give a defendant the sentence recommended by a prosecutor under a plea agreement. See *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). And the district court specifically advised Leahy of this fact at the plea hearing. In light of the familiar sentencing factors set forth above and Leahy's role in Wright's death, we cannot say that

the district court abused its discretion in imposing consecutive sentences.

CONCLUSION

We find no basis to reverse any aspect of Leahy's sentences. The district court correctly calculated the extent to which Leahy was entitled to credit for time served, did not err by receiving exhibit 51, and did not abuse its discretion by imposing consecutive sentences.

Affirmed.

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

State of Nebraska ex rel. Billy D. Rhiley, appellant and cross-appellee, v. Nebraska State Patrol, appellee and cross-appellant.

917 N.W.2d 903

Filed October 5, 2018. No. S-17-1261.

1. **Immunity: Jurisdiction.** Sovereign immunity is jurisdictional in nature, and courts have a duty to determine whether they have subject matter jurisdiction over a matter.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the appeal.
4. **Immunity.** A state's immunity from suit is a fundamental aspect of sovereignty.
5. **Constitutional Law: Actions: Legislature.** The provisions of Neb. Const. art. V, § 22, are not self-executing, and no suit may be maintained against the State unless the Legislature, by law, has so provided.
6. **Statutes: Immunity: Waiver.** Statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver.
7. ____: ____: ____. A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
8. **Immunity: Waiver: Jurisdiction: Legislature.** Absent legislative action waiving sovereign immunity, a trial court lacks subject matter jurisdiction over an action against the State.
9. **Criminal Law: Political Subdivisions: Immunity: Waiver.** Neb. Rev. Stat. § 29-3528 (Reissue 2016) does not expressly waive sovereign

immunity for actions brought against a state agency seeking to compel compliance with the Security, Privacy, and Dissemination of Criminal History Information Act, nor does the text overwhelmingly imply that waiver of sovereign immunity is the only reasonable construction.

Appeal from the District Court for Hall County: John H. Marsh, Judge. Vacated and dismissed.

Jared J. Krejci, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellant.

Douglas J. Peterson, Attorney General, and David A. Lopez for appellee.

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

Stacy, J.

Billy D. Rhiley filed this mandamus action against the Nebraska State Patrol (NSP) seeking an order commanding the NSP to remove from the public record information regarding his 1991 arrest. The NSP argued (1) the mandamus action was barred by sovereign immunity and thus the court lacked subject matter jurisdiction, (2) the action was moot, and (3) mandamus relief was unavailable because Rhiley had an adequate remedy at law. The district court rejected the sovereign immunity defense, but granted judgment in favor of the NSP and dismissed the mandamus action on the other grounds. Rhiley appeals the dismissal of his mandamus action, and the NSP cross-appeals the rejection of its sovereign immunity defense. We conclude the sovereign immunity defense is meritorious and dismiss the appeal for lack of subject matter jurisdiction.

FACTS

On February 1, 1991, Rhiley was arrested by police in Grand Island, Nebraska, pursuant to a felony arrest warrant for burglary issued in Laramie, Wyoming. The arresting officers informed the NSP's Criminal Identification Division (CID)

of the arrest. The CID serves as a repository of criminal history information[1] in Nebraska. Under Nebraska's Security, Privacy, and Dissemination of Criminal History Information Act[2] (the Criminal History Act), each criminal justice agency is required to maintain "complete and accurate criminal history record information with regard to the actions taken by the agency."[3] Under the Criminal History Act, "complete" information means that "arrest records shall show the subsequent disposition of the case as it moves through the various stages of the criminal justice system" and "accurate" information "shall mean containing no erroneous information of a material nature."[4]

According to Rhiley, after he was arrested, officials determined he was not involved in the burglary, he was released, and Wyoming prosecutors voluntarily dismissed the burglary charge. The NSP's CID was not notified of the Wyoming action.

In 2016, Rhiley obtained a copy of his NSP criminal history information and found it included information about the 1991 arrest for burglary. Regarding disposition of the arrest, the report provided: "ARREST DISPOSITION: TRANSFERRED TO ANOTHER AGENCY—WYOMING." The criminal history report did not indicate the burglary charge had been dismissed by the Wyoming prosecutor. Rhiley's attorney telephoned the NSP's CID to request correction, and was told to contact the arresting agency. Rhiley's counsel then contacted

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[1] See Neb. Rev. Stat. § 29-3506 (Reissue 2016) ("[c]riminal history record information [means] information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of issuance of arrest warrants, arrests, detentions, indictments, charges by information, and other formal criminal charges, and any disposition arising from such arrests, charges, sentencing, correctional supervision, and release").

[2] See Neb. Rev. Stat. §§ 29-209, 29-210, 29-3501 to 29-3528 (Reissue 2016), and 81-1423 (Cum. Supp. 2016).

[3] § 29-3515.

[4] § 29-3507.

the Hall County Attorney in an attempt to resolve the matter, but was unsuccessful.

On March 28, 2017, Rhiley filed a lawsuit in the Hall County District Court seeking to have the 1991 arrest information removed from the public record pursuant to § 29-3523. That statute generally provides that in the case of an arrest, all criminal history record information relating to the case "shall be removed from the public record" as follows:

> (a) When no charges are filed as a result of the determination of the prosecuting attorney, the criminal history record information shall not be part of the public record after one year from the date of arrest, citation in lieu of arrest, or referral for prosecution without citation;
>
> (b) When charges are not filed as a result of a completed diversion, the criminal history record information shall not be part of the public record after two years from the date of arrest, citation in lieu of arrest, or referral for prosecution without citation; and
>
> (c) When charges are filed, but the case is dismissed by the court (i) on motion of the prosecuting attorney, (ii) as a result of a hearing not the subject of a pending appeal, (iii) after acquittal, or (iv) after completion of a program prescribed by a drug court or any other problem solving court approved by the Supreme Court, the criminal history record information shall not be part of the public record *immediately upon notification of a criminal justice agency* after acquittal pursuant to subdivision (3)(c)(iii) of this section or after the entry of an order dismissing the case.[5]

Initially, Rhiley's lawsuit was brought against several defendants, including the city of Grand Island, Hall County, the Hall County Attorney, and the NSP's Superintendent of Law Enforcement and Public Safety, individually and in his official capacity. On July 13, 2017, Rhiley voluntarily

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[5] § 29-3523 (3)(a) through (c) (emphasis supplied).

dismissed all defendants except the NSP. Thus, Rhiley elected to proceed with a mandamus action against only the NSP, seeking to compel the removal of criminal history information regarding his 1991 arrest from the public record. After the lawsuit was filed, the NSP removed Rhiley's arrest information from the public record.

Rhiley claims that § 29-3528 authorizes a mandamus action directly against the NSP to compel compliance with the Criminal History Act. Section 29-3528 provides:

> Whenever any officer or employee of the state, its agencies, or its political subdivisions, or whenever any state agency or any political subdivision or its agencies fails to comply with the requirements of [the Criminal History Act] or of regulations lawfully adopted to implement [that act], any person aggrieved may bring an action, including but not limited to an action for mandamus, to compel compliance and such action may be brought in the district court of any district in which the records involved are located or in the district court of Lancaster County. The commission may request the Attorney General to bring such action.

The NSP moved for judgment on the pleadings, arguing the mandamus action was barred by the doctrine of sovereign immunity. The district court overruled the motion. The NSP subsequently filed another motion, styled as a motion for summary judgment, asserting: (1) Rhiley's mandamus action was barred by sovereign immunity; (2) Rhiley had a plain and adequate remedy at law, so mandamus was not available; and (3) the action was rendered moot when the 1991 arrest information was removed from the public record shortly after the mandamus action was filed. No party challenges the use of summary judgment within a mandamus action.

The district court again rejected the sovereign immunity defense, but granted judgment in favor of the NSP on the other two grounds and denied mandamus relief. It reasoned Rhiley's claim was rendered moot by the NSP's removal of his arrest

information from the public record. Alternatively, it reasoned regulations promulgated pursuant to the Criminal History Act created procedures for challenging incorrect criminal history[6] and found such procedures were a "plain and adequate remedy" available to Rhiley that precluded mandamus relief.[7]

Rhiley appeals, and the NSP cross-appeals. We granted the NSP's petition to bypass.

ASSIGNMENTS OF ERROR

Rhiley assigns, restated and summarized, that the district court erred in (1) determining the action is moot, (2) determining he failed to avail himself of a plain and adequate remedy at law, (3) relying on an administrative exhaustion defense when the NSP did not assert such a defense in its answer, (4) sustaining the NSP's hearsay objection to certain evidence, and (5) failing to bind the NSP to its guidance documents.

On cross-appeal, the NSP contends both the district court and this court lack jurisdiction, because Rhiley's claim against the NSP, a state agency, is barred by the doctrine of sovereign immunity and the language in § 29-3528 is not a waiver of such immunity.

STANDARD OF REVIEW

[1] Sovereign immunity is jurisdictional in nature, and courts have a duty to determine whether they have subject matter jurisdiction over a matter.[8]

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[9]

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[6] See, § 29-3526; 78 Neb. Admin. Code, ch. 1 (1978).

[7] Neb. Rev. Stat. § 25-2157 (Reissue 2016).

[8] *Cappel v. State*, 298 Neb. 445, 905 N.W.2d 38 (2017).

[9] *Tilson v. Tilson*, 299 Neb. 64, 907 N.W.2d 31 (2018); *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

ANALYSIS

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the appeal.[10] Because the NSP's cross-appeal presents a jurisdictional question, we address it first.

Actions Against State Are Barred Unless Sovereign Immunity Is Waived

[4] The 11th Amendment makes explicit reference to the states' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[11] This court has, as a result, sometimes referred to the 11th Amendment when discussing Nebraska's sovereign immunity from suit.[12] However, the sovereign immunity of a state neither derives from nor is limited by the terms of the 11th Amendment.[13] Rather, as we have recognized, a state's immunity from suit is a fundamental aspect of sovereignty.[14]

[5] Neb. Const. art. V, § 22, provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." Long ago, we held that this provision is not self-executing and that no suit may be maintained against the State unless the Legislature, by law, has so provided.[15] Over time, we have examined the Legislature's limited waivers of the

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[10] *Bloedorn Lumber Co. v. Nielson*, 300 Neb. 722, 915 N.W.2d 786 (2018).

[11] U.S. Const. amend. XI. See *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).

[12] See, e.g., *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018); *Gillpatrick v. Sabatka-Rine*, 297 Neb. 880, 902 N.W.2d 115 (2017); *Lamb v. Fraternal Order of Police Lodge No. 36*, 293 Neb. 138, 876 N.W.2d 388 (2016).

[13] *Alden, supra* note 11.

[14] *Id.* See *Jill B. & Travis B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017).

[15] *Shear v. State*, 117 Neb. 865, 223 N.W. 130 (1929).

State's sovereign immunity, usually in the context of either the State Tort Claims Act or the Political Subdivisions Tort Claims Act.[16]

[6-8] In doing so, we have found it well settled that statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver.[17] A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.[18] Absent legislative action waiving sovereign immunity, a trial court lacks subject matter jurisdiction over an action against the State.[19]

This action originally involved other parties and claims, but Rhiley voluntarily dismissed all parties except the NSP and all claims except mandamus. The NSP is an administrative department of the State of Nebraska,[20] and an action against a state agency is an action against the State.[21] Therefore, Rhiley's mandamus action against the NSP is barred by sovereign immunity unless the Legislature has waived it.

Rhiley argues § 29-3528 waives the State's sovereign immunity in a mandamus action seeking to compel compliance with the Criminal History Act. His argument is generally twofold. First, he asserts we should construe § 29-3528 as a waiver of the State's sovereign immunity. Second, he contends our

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[16] See, e.g., *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

[17] *Amend, supra* note 12; *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013).

[18] *Amend, supra* note 12; *Jill B. & Travis B., supra* note 14.

[19] *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999).

[20] Neb. Rev. Stat. § 81-2001 (Reissue 2014).

[21] See *Henderson, supra* note 19. See, also, *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997), *disapproved on other grounds, Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999).

decision in *Henderson v. Department of Corr. Servs.*[22] interpreting the Nebraska mandamus statutes was incorrect and should be overruled. We address these arguments in reverse order and ultimately reject both.

Henderson Correctly Held Mandamus Statutes Do Not Waive Sovereign Immunity for State Agency

Rhiley seeks a writ of mandamus. Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.[23] Mandamus is statutorily authorized by Neb. Rev. Stat. §§ 25-2156 to 25-2169 (Reissue 2016).

In *State ex rel. Steinke v. Lautenbaugh*,[24] we addressed whether a suit seeking a writ of mandamus against the Douglas County election commissioner, in his official capacity, was barred by sovereign immunity. We found it was not, reasoning:

> When an action is brought against an individual employee of a state agency, a court must determine whether the action against the individual official is in reality an action against the state and therefore barred by sovereign immunity.[25] In addressing this issue, we have stated that an action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited

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[22] *Henderson, supra* note 19.

[23] *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

[24] *Id.*

[25] See *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995).

> by sovereign immunity.[26] This exception to the rule of sovereign immunity exists because "'acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state.'"[27] . . .
>
> Application of the foregoing principles demonstrates that this is not in reality an action brought against the state or one of its political subdivisions. The basis for relators' claims is that [the election commissioner] exceeded his statutory authority to adjust subdistrict boundaries, and thus, they seek relief from what they allege to be an invalid act or an abuse of authority by [the commissioner].[28]

Lautenbaugh did not rely on any Legislative waiver of sovereign immunity to find the action proper. Instead, it relied on the rationale that an act done by a state official that exceeds or abuses his or her authority is not an act of the State. As such, *Lautenbaugh* recognized the general principle that sovereign immunity does not bar mandamus actions against a public officer seeking relief from what is alleged to be an invalid act or an abuse of authority by the public officer.

Under the principle announced in *Lautenbaugh*, if Rhiley had proceeded with his mandamus action against a public officer of the NSP, our sovereign immunity analysis would be different. But Rhiley's mandamus action against the NSP superintendent was voluntarily dismissed, leaving the NSP, a state agency, as the only named party.

We addressed a similar situation in *Henderson*.[29] There, an inmate sought a writ of mandamus directing the Department

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[26] *Johnson, supra* note 21.

[27] *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 156, 505 N.W.2d 654, 658 (1993), quoting *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947).

[28] *Lautenbaugh, supra* note 23, 263 Neb. at 661-62, 642 N.W.2d at 140.

[29] *Henderson, supra* note 19.

of Correctional Services to establish his projected release date in accordance with his interpretation of a statute. The inmate sued several state officers in addition to the Department of Correctional Services, but he failed to perfect service on any of the officers. Thus, the mandamus action proceeded against only the department, and we phrased the jurisdictional question as whether the district court had subject matter jurisdiction over a mandamus action against the department, a state agency, absent legislative action waiving the State's sovereign immunity.[30]

In considering whether sovereign immunity had been waived, *Henderson* looked to the general statute authorizing mandamus, § 25-2156. That statute provides in relevant part: "The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station."[31] We concluded that "[n]othing in the statutes governing mandamus . . . indicates a legislative intent to waive sovereign immunity for mandamus actions against a state agency."[32]

Rhiley argues we erred in *Henderson*, and he invites us to overrule that case. He contends that although the NSP is a state agency, it can also be an "inferior tribunal" within the context of § 25-2156, and he asks us to find that the Legislature has waived the State's sovereign immunity for inferior tribunals.

We adhere to the holding in *Henderson* and do not consider Rhiley's argument, because it is hypothetical. There is nothing in the record suggesting the NSP acted as a tribunal in this case, and it is not the function of the courts to render a judgment that is merely advisory.[33] Moreover, appellate

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[30] *Id.*

[31] § 25-2156.

[32] *Henderson, supra* note 19, 256 Neb. at 317, 589 N.W.2d at 522.

[33] *In re Applications of Koch*, 274 Neb. 96, 736 N.W.2d 716 (2007).

courts do not generally consider arguments and theories raised for the first time on appeal,[34] and there is nothing in the record indicating Rhiley ever presented this theory to the district court.

§ 29-3528 Does Not Waive Sovereign Immunity for Actions Seeking to Enforce Criminal History Act

Rhiley argues § 29-3528 waives sovereign immunity for actions brought against state agencies to compel compliance with the Criminal History Act. As noted, § 29-3528 provides:

> Whenever any officer or employee of the state, its agencies, or its political subdivisions, or whenever any state agency or any political subdivision or its agencies fails to comply with the requirements of [the Criminal History Act] or of regulations lawfully adopted to implement [that act], any person aggrieved may bring an action, including but not limited to an action for mandamus, to compel compliance and such action may be brought in the district court of any district in which the records involved are located or in the district court of Lancaster County. The commission may request the Attorney General to bring such action.

As we recently reiterated in *Amend v. Nebraska Pub. Serv. Comm.*[35]:

> It is well settled that statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver. . . . *A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.*

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[34] *Maria T. v. Jeremy S.*, 300 Neb. 563, 915 N.W.2d 441 (2018).

[35] *Amend, supra* note 12, 298 Neb. at 624, 905 N.W.2d at 557 (emphasis supplied).

The question, then, is whether, strictly construed against waiver, § 29-3528 contains language that either (1) expressly waives sovereign immunity for actions brought against a state agency seeking compliance with the Criminal History Act or (2) contains text from which the overwhelming implication allows no other reasonable construction.

Rhiley concedes, as he must, that there is no language in § 29-3528 which expressly waives sovereign immunity for actions to compel compliance with the Criminal History Act. He argues, however, that the overwhelming implication of the statutory language allows no other reasonable construction. Rhiley essentially contends that because the statute references "state agency" and, later in the same sentence, references bringing an "action, including but not limited to an action for mandamus," to compel compliance, the only reasonable way to construe the statute is that it waives the State's sovereign immunity in such actions. We disagree.

When strictly construed in favor of the sovereign and against waiver, a reasonable construction of the relevant text in § 29-3528 is that it recognizes a private civil right of action to enforce the Criminal History Act. So construed, § 29-3528 allows an aggrieved party to bring a civil action, including a mandamus action, to enforce compliance with the requirements of the Criminal History Act, assuming all other jurisdictional and statutory requirements for bringing any particular action are met.

But nothing about allowing a private right of action is an express or implied waiver of the State's sovereign immunity. While a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless,[36] a court also must not read into a statute a meaning that is not there.[37] Section

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[36] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015).

[37] *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015).

29-3528 simply does not address the issue of sovereign immunity either expressly or by necessary implication, and we reject Rhiley's suggestion to the contrary.

We also reject Rhiley's contention that the federal district court for Nebraska has determined that § 29-3528 waives the State's sovereign immunity. In *Estate of Wondercheck, ex rel. Wondercheck v. Nebraska*,[38] an unpublished opinion of the U.S. District Court for the District of Nebraska, that court discussed § 29-3528. It did so, however, in the context of analyzing a different issue—whether § 29-3528 authorized a party to bring a mandamus action against the State of Nebraska in federal court.

As to that issue, the federal court concluded "section 29-3528 does not constitute a waiver [of the State's] immunity from suit in federal court for violation of the [Criminal History Act]."[39] It reached this conclusion because the statutory language did not include a clear declaration that the State intended to submit to federal jurisdiction, and instead referenced only "'the district court of any district in which the records involved are located or in the district court of Lancaster County.'"[40] In the course of explaining its reasoning, the federal court broadly stated that "section 29-3528 waives Nebraska's immunity only for [Criminal History Act] claims brought in state district court."[41] We read this statement in the context of the court's entire analysis of federal jurisdiction, and not as a precise holding on the statutory interpretation question presented in the instant case. In any event, to the extent the federal district court's interpretation of § 29-3528

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[38] *Estate of Wondercheck, ex rel. Wondercheck v. Nebraska*, No. 4:06CV3087, 2006 WL 3392185 (D. Neb. Oct. 18, 2006) (unpublished memorandum and order).

[39] *Id*. at *4.

[40] *Id*., quoting § 29-3528.

[41] *Id*. at *4.

differs from ours, we respectfully observe that this court is the final arbiter of Nebraska law.[42]

[9] We hold that § 29-3528 does not expressly waive sovereign immunity for actions brought against a state agency seeking to compel compliance with the Criminal History Act, nor does the text overwhelmingly imply that waiver of sovereign immunity is the only reasonable construction. We thus hold that Rhiley's mandamus action against the NSP seeking to compel compliance with the Criminal History Act is barred by the doctrine of sovereign immunity.

CONCLUSION

The Legislature has not waived the State's sovereign immunity in mandamus actions brought directly against a state agency to enforce the Criminal History Act. As such, the district court lacked subject matter jurisdiction over Rhiley's mandamus action against the NSP, a state agency.[43] When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks the jurisdiction to review the merits of the claim.[44] We thus vacate the district court's judgment, and dismiss this appeal for lack of subject matter jurisdiction.

Vacated and dismissed.

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[42] *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

[43] See *Henderson, supra* note 19.

[44] *Id.*

Samuel Pan, doing business as US World Daycare Center, appellee, v. IOC Realty Specialist Inc. and Bernard M. Tompkins, appellants.

918 N.W.2d 273

Filed October 12, 2018. No. S-17-815.

1. **Statutes: Judgments: Appeal and Error.** Issues of statutory interpretation present a question of law, and when reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Intent: Words and Phrases.** The word "include" preceding a list does not indicate an exclusive list absent other language showing a contrary intent.
4. **Landlord and Tenant: Leases: Property: Statutes.** The scope of the Disposition of Personal Property Landlord and Tenant Act is not so narrowly confined as to exclude commercial leases. As such, the act applies in commercial lease cases.
5. **Landlord and Tenant: Property: Proof: Liability.** All that is required under the Disposition of Personal Property Landlord and Tenant Act is evidence that would lead a prudent person to believe the property belonged to the requesting party. The landlord need not know for certain that the party requesting the personal property owns it in order to be relieved from liability.
6. **Actions: Parties.** In order for a party to be indispensable or necessary, the threshold determination that must be made is whether the party has an interest in the subject matter of the controversy.

7. **Landlord and Tenant: Property: Conversion.** The remedial provisions within the Disposition of Personal Property Landlord and Tenant Act are rooted in the theories of conversion by seeking to restore the status quo when a landlord improperly disposes of or withholds the property of a former tenant.
8. **Landlord and Tenant: Property: Damages: Words and Phrases.** The phrase "value of the personal property" in its relation to "actual damages" is the fair market value of the property at the time the tenant's property is improperly detained by the landlord.
9. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
10. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.
11. **Attorney Fees: Records.** An award of attorney fees involves consideration of such factors as the nature of the case, the services performed and results obtained, the length of time required for preparation and presentation of the case, the customary charges of the bar, and general equities of the case. If the contents of the record show the allowed fee not to be unreasonable, then that fee would not be untenable or an abuse of discretion.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed.

John C. Chatelain, of Chatelain & Maynard, for appellants.

Willow T. Head, of Law Offices of Willow T. Head, P.C., L.L.O., for appellee.

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

Freudenberg, J.

I. SUMMARY OF CASE

This case involves a dispute between a landlord and a tenant over the disposition of personal property. A former tenant, Samuel Pan, sued his landlord, IOC Realty Specialist Inc., and

its sole shareholder, Bernard M. Tompkins, when the landlord refused to return the tenant's personal property that remained on the leased premises. After a bench trial, a judgment was entered against IOC Realty Specialist and Tompkins for the wrongful retention of property pursuant to the Disposition of Personal Property Landlord and Tenant Act (the Act).[1] The district court held that IOC Realty Specialist and Tompkins violated the Act by knowingly retaining personal property that belonged to Pan and awarded Pan damages and attorney fees. We affirm.

II. FACTS

IOC Realty Specialist is a corporation that deals in real estate and property management. IOC Realty Specialist is owned by its sole shareholder and licensed real estate broker, Tompkins (collectively IOC). For approximately 20 years, Tompkins, by and through IOC Realty Specialist, has managed the leased premises at issue in Omaha, Nebraska, for its owners, Leon and Mary Kleinschmit. The Kleinschmits or their corporation, Millard Electronics, Inc., were consistently listed as the "lessor" on each lease signed concerning the subject property.

In 2007, Pan purchased a daycare business which included an assignment of a lease at a commercial property owned by the Kleinschmits. IOC facilitated this assignment as the Kleinschmits' real estate broker. The leasehold was assigned in October 2007, designating Pan and his business partner, Mary Chol, as the new tenants on the assignment agreement and lease documentation. In 2007, Chol left the business arrangement with Pan. However, Pan's daycare business continued to lease the property on a month-to-month basis until June 2014.

In June 2014, Pan negotiated with Ci Nuer Ben America (CNBA), a Nebraska corporation, for the purchase of Pan's

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[1] Neb. Rev. Stat. §§ 69-2301 to 69-2314 (Reissue 2009 & Cum. Supp. 2016).

daycare business and all of Pan's personal property on the leased premises. The personal property included various children's toys, sleeping mats, appliances, a wooden fence, a storage shed, and outside playsets embedded in concrete at the back of the building. Pan advised IOC of his agreement with CNBA for the purchase of Pan's daycare business, including all of his personal property on the leased premises. IOC met with the owner of CNBA, James Panoam, in July and signed a new lease to begin CNBA's tenancy of the property on August 1.

Soon thereafter, CNBA paid rent for the month of August, but failed to make any further rent payments. Additionally, Pan never received any payment from CNBA under the terms of their agreement and, as a consequence, Pan never delivered the keys to the lease premises to CNBA.

Pan advised IOC in August 2014 that CNBA never paid the contract price for the personal property on the leased premises. Pan repeatedly attempted to recover his property through December. Pan called IOC and visited the leased property in an effort to retrieve the personal property at issue, but found that the locks had been changed.

Pan and IOC spoke both over the telephone and in person regarding the disposition of the property. At one point, IOC allowed Pan to access the leased property to recover some of his belongings. However, IOC did not allow Pan to retrieve the remainder of his property after further requests from Pan to do so.

After 3 consecutive months (September through November 2014) of nonpayment of rent, IOC evicted CNBA and sought a new lessee. In an effort to mitigate damages and relet the building, IOC had several personal property items subject to the agreement between Pan and CNBA moved to a warehouse that IOC managed for Millard Electronics.

Pan retained an attorney who sent a letter to IOC requesting that Pan's property be returned. IOC stated it was concerned about future property disputes between Pan and CNBA. Therefore, IOC requested that Pan provide a statement from

CNBA waiving its claim to the property. On December 26, 2014, Pan provided IOC an affidavit from Panoam, identifying himself as president of CNBA, and indicating that Pan owned the property. IOC refused to return the property and requested a notarized corporate resolution, reasoning that the initial affidavit was insufficient to bind CNBA. On January 12, 2015, Pan provided a second statement from Panoam as "President and Sole Shareholder d/b/a [CNBA]" containing a list of personal property and stating that CNBA did not have any ownership in the personal property on the leased premises. However, IOC again refused to return the personal property, because it did not receive a corporate resolution as requested.

In January 2015, IOC entered into a new lease with another company to operate a daycare. Some of the disputed property was considered by IOC too large to remove and remained on the leased premises. IOC permitted the new daycare to utilize the property.

IOC did not request storage fees from Pan during any of their business discussions regarding the property. IOC first requested storage fees when it filed a counterclaim for such payment in its answer to Pan's complaint.

In June 2015, IOC mailed correspondence to Pan stating a willingness to release the subject personal property if Pan would provide a "'Transfer or Assignment and Indemnification,'" requesting that Pan indemnify IOC from claims by CNBA. Pan refused to agree to indemnify IOC and subsequently filed suit for recovery of the property, damages for IOC's retention of the property, and attorney fees. IOC denied that Pan was entitled to the property and filed a counterclaim for storage fees incurred.

1. Exhibits 17 and 32 and Reasonable Belief of Ownership

During trial, two affidavits were admitted into evidence over hearsay objections. The first, exhibit 17, was a letter authored by Pan's attorney which included one of the

above-mentioned affidavits from Panoam doing business as CNBA. The affidavit asserted that the property did not belong to CNBA, but, rather, it belonged to Pan. The court admitted the exhibit, reasoning that the exhibit was being offered as a showing by Pan that he complied with IOC's demand for a statement from CNBA disavowing its ownership in the subject personal property.

In a similar fashion, Pan offered exhibit 32, the second affidavit by Panoam stating that the personal property located at the subject leased premises did not belong to CNBA. The court again overruled the hearsay objection, finding Pan was not offering the exhibit for the truth of its contents. Further, the district court detailed that exhibit 32 would be utilized only to show that Pan complied with the requests made by IOC as opposed to proving that the property was owned by Pan.

2. Evidence of Damages and Fair Market Value

At trial, Pan opined on the value of the disputed personal property. Pan, although lacking several itemized and specific receipts of his expenditures on the subject personal property, asserted that the property was worth $27,611, according to an itemization in exhibit 14. In addition, Pan testified as to the accuracy of bank statements and copies of checks stemming from two accounts used in the operation of his daycare business. Pan also testified that these statements and checks corresponded to the property at issue. Generally, these bank statements and checks identify to whom funds were paid, but do not enumerate the specific purchases being made.

Contesting Pan's asserted valuation of the personal property, IOC presented testimony that the property was bug infested, dirty, and in poor condition following CNBA's eviction in November 2014. IOC did not present evidence as to a specific monetary value of the personal property. No expert

evidence was presented by either party regarding the fair market value of the property at issue.

3. District Court's Final Order

After the trial, the district court found that the Act applied. The court reasoned that by utilizing the phrase "*whether such premises are used as a dwelling unit or self-storage unit or facility or not*" in the definition of "tenant," the Act did not preclude commercial tenants from citing the Act in attempting to retrieve their personal property from landlords.

The district court found each defendant to be jointly and severally liable, because neither IOC Realty Specialist nor Tompkins made any distinction between themselves in the pleadings. Further, the court found IOC held itself out to be the owner, landlord, and lessor of the property in question and never took the position that it was simply an agent for the true owners of the property in any pleadings filed in the case. The court also noted that IOC's counterclaim for storage fees corroborated this finding.

Based on the evidence received at trial, the district court found that IOC retained Pan's property in violation of the Act. By finding that IOC withheld Pan's property from him while knowing that Pan's sale of the property had not been completed in August 2014, the court implicitly found IOC's asserted belief that the property belonged to CNBA was unreasonable.

The court relied on exhibit 14, as well as the testimony regarding the condition of the property, in order to determine damages in the case. Pan was awarded $10,000, or approximately 50 percent of Pan's personal valuation, in damages. The court notably excluded the storage shed and fence, finding that these items were permanently affixed to the real property and no longer personal property.

Also pursuant to the Act, the district court awarded Pan attorney fees. IOC's counterclaim for storage fees was dismissed. From this order, IOC appeals.

III. ASSIGNMENTS OF ERROR

IOC assigns that the district court erred in (1) failing to join necessary and indispensable parties, (2) admitting hearsay into evidence, (3) finding that Pan had ownership and a right to possession of the subject party, (4) entering a money judgment in a replevin action without determining that the property could not be returned, (5) determining the fair market value of the property at issue without sufficient evidence, (6) finding the Act applicable to a commercial lease, (7) finding that IOC violated the Act, and (8) denying IOC's claim for storage fees.

IV. STANDARD OF REVIEW

[1] Issues of statutory interpretation present a question of law, and when reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[2]

The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.[3] With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard of review.[4]

[2] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, and the Supreme Court will not disturb those findings unless they are clearly erroneous.[5] In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence,

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[2] See *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003).

[3] *Funk v. Lincoln-Lancaster Cty. Crime Stoppers*, 294 Neb. 715, 885 N.W.2d 1 (2016).

[4] *Id.*

[5] *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

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.[6]

When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.[7]

V. ANALYSIS

1. The Act or Replevin

Before addressing the parties' assignments of error, it is necessary to clarify the nature of the action tried to the court. Pan's complaint styled his action as one for replevin, but both parties address issues of the Act on appeal and tried the action largely as one seeking damages under the Act. Generally, the measure of damages under the Act are (1) money damages not exceeding fair market value of the personal property and (2) attorney fees,[8] while the object of a replevin action is to recover specific personal property.[9]

The parties tried the case as one seeking primarily monetary damages. On appeal, IOC does not assign error to the district court's order for an unpled remedy. Thus, while it would have been preferable for Pan to move to conform the pleadings to the evidence, Pan's failure to formally seek amendment is not dispositive.[10]

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 treated in all respects as if they had been raised in the

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[6] *Id.*

[7] *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017).

[8] § 69-2312.

[9] *Zelenka v. Pratte*, 300 Neb. 100, 912 N.W.2d 723 (2018).

[10] See *id.*

> 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.[11]

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

2. The Act Applies to Commercial Leases

This is the court's first opportunity to address the Act, which provides procedures that landlords are to follow when a former tenant abandons personal property.[12] It also provides remedies to tenants in the event they seek the return of property and the landlord improperly refuses.[13]

The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.[14] When statutory interpretation is one of first impression, the statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[15] The court, in discerning the meaning of a statute, should determine and give effect to the purpose and intent of the Legislature as ascertained from the entire

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[11] See *Zelenka v. Pratte, supra* note 9 (citing *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006)).

[12] See §§ 69-2303 through § 69-2307.

[13] See § 69-2312.

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

[15] *Dean v. State*, 288 Neb. 530, 849 N.W.2d 138 (2014).

language of the statute considered in its plain, ordinary, and popular sense.[16]

In construing statutes, legislative intention is to be determined from a general consideration of a whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and intent so deduced from the whole will prevail over that of a particular part considered separately.[17] When words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, or lead to some manifest absurdity or to some consequences which a court sees plainly could not have been intended, or to result manifestly against the general term, scope, and purpose of the law, then the court may apply the rules of construction to ascertain the meaning and intent of the lawgiver, and bring the whole statute into harmony if possible.[18]

IOC argues on appeal that the Act does not apply to commercial leases. Rather, IOC contends that by specifically identifying the terms "'dwelling unit'" and "'self-storage unit'" in certain sections of the Act, the Legislature intended for the statute to be read narrowly.[19] Further, IOC argues that the district court erred in construing § 69-2302(6) by reading a meaning into it that was not plainly there. We disagree.

IOC relies on the language of § 69-2302(1) and (6), defining landlord and tenant respectively, in making its argument. Section 69-2302(1), defining landlord, states, "Landlord [is defined as] the owner, lessor, or sublessor of . . . premises, *including self-service storage units or facilities*, for rent or his or her agent or successor in interest." (Emphasis supplied.) Section 69-2302(6) defines "[t]enant" to mean "a person entitled under a rental agreement to occupy any premises for rent

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[16] *Farmers Co-op v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017).

[17] *Lang v. Sanitary District*, 160 Neb. 754, 71 N.W.2d 608 (1955).

[18] *Dean v. State*, *supra* note 15.

[19] Brief for appellants at 37.

or storage uses to the exclusion of others *whether such premises are used as a dwelling unit or self-service storage unit or facility or not*." (Emphasis supplied.)

[3] This court has held that the word "include" preceding a list does not indicate an exclusive list absent other language showing a contrary intent.[20] Thus, the identification of "storage units or facilities" within definition of "landlord" under § 69-2302(1) does not itself indicate a limitation of the Act to self-storage units and dwellings. Rather, the inclusion of these two types of facilities would indicate a nonexclusive list of example applications. Therefore, the Legislature's specific identification of storage units and facilities in this section would not create such a limiting effect as to indicate that the Act applies only to leases of that nature.

Regarding the definition of "tenant," the phrase "whether or not," as found in the definition of "tenant" under § 69-2302(6), is plainly defined to indicate that it is not important which of the possibilities are true.[21] In addition, a reading of subsection (6) of § 69-2302, when considering the rest of the statute, specifically in conjunction with the definition of "landlord" at subsection (1), would not produce such a narrowed scope as IOC suggests. Rather, a plain reading of this definitional section would indicate that the use of the premises or nature of the lease would not have an effect on its applicability.[22] Moreover, the definition of "tenant" also broadly includes the language "any premises for rent or storage."[23]

[4] We find that the scope of the Act is not so narrowly confined as to exclude commercial leases. As such, the Act applies in commercial lease cases.

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[20] *Timberlake v. Douglas County*, 291 Neb. 387, 865 N.W.2d 788 (2015).

[21] See "Whether or not," Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english (last visited Sept. 24, 2018).

[22] See § 69-2302(1) and (6).

[23] § 69-2302(6).

3. Violation of the Act

The district court found that, in violation of the Act, IOC, as the landlord of the leased premises, wrongfully retained Pan's personal property by failing to return it to Pan upon his request. IOC argues on appeal that (1) IOC was not the "landlord" under § 69-2302(1), (2) Pan was not the "former tenant" under § 69-2307(1), and (3) § 69-2302(4) of the Act requires a "[r]easonable belief" that the personal property belonged to the requesting party before the landlord is required to return the property to that party. Lastly, IOC argues that the Act requires the payment of storage fees to IOC.

Under § 69-2307(1):

> A landlord shall release personal property left on the vacated premises to the former tenant or to any person reasonably believed by the landlord to be the owner if such tenant or other person pays the reasonable costs of storage and advertising and takes possession of the property not later than the date specified in the notice for taking possession.

The purpose of § 69-2307(1) is to protect landlords from liability to owners of personal property when the landlord erroneously surrenders property to a party other than the true owner but who the landlord reasonably believed was the owner. Conversely, if the requesting party is not a former tenant or a person that the landlord reasonably believes owns the personal property, the landlord would not be protected from liability under § 69-2307(1).

Under § 69-2312, the Act plainly envisions a cause of action by a tenant for landlord violations of its provisions. Reading §§ 69-2307 and 69-2312 in conjunction, a landlord would not be required to relinquish property to any party that is either (1) not a former tenant or (2) not a person who is reasonably believed by the landlord to be the owner of the personal property at issue. But a landlord would be required to release the property to a former tenant or a person claiming ownership of the personal property, so long as the landlord, under an

objective, prudent person standard, should reasonably believe the requesting party is the owner of the personal property in his possession *and* that person pays reasonable storage fees to the extent required to be paid by the Act.

(a) Landlord

Addressing IOC's first contention that it is not the landlord under the Act, the definition of a landlord under § 69-2302(1) explicitly provides that the landlord is the "owner, lessor, or sublessor . . . or his or her agent or successor in interest." This definition clearly includes agents under its scope. Tompkins admitted in his testimony at trial that he, as well as his company, IOC Realty Specialist, served as the Kleinschmits' agent for the lease of the property for years. Consequently, IOC is considered the landlord of the property for the purposes of applying this section of the Act.

(b) Former Tenant

IOC contends that CNBA, and not Pan, was the "former tenant" for the purposes of applying § 69-2307(1) of the Act. The definition of tenant under the Act, in pertinent part, broadly defines tenant to include "person[s] entitled under a rental agreement to occupy any premises for rent or storage uses to the exclusion of others."[24] Pan falls under this definition, because he rented the leased premises and operated his daycare business on the property for several years.

But § 69-2307(1) specifies that the landlord shall release personal property to the *former* tenant. Giving the word "former" its plain and ordinary meaning, as Nebraska law requires, "former" is defined as having been previously or "coming before in time."[25] There is no reason to narrowly construe the term "former tenant" in § 69-2307(1), as IOC suggests. Rather, "former tenant" includes any past tenant to whom the property

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[24] § 69-2302(6).

[25] Merriam Webster's Collegiate Dictionary 459 (10th ed. 2001).

may have belonged. Under such an analysis, the district court did not err in finding that Pan was a former tenant under the Act and that IOC was required to release the personal property to Pan.

(c) Reasonable Belief That Pan Was Owner of Property

IOC also asserts that it lacked a reasonable belief that Pan was the owner of the property. IOC could be relieved of liability if it did not have a reasonable belief that Pan was the true owner of the personal property.[26]

The Act defines reasonable belief at § 69-2302(4):

> Reasonable belief shall mean the knowledge or belief a prudent person should have without making an investigation, including any investigation of public records, except that when the landlord has specific information indicating that such an investigation would more probably than not reveal pertinent information and the cost of such an investigation would be reasonable in relation to the probable value of the personal property involved, reasonable belief shall include the actual knowledge or belief a prudent person would have if such investigation were made.

Under this definition, IOC's imputed reasonable belief would include the actual knowledge or belief that "a prudent person" would have if an investigation were made. It is an objective rather than a subjective standard.

Although Pan did initially inform Tompkins that Pan entered into an agreement with CNBA to sell his personal property, Tompkins was subsequently told on a number of occasions that Pan was the owner of this property. Pan sent numerous letters to Tompkins, including various affidavits and statements from CNBA stating that CNBA had no ownership right to the property. Tompkins admitted in his testimony

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[26] See § 69-2307(1).

at trial and in response letters to Pan's attorney submitted as evidence at trial that he had received Pan's letters and CNBA's statements.

[5] All that is required under the Act is evidence that would lead a prudent person to believe the property belonged to the requesting party. The landlord need not know for certain that the party requesting the personal property owns it in order to be relieved from liability. IOC demanded more than what is required under the Act. IOC specifically requested a notarized affidavit and corporate resolution before it would agree to return Pan's personal property. Although Pan sent multiple affidavits stating that CNBA disclaimed ownership in the property, IOC continued to refuse to return the property.

The district court implicitly found IOC's belief the property belonged to CNBA to be unreasonable by determining that IOC withheld Pan's personal property while knowing that Pan's purchase agreement had not been completed in August 2014. In making this determination, the district court relied on correspondence between Pan and Tompkins in the aggregate. In the parties' correspondence, Tompkins specifically conditioned the return of the property upon his receipt of written statements from CNBA disclaiming its ownership interest in the personal property at issue. The district court additionally stated that it relied on testimony disclosing the fact that Tompkins spoke to Pan regarding the failed sale of his business to CNBA in making its determination of property ownership.

IOC argues on appeal that the district court improperly relied upon inadmissible hearsay when it received into evidence certain attachments to the correspondence between Pan and Tompkins, specifically, exhibits 17 and 32, which were identified as affidavits from CNBA stating that it disclaimed any ownership in the personal property. We find no merit to IOC's argument that the court improperly relied on hearsay in reaching its conclusion.

Hearsay is a statement offered in evidence to prove the truth of the matter asserted.[27] If an out-of-court statement is not offered for proving the truth of the facts asserted, it is not hearsay.[28] The district court admitted exhibits 17 and 32 for the purpose of proving that Pan complied with IOC's requests for proof that CNBA did not claim an ownership interest in the property. Regardless of the truth of the matter asserted in those exhibits, they form part of the surrounding circumstances that would lead a prudent person to believe that Pan was the owner of the personal property at issue.

The court also relied on testimony disclosing the fact that Tompkins spoke to Pan regarding the failed sale of his business to CNBA. Consequently, the district court found that IOC was aware that the property belonged to Pan as a result of the failed sale. Other relevant and properly admitted evidence included testimony from both Pan and Tompkins indicating that IOC at one point allowed Pan onto the premises to take some of the personal property, as well as an admission within IOC's counterclaim stating Pan *owns* or claims ownership in the property.

The district court did not clearly err in finding that Pan was the owner of the personal property and, further, in its implicit finding that IOC's belief the property belonged to CNBA was unreasonable. As such, the court did not clearly err when it held that IOC violated the Act by refusing to return Pan's property upon his request.

(d) Storage Fees

IOC argues that it did not violate the Act, because § 69-2312 requires the payment of reasonable storage fees when a landlord retains the personal property of a tenant. While this may be true, pursuant to § 69-2311(3), a demand for storage fees by a landlord must be in writing and mailed to the tenant

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[27] Neb. Rev. Stat. § 27-801(3) (Reissue 2016).

[28] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

within 5 days of the landlord's receipt of the tenant's request for the return of personal property.

In this case, there is no evidence that IOC requested storage fees before the claim was filed against it. Rather, the first time storage fees were requested was in the counterclaim asserted in IOC's answer. IOC did not request storage fees within the timeframe required by the Act. Accordingly, this court affirms the district court's judgment rejecting IOC's claim for storage fees.

4. Failure to Join Indispensable Parties

IOC assigns as error on appeal that the district court erred in failing to add Chol; CNBA; and the Kleinschmits, doing business as Millard Electronics, as necessary and indispensable parties. This argument has no merit.

The code of civil procedure provides that if a determination of the controversy cannot be had without the presence of the parties, the court must order them to be brought into the litigation.[29] Neb. Rev. Stat. § 25-323 (Reissue 2016) codifies the concept of compulsory joinder in Nebraska, stating in relevant part:

> The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

The first clause of this statute makes the inclusion of necessary parties discretionary when a controversy of interest to them is severable from their rights.[30] However, the second clause

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[29] *Koch v. Koch*, 226 Neb. 305, 411 N.W.2d 319 (1987).

[30] *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017).

mandates the district court to order indispensable parties be brought into the controversy.[31]

[6] In Nebraska, it has long been held that an indispensable party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.[32] Further, based on the distinction of parties in § 25-323, we have found that all persons interested in a contract or property involved in a suit to be necessary parties, and all persons whose interests therein may be affected by the decree in equity to be indispensable parties.[33] As such, in order for a party to be indispensable or necessary, the threshold determination that must be made is whether the party has an interest in the subject matter of the controversy.

Here, none of the listed parties can be considered necessary or indispensable, because none of them claim or have a property interest in the subject matter of this controversy. Chol; CNBA; and the Kleinschmits, doing business as Millard Electronics, never asserted any ownership interest over the property at issue. In fact, CNBA made statements disclaiming ownership. Further, IOC acknowledged in its appellate brief that it received multiple statements from Panoam indicating that Pan was the sole owner of the property. Accordingly, we find that Chol; CNBA; and the Kleinschmits, doing business as Millard Electronics, are not necessary or indispensable parties to this action, because they do not assert any interest in the personal property involved in this dispute.

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[31] *Id.*

[32] *Id*. See, also, *American Nat. Bank v. Medved*, 281 Neb. 799, 801 N.W.2d 230 (2011); *Koch v. Koch, supra* note 29; *Johnson v. Mays*, 216 Neb. 890, 346 N.W.2d 401 (1984).

[33] *Midwest Renewable Energy v. American Engr. Testing, supra* note 30.

5. Appropriate Remedy and Damages

IOC asserts that there was insufficient evidence to support the court's award of damages and attorney fees under the Act. The Act, at § 69-2312, provides in pertinent part:

> Any landlord who retains personal property in violation of the . . . Act shall be liable to the tenant in a civil action for:
>
> (1) Actual damages not to exceed the value of the personal property if such property is not surrendered: (a) Within a reasonable time after the tenant requests surrender of the personal property . . . and
>
> (2) Reasonable attorney's fees and costs.

Because we have held that the Act applies in this case and that IOC violated the Act by unreasonably withholding Pan's personal property, Pan is entitled to actual damages for the value of his property, as well as reasonable attorney fees.

[7,8] IOC asserts, specifically, that Pan failed to prove with a sufficient degree of certainty what the fair market value of his property was. We observe that in conversion actions, the fair market value of the property for the purposes of actual damages is calculated on the date of the unlawful taking, with interest accruing thereon.[34] Further, "fair market value" is defined as the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction.[35] While this is not a conversion action, the remedial provisions within the Act are rooted in the theories of conversion by seeking to restore the status quo when a landlord improperly disposes of or withholds the property of a former tenant. In accordance with these holdings and the plain language of § 69-2312(1), we find that the phrase "value of the

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[34] See NJI2d Civ. 4.27. See, also, *Zelenka v. Pratte*, *supra* note 9; *Hickman-Williams Agency v. Haney*, 152 Neb. 219, 40 N.W.2d 813 (1950); *Oak Creek Valley Bank v. Hudkins*, 115 Neb. 628, 214 N.W. 68 (1927).

[35] Black's Law Dictionary 1785 (10th ed. 2014).

personal property" in its relation to "[a]ctual damages" is the fair market value of the property at the time the tenant's property is improperly detained by the landlord.

[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.[36] Further, the amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.[37] With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard of review.[38]

This court has long held that damages, like any other element of the plaintiff's case, must be pled and proved and that the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages.[39] Evidence of damages must be sufficient to enable the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness.[40] Proof of damages to a mathematical certainty is not required; however, a plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural.[41]

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[36] *Mays v. Midnite Dreams, supra* note 5.

[37] *Funk v. Lincoln-Lancaster Cty. Crime Stoppers, supra* note 3.

[38] *Id.*

[39] See, *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011); *Bass v. Boetel & Co.*, 191 Neb. 733, 217 N.W.2d 804 (1974).

[40] *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, supra* note 7; *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012); *Bedore v. Ranch Oil Co., supra* note 39; *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000).

[41] *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, supra* note 7.

IOC argues that there was insufficient evidence presented on the issue of fair market value to justify the district court's judgment awarding Pan $10,000 in actual damages, or approximately 50 percent of Pan's evaluation of the property. We disagree.

At trial, several documents were received into evidence related to actual damages. These documents included bank statements and receipts for the personal property at issue, as well as an exhibit that contained an itemization of the property and Pan's opinion as to its value. The itemization, along with the bank statements and receipts, including any oral testimony relevant to these documents, were not objected to by IOC.

It is well established in Nebraska that the opinion of a personal property owner is competent evidence of its value, solely because of his or her status as owner.[42] Further, additional evidence was presented at trial to bolster the district court's judgment on damages. This evidence included testimony from Pan discussing the purchase price of $30,000 pursuant to his purchase agreement with CNBA and testimony from witnesses from both sides opining as to the condition of the personal property.

In reviewing the district court's award of $10,000 in damages, and considering the evidence in the light most favorable to the successful party while resolving evidentiary conflicts in favor of that party, we find that the district court's award is not clearly erroneous. As a result, we affirm the district court's valuation of damages.

[10,11] Concerning attorney fees, the Act explicitly awards a tenant reasonable attorney fees upon improper rejection of a request for the return of personal property by a landlord.[43] In Nebraska, we have held that when an attorney fee

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[42] See *Peck v. Masonic Manor Apartment Hotel*, 203 Neb. 308, 278 N.W.2d 589 (1979).

[43] § 69-2312(2).

is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.[44] 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.[45] An award of attorney fees involves consideration of such factors as the nature of the case, the services performed and results obtained, the length of time required for preparation and presentation of the case, the customary charges of the bar, and general equities of the case.[46] If the contents of the record show the allowed fee not to be unreasonable, then that fee would not be untenable or an abuse of discretion.[47]

In this case, Pan produced evidence of his attorney fees by way of an affidavit by his attorney. This evidence was neither objected to nor argued against at the trial court level. The affidavit unambiguously details $14,151.49 in fees pursuant to the litigation of the case between Pan and IOC. Therefore, we find that the district court was within its discretion in awarding Pan $10,000 in attorney fees.

VI. CONCLUSION

For the reasons stated above, the lower court's decision in this case is affirmed.

Affirmed.

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[44] *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, supra* note 7.

[45] *Id.*

[46] *Id.*

[47] See *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014) (citing *Boamah-Wiafe v. Rashleigh*, 9 Neb. App. 503, 614 N.W.2d 778 (2000)).

Brick Development, appellant, v. CNBT II LLC and The Cattle National Bank & Trust Co., appellees.

918 N.W.2d 824

Filed October 12, 2018. No. S-17-865.

1. **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.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Real Estate: Leases.** Neb. Rev. Stat. § 36-105 (Reissue 2016) requires a signature by the party to be charged by the writing.
4. **Landlord and Tenant: Assignments.** A lessee, during his occupancy of the demised premises, holds both by privity of estate and of contract. Assignment of the lease by the lessee divests him of this privity of estate and transfers it to his assignee, who thereafter holds in privity of estate with the lessor.
5. **Landlord and Tenant: Assignments: Breach of Contract.** Privity of contract is not transmitted to the purchaser of the leasehold by an assignment of the lease alone; for the express covenants of the lessee contained in the lease will remain, during the continuance of the terms, obligatory upon the lessee. These obligations extend to breaches of covenant which have occurred after the assignment, and the lessee is not relieved therefrom by the mere acceptance of rent by the lessor from the person to whom such assignment has been made.
6. **Landlord and Tenant: Leases.** A landlord is not necessarily entitled to enforce all of the terms of a lease merely because there is privity of

estate; rather, such privity only gives the landlord the right to enforce covenants that run with the land.

7. **Contracts: Real Estate: Words and Phrases.** Generally, the three essential requirements for a covenant of any type to run with land are (1) the grantor and the grantee intend that the covenant run with the land, as determined from the instruments of record; (2) the covenant must "touch and concern" the land with which it runs; and (3) the party claiming the benefit of the covenant and the party who bears the burden of the covenant must be in privity of estate.
8. **Contracts: Real Estate: Landlord and Tenant: Liability.** The covenant to pay rent runs with the land, and a party in privity of estate with the landlord is directly liable to him for the installments accruing while that relation exists.
9. **Contracts: Real Estate: Liability.** Liability for covenants which run with the land cease with cessation of possession.
10. **Real Estate: Leases.** An express assumption of a real property lease requires specific affirmation by the assignee to bind itself to the lease obligations.
11. **Estoppel.** The doctrine of equitable estoppel is applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he or she has acquiesced or of which he or she has accepted any benefit.
12. **Contracts: Fraud: Estoppel.** Only where a party to a written contract within the statute of frauds induces another to waive some provision upon which he is entitled to insist and thereby change his position to his disadvantage because of that party's inducement will the inducing party be estopped to claim that such oral modification is invalid because not in writing.
13. **Contracts: Fraud.** Sophisticated business entities are charged with knowledge of the statute of frauds and cannot reasonably rely on oral statements or conduct.

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

Randall L. Goyette and Phoebe L. Gydesen, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P, for appellant.

John M. Guthery, Haleigh B. Carlson, and Derek A. Aldridge, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

An owner of one property seeks to bind a purchaser of another property to the terms of a 50-year lease agreement entered into between different parties. Because there is no privity of contract and the purchaser did not expressly assume the lease, the statute of frauds bars the owner's claim for breach of contract. We further conclude that equitable estoppel does not prevent the purchaser from raising the statute of frauds as a defense and that there is no genuine issue of material fact. We affirm.

BACKGROUND

Parking Lot Lease

In 1978, D. William Smith and Joyce Smith owned a parking lot located on N Street in Lincoln, Nebraska. Two Twenty Enterprises, L.L.C. (TTE), owned an office building located on 17th Street west of the parking lot. The Smiths, as lessors, entered into a lease agreement with TTE, as lessee, to lease the parking lot to TTE (parking lot lease). The original term of the lease was for 50 years.

One section of the parking lot lease allowed the lessee to encumber the leasehold interest by mortgage or other proper instrument. The lease provided in part:

> The execution of any such mortgage or other instrument, or the foreclosure thereof, or any sale thereunder, . . . shall not be held as a violation of the terms or conditions hereof, or as an assumption by the holder of such indebtedness of the obligations hereof. No such encumbrance, foreclosure, conveyance, or exercise of right shall relieve LESSEE of its liability hereunder.

The parking lot lease contained several other sections pertinent to this appeal. One section authorized assignment of

the lease. A different section set forth a right of first refusal in the event that either the lessor or the lessee decided to sell its property or the lessee wished to transfer its interest in the leasehold. And under a rent escalation clause, the rent was to be adjusted in the 11th year and every 5th year thereafter.

Lease With DAS

On May 24, 2004, TTE entered into a lease with the Nebraska Department of Administrative Services (DAS) on behalf of a tenant. TTE agreed to lease space at the office building and to provide parking stalls in the parking lot for use by the tenant's clients. The lease was set to end on August 30, 2015.

Purchase and Assignment

In 2006, Raasch Enterprises, Inc. (Raasch), purchased the office building from TTE. The purchase was financed by a loan from The Cattle National Bank & Trust Co. (the Bank), and Raasch executed a deed of trust to secure the loan. The deed of trust, signed only by Raasch, stated that Raasch "irrevocably assigns, grants and conveys" to the Bank "all the right, title and interest" in existing or future leases "for the use and occupancy of the Property." The deed of trust identified the "Property" as the office building. The deed of trust did not contain any language concerning the parking lot parking property; nor did it identify the parking lot lease as an encumbrance.

On the same day, TTE assigned the parking lot lease to Raasch. Raasch accepted the assignment and assumed the liabilities and duties to perform the terms and conditions of the parking lot lease. The Smiths gave their written consent to the assignment.

Default and Sale of Office Building

After Raasch failed to timely pay indebtedness secured by the deed of trust, the Bank issued a notice of default. As a

result of Raasch's default, a trustee's sale was arranged. The published notice of trustee's sale stated that the property "will be sold subject to any and all . . . leases, subleases, assignments, amendments, and other rights and interests, if any, which are specifically announced by the Trustee at the sale." According to the sale announcement, the real estate would be subject to the parking lot lease, the 2006 assignment of lease, and the lease between TTE and DAS.

CNBT II LLC (CNBT), whose sole member is the Bank, purchased the office building at the trustee's sale. In February 2012, the Bank filed a trustee's deed conveying the office building to CNBT. In conformity with the sale announcement, the deed stated that the property transfer was "subject to" the parking lot lease along with the 2006 assignment of the lease and the lease between TTE and DAS. The deed further stated that the transfer was subject to those leases "provided that the Grantee is not assuming any liabilities, and shall not be liable, for any act or omission of the landlord or any other party under, without limitation, any of the Leases." The president of the Bank signed the deed. CNBT used the parking lot and paid rent to the Smiths.

Brick Becomes Lessor

In December 2012, the Smiths conveyed to Brick Development (Brick), via a quitclaim deed, the parking lot. Brick is the successor in interest to the Smiths as lessor under the parking lot lease.

Proposed Sale of Office Building

In 2013, CNBT received an offer to purchase the office building. It gave notice to Brick of the offer "[p]ursuant to" the right of first refusal interest contained in the parking lot lease. The notice stated, "Per the lease you have 30-days from the date of this notice to notify us of your intent to purchase the Property on the same terms and conditions as the Buyer . . . ."

Brick notified CNBT of a concern. Brick stated that it had "not been able to find any language in the Real Estate Purchase Agreement which refers to the Buyer's assumption of the existing lease on the parking lot . . . which language [Brick] would have expected to see as a Buyer's Condition of Closing." CNBT's president responded: "I believe the terms of the previous lease on the parking lot carry over to . . . the new owner. If you would like us to get a written agreement to this affect [sic] as a condition of closing we can do this."

Brick later sent a letter to CNBT along with a proposed assignment of lease between CNBT and the buyer. The proposed assignment had been signed by Brick, as lessor, giving its consent, and Brick requested that CNBT sign it. The letter further stated, "In the event the proposed sale does not close, then we will of course continue to look to CNBT . . . as successor-in-interest from Raasch . . . to fulfill the obligations of the [parking lot lease]." Ultimately, the sale did not occur.

Other Communications Between Brick and CNBT

In January 2014, Brick sent a letter to the Bank and CNBT "to both reconcile unpaid previously scheduled monthly rental increases and inform [them] of the new monthly lease payment for the five year period of September of 2013 through September of 2018 for the parking lot." The letter pointed out that under the parking lot lease, the monthly lease payment was scheduled to increase every 5 years beginning in 1988, but that the increase to begin in September 2008 had not been implemented. Brick also sent an email to counsel for CNBT and the Bank. It stated, in part, "[W]e'd like to get something on record that your client has assumed, or has accepted an assignment of, the [parking lot lease]."

In February 2014, Brick filed with the register of deeds a notice of lease and right of first refusal. The document contained Brick's signature only. The purpose of the notice was to

confirm that the parking lot lease "is currently in full force and effect, and has not been modified other than by conveyance of the interest of the original Lessor to the current owners of the Property, and from the original Lessee . . . to CNBT . . . , the current Lessee and owner of [the office building]."

On August 7, 2015, CNBT sent Brick a notice of termination and cancellation of the parking lot lease effective September 10. There is no dispute that CNBT paid rent to Brick through September 10.

Pleadings

Brick sued CNBT and the Bank. Brick alleged that as of February 2012, CNBT assumed the parking lot lease as lessee. According to Brick, CNBT had paid rent and taxes, had maintained the property, and had complied with the right of first refusal terms of the lease. Brick claimed that CNBT's actions were "tantamount to and act as an assumption of the [lease]." Brick also alleged that CNBT was equitably estopped from asserting that it was not contractually bound as the lessee because CNBT acquiesced to or accepted a benefit under the lease.

CNBT responded that it did not receive an assignment or transfer of interest by Raasch and that it did not assume the parking lot lease. CNBT and the Bank both alleged that the conveyance stated CNBT was not assuming any liabilities under the lease. They also both alleged that Brick's claims were barred by the statute of frauds, including Neb. Rev. Stat. §§ 36-105 and 36-202 (Reissue 2016). CNBT claimed that its use of the parking lot property was on a month-to-month basis from the time that it became the owner of the office building.

CNBT, the Bank, and Brick each moved for summary judgment.

District Court's Decision

In resolving the motions for summary judgment, the district court first considered whether the trustee's deed to CNBT

satisfied the statute of frauds. It noted that neither Brick nor CNBT was a party to the trustee's deed and that it was signed by the Bank only. The court determined that "the documents do not show CNBT's assumption of the obligations of the [parking lot lease]."

Next, the court addressed whether CNBT was estopped from asserting the statute of frauds defense. The court found no evidence that CNBT induced Brick to believe that CNBT had assumed future obligations of the parking lot lease. It found that Brick qualified as a sophisticated business entity and that sophisticated business entities are charged with knowledge of the statute of frauds. The court determined that any reliance by Brick that CNBT had assumed the obligations under the lease was unreasonable. The court concluded that CNBT's liability ceased with its cessation of possession and that thus, it was not liable for its obligations as a tenant beyond September 10, 2015. The court sustained CNBT's and the Bank's motions for summary judgment.

Brick appealed, and we moved the case to our docket.[1]

ASSIGNMENTS OF ERROR

Brick assigns two errors. First, Brick alleges that the court erred in denying its motion for summary judgment for several reasons. Second, Brick claims that the court erred in granting CNBT's and the Bank's motions for summary judgment.

STANDARD OF REVIEW

[1,2] 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

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

[2] *Jordan v. LSF8 Master Participation Trust*, 300 Neb. 523, 915 N.W.2d 399 (2018).

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]

ANALYSIS

Statute of Frauds

Brick argues that the district court erred by concluding that CNBT and the Bank did not assume the parking lot lease and that the statute of frauds precluded the lease's enforcement. Under Nebraska's statute of frauds, "Every contract for the leasing for a longer period than one year . . . shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease . . . is to be made."[4]

In this case, a relationship complying with the statute of frauds developed a new wrinkle: The 50-year parking lot lease between the Smiths and TTE complied with the statute of frauds. So, too, did TTE's assignment of the lease to Raasch. And at the time of the assignment, TTE also conveyed the office building to Raasch. Thus, for approximately 6 years, Raasch owned the office building and, as assignee of the parking lot lease, was entitled to use the nearby parking lot. The statute of frauds problem crept in with Raasch's executing the deed of trust to secure the loan from the Bank and the subsequent trustee's sale of the property.

[3] Section 36-105 requires a signature by the party to be charged by the writing.[5] Brick seeks to have CNBT bound by the parking lot lease. But as Brick forthrightly conceded at oral argument, there is no direct writing between Brick and CNBT that is also signed by CNBT. And neither the deed of trust nor the trustee's deed is signed by CNBT.

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[3] *Id.*

[4] § 36-105.

[5] See *Walters v. Sporer*, 298 Neb. 536, 905 N.W.2d 70 (2017).

Brick directs us to the trustee's deed, which stated that the property was "subject to" the parking lot lease. However, the deed of trust contains no reference to the parking lot property or to the parking lot lease. A deed of trust is a mortgage.[6] In the context of mortgages, we have stated that a mortgage foreclosure sale transfers to the purchaser every right and interest of all parties to the foreclosure suit in the mortgaged property.[7] It follows then that a trustee's sale transfers to the purchaser every right and interest of the parties to the property described in the deed of trust. And because the deed of trust concerned the office building only and not the parking lot, we reject Brick's contention that the parking lot lease fell within the deed of trust's clause where Raasch assigned to the Bank "all the right, title and interest in . . . existing or future leases . . . for the use and occupancy of the Property."

We briefly digress to distinguish *Walters v. Sporer*.[8] In that case, the original grantor sought to enforce a right of first refusal contained in a warranty deed. We stated that the right of first refusal was within Neb. Rev. Stat. § 36-103 (Reissue 2016) of the statute of frauds, which required a signature by the party to be charged by the writing. But we determined that acceptance of the deed satisfied the statute of frauds. We reasoned that "[t]o hold otherwise would be a misapplication of the statute of frauds by inequitably allowing the [original grantees] to retain the benefit of the deed while escaping a clear statement of intent on its face."[9] But in the instant case, there is no such clear statement of intent. The deed of trust did not specifically mention the parking lot lease. Thus, there is no inequity in not binding the grantee to the terms of the lease.

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[6] *Fiske v. Mayhew*, 90 Neb. 196, 133 N.W. 195 (1911).

[7] See *Clements v. Doak*, 140 Neb. 265, 299 N.W. 505 (1941).

[8] *Walters v. Sporer, supra* note 5.

[9] *Id.* at 558, 905 N.W.2d at 86.

In an attempt to circumvent the statute of frauds, Brick focuses on CNBT's actions. For over 3 years, CNBT made monthly rent payments for use of the parking lot, including rental increases called for in the parking lot lease. CNBT also reaped the benefits of the 2004 lease that TTE entered into with DAS and that expired on August 30, 2015. And CNBT complied with the right of first refusal language contained in the parking lot lease. Brick points to language in cases from other jurisdictions stating that possession plus paying rent gives rise to a presumption of an assignment sufficient to satisfy the statute of frauds.[10] But those jurisdictions also make clear that an assignee will be liable for covenants that run with the land only while in privity of estate.[11]

[4,5] A lease of real property implicates principles of both privity of contract and privity of estate. A lessee, during his occupancy of the demised premises, holds both by privity of estate and of contract. Assignment of the lease by the lessee divests him of this privity of estate and transfers it to his assignee, who thereafter holds in privity of estate with the lessor.[12] Privity of contract, however, is not transmitted to the purchaser of the leasehold by an assignment of the lease alone; for the express covenants of the lessee contained in the lease will remain, during the continuance of the terms, obligatory upon the lessee. These obligations extend to breaches of covenant which have occurred after the assignment, and the lessee is not relieved therefrom by the mere acceptance of rent by the lessor from the person to whom such assignment has been made.[13]

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[10] See, *Gateway I Group v. Park Ave. Physicians*, 62 A.D.3d 141, 877 N.Y.S.2d 95 (2009); *8182 Maryland Associates v. Sheehan*, 14 S.W.3d 576 (Mo. 2000); *Abbott v. Bob's U-Drive et al*, 222 Or. 147, 352 P.2d 598 (1960).

[11] See, *Beltrone Marital Trust v. Lavelle and Finn*, 22 A.D.3d 936, 803 N.Y.S.2d 211 (2005); *8182 Maryland Associates v. Sheehan, supra* note 10; *Abbott v. Bob's U-Drive et al, supra* note 10.

[12] *Mayer v. Dwiggins*, 114 Neb. 184, 206 N.W. 744 (1925).

[13] *Id.*

[6-9] If privity of estate is present, a party is typically liable only for covenants that run with the land. A landlord is not necessarily entitled to enforce all of the terms of a lease merely because there is privity of estate; rather, such privity only gives the landlord the right to enforce covenants that run with the land.[14] Generally, the three essential requirements for a covenant of any type to run with land are (1) the grantor and the grantee intend that the covenant run with the land, as determined from the instruments of record; (2) the covenant must "'touch and concern'" the land with which it runs; and (3) the party claiming the benefit of the covenant and the party who bears the burden of the covenant must be in privity of estate.[15] The covenant to pay rent runs with the land, and a party in privity of estate with the landlord is directly liable to him for the installments accruing while that relation exists.[16] Liability for covenants which run with the land cease with cessation of possession.[17]

[10] Privity of contract does not run with the land. Privity of contract is not transmitted to the purchaser of a leasehold.[18] Thus, unless a new tenant assumes the lease, the tenant will not be bound under privity of contract.[19] An express assumption of a real property lease requires specific affirmation by the assignee to bind itself to the lease obligations.[20] CNBT has not specifically stated, orally or in writing, that it agreed

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[14] See *Excel Willowbrook v. JP Morgan Chase Bank*, 758 F.3d 592 (5th Cir. 2014).

[15] *Regency Homes Assn. v. Egermayer*, 243 Neb. 286, 296, 498 N.W.2d 783, 789 (1993).

[16] *Hogg v. Reynolds*, 61 Neb. 758, 86 N.W. 479 (1901).

[17] See *Kelly v. Tri-Cities Broadcasting, Inc.*, 147 Cal. App. 3d 666, 195 Cal. Rptr. 303 (1983).

[18] See *Mayer v. Dwiggins, supra* note 12.

[19] See *Kelly v. Tri-Cities Broadcasting, Inc., supra* note 17.

[20] *Landlord v. Farmers & Merchants*, 14 Cal. App. 5th 992, 222 Cal. Rptr. 3d 435 (2017).

to be bound by the parking lot lease. Because CNBT did not expressly assume the lease, it is not bound by the obligations contained therein, other than covenants which run with the land during CNBT's occupancy. We conclude that paying rent while in possession is not an exception to the requirement under the statute of frauds that an assumption of a lease for a period greater than 1 year must be in writing.

Equitable Estoppel

[11] Brick assigns that the district court erred in determining that equitable estoppel did not apply. It contends that CNBT should be estopped from relying on the statute of frauds as a defense. The doctrine of equitable estoppel is applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he or she has acquiesced or of which he or she has accepted any benefit.[21] Brick contends that CNBT both acquiesced to and received benefits as a lessee under the parking lot lease agreement and should not now be allowed to disclaim it.

[12,13] Equitable estoppel does not apply under the circumstances. Only where a party to a written contract within the statute of frauds induces another to waive some provision upon which he is entitled to insist and thereby change his position to his disadvantage because of that party's inducement will the inducing party be estopped to claim that such oral modification is invalid because not in writing.[22] There is no evidence that CNBT induced Brick to believe that CNBT assumed the long-term obligations of the lease or that Brick changed its position to its disadvantage in reliance upon such a belief. Further, the district court found that Brick qualified as a sophisticated

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

[22] *Fast Ball Sports v. Metropolitan Entertainment*, 21 Neb. App. 1, 835 N.W.2d 782 (2013). See *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976).

business entity, and Brick does not challenge this finding on appeal. Sophisticated business entities are charged with knowledge of the statute of frauds and cannot reasonably rely on oral statements or conduct.[23] Because Brick was a sophisticated business entity, CNBT is not estopped from raising the statute of frauds as a defense.

No Genuine Issue

Finally, Brick argues that an issue of fact remained regarding whether CNBT and the Bank intended to assume the assignment of the parking lot lease by continuing to rent the parking lot and complying with all provisions of the lease agreement. But there is no genuine issue of material fact that CNBT never signed anything expressly assuming the obligations of the parking lot lease. Because the statute of frauds bars Brick's claims, CNBT's conduct and intent are irrelevant.

CONCLUSION

Because there is no privity of contract and CNBT did not expressly assume the lease, Brick's breach of contract claim is barred by the statute of frauds. We further conclude that CNBT is not estopped from raising the statute of frauds as a defense. And because there was no genuine issue of material fact, the district court did not err in granting summary judgment in favor of CNBT. We affirm.

Affirmed.

Stacy, J., not participating.

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[23] See *168th and Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945 (8th Cir. 2007).

State of Nebraska, appellee, v. Ryan M. Barbeau, appellant.

917 N.W.2d 913

Filed October 12, 2018. No. S-17-1158.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** When 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. **Investigative Stops: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop 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. **Constitutional Law: Search and Seizure.** Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.
4. **Constitutional Law: Search and Seizure: Investigative Stops: Motor Vehicles.** A traffic stop is a seizure for Fourth Amendment purposes, and therefore is accorded Fourth Amendment protections.
5. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
6. **Constitutional Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** Probable cause is not the only standard applied by courts to determine whether a traffic stop is reasonable under the Fourth Amendment. The Fourth Amendment also permits brief investigative stops of vehicles based on reasonable suspicion when

a law enforcement officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity.

7. **Probable Cause.** Like the probable cause standard, the reasonable suspicion standard takes into account the totality of the circumstances.
8. **Constitutional Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment.
9. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause.
10. **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.
11. **Constitutional Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Statutes.** Reasonable suspicion, as a prerequisite for a constitutional investigatory stop, cannot be based only on a police officer's desire to verify compliance with motor vehicle registration statutes.
12. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Statutes.** When an officer observes a vehicle without license plates or in-transit tags, a particularized and objective basis exists to justify a reasonable, articulable suspicion that the driver may be criminally avoiding the motor vehicle registration statutes. The State's interest in enforcing its registration laws supports a brief investigatory stop to ascertain whether the driver possesses the necessary documentation to show compliance with the motor vehicle registration statutes.
13. **Probable Cause: Police Officers and Sheriffs.** Reasonable suspicion can be premised on an officer's mistake of fact or mistake of law, so long as the mistake was reasonable.
14. ____: ____. A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct. The inquiry is not whether some circumstances may be susceptible of innocent explanation, but whether, taken together, they suffice to form a particularized and objective basis for the officer to suspect a crime is occurring, or is about to occur.
15. **Police Officers and Sheriffs: Motor Vehicles: Probable Cause.** Exiting a highway after passing a sign indicating there is a police checkpoint ahead does not, without more, give rise to reasonable suspicion. But it is one factor which can be considered in the totality of the circumstances.

16. **Investigative Stops: Motor Vehicles: Time.** A lawful traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of the stop.
17. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are any outstanding warrants for any of its occupants.

Appeal from the District Court for Hamilton County: Rachel A. Daugherty, Judge. Affirmed.

Mark Porto, of Porto Law Office, for appellant.

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

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

Stacy, J.

Ryan M. Barbeau appeals his convictions for drug-related felonies, arguing the evidence was obtained as the result of an unconstitutional traffic stop and should have been suppressed. The district court overruled his motion to suppress, finding the traffic stop was supported by probable cause. We do not reach the question of probable cause, because we conclude this was an investigatory traffic stop supported by reasonable suspicion. Therefore, although our reasoning differs from that of the district court, we agree the motion to suppress was properly overruled, and we therefore affirm.

BACKGROUND

On December 11, 2015, Nebraska State Patrol Trooper Gregory Goltz was conducting a "ruse checkpoint" operation

at the Giltner interchange on Interstate 80 in Hamilton County, Nebraska. As part of that operation, signs were placed along the Interstate advising drivers there was a State Patrol checkpoint ahead and a drug dog in use. No such Interstate checkpoint actually existed, but troopers monitored vehicles that left the Interstate immediately after passing the sign.

At approximately 2:52 p.m., Goltz saw a Lincoln Town Car leave the Interstate after passing the checkpoint sign. The car stopped at the end of the off ramp, signaled, and turned north onto the Giltner spur. Goltz followed the car, eventually catching up to it and traveling several car lengths behind it. The car was not speeding.

Goltz could see the car had no license plates, but had what appeared to be an in-transit tag mounted inside a black license plate holder on the rear of the car. Portions of the in-transit tag were covered by the top and bottom of the frame, preventing Goltz from reading the state of issuance and some of the numbers and handwriting on the tag. Goltz also noticed some of the handwritten numbers on the in-transit tag were written in red ink; he considered that unusual because he had never seen a Nebraska in-transit tag with red ink before. Goltz initiated a traffic stop.

After the car was stopped, Goltz approached it on foot and was able to read "North Carolina" on the in-transit tag. There were two individuals in the car. Goltz made contact with the driver and explained he had been stopped because his car did not have plates and the trooper could not read the in-transit tag. Goltz asked to see an operator's license and identified the driver as Barbeau.

Goltz asked to see the car's paperwork to determine whether the in-transit tag was "real." Barbeau told Goltz he had recently purchased the car in North Carolina and was driving it back to his home in Oregon. But Barbeau was not able to produce any paperwork or insurance information on the car.

When Barbeau was unable to produce any paperwork for the car, Goltz had him step out of the car and walk to the

front of Goltz' patrol car. Goltz' plan was to "investigate the vehicle" and obtain additional information from Barbeau about "where the vehicle came from" and Barbeau's travel plans. Goltz then got into his patrol car to run Barbeau's operator's license and wait for backup. Goltz had called for backup, and a canine unit, almost immediately after the stop. According to Goltz, he planned to return to Barbeau's car to take a closer look at the in-transit tag once backup arrived.

Within a few minutes of the initial stop, another trooper arrived on the scene and obtained the passenger's identification information. When Goltz ran the passenger's information, he learned there was an active warrant for his arrest. The passenger was then arrested and handcuffed.

After the passenger was arrested, the dog alerted to drugs in the trunk of Barbeau's car. A subsequent search of the car yielded an AR-15 semiautomatic rifle with ammunition and a 30-round clip; two marijuana pipes; 40 tramadol pills; 60 hydrocodone pills; and $39,575, which was determined to have been used in a controlled substance transaction.

Barbeau was then arrested and charged with (1) possession of a controlled substance with intent to deliver while in possession of a firearm, (2) possession of a deadly weapon during the commission of a felony, (3) possession of drug money, and (4) possession of a controlled substance. Goltz did not issue Barbeau a ticket or a warning related to the in-transit tag.

Before trial, Barbeau moved to suppress the evidence obtained from the search of his car. Barbeau argued Goltz did not have probable cause or reasonable suspicion to initiate the traffic stop. Alternatively, he argued the stop should have been terminated as soon as Goltz could read the information on the in-transit tag.

The State countered that Goltz had probable cause for the traffic stop based on the partially obscured in-transit tag. The State claimed this was a violation of Neb. Rev. Stat. § 60-399(2) (Reissue 2010), which requires that "[a]ll letters,

numbers, printing, writing, and other identification marks" on plates "shall be kept clear . . . so that they shall be plainly visible at all times during daylight and under artificial light in the nighttime."

At the evidentiary hearing on the motion to suppress, Goltz testified to the facts summarized above and a video recording of the stop was received into evidence. The court found that some of the information on the in-transit tag was covered by the license plate frame, and because the printing was not "plainly visible," the court concluded that Goltz had probable cause to suspect a violation of § 60-399(2). The court rejected Barbeau's claim that the traffic stop should have ended once Goltz approached the car and could read the in-transit tag was from North Carolina. The court reasoned that once the car was lawfully stopped, Nebraska law permitted Goltz to conduct an investigation reasonably related in scope to the circumstance that justified the traffic stop, including asking the driver for an operator's license and registration, requesting the driver to sit in the patrol car, asking the driver about the purpose and destination of his or her travel, and running a computer check to determine whether the vehicle involved in the stop had been stolen and whether there were outstanding warrants for any of its occupants.[1] The trial court reasoned that while troopers were conducting such an investigation, they discovered the passenger had an active warrant. They then arrested the passenger and conducted a postarrest search, during which the drugs, gun, and money were discovered. The trial court overruled the motion to suppress.

The State and Barbeau subsequently entered into an agreement whereby the State would drop the charge of possession of a deadly weapon during the commission of a felony in exchange for a bench trial on stipulated facts. At the bench trial, Barbeau renewed his motion to suppress evidence obtained from the stop.

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[1] See *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011).

The trial court found Barbeau guilty of possession of a controlled substance with intent to deliver, possession of drug money, and possession of a controlled substance. Barbeau was sentenced to concurrent terms of imprisonment, the longest of which was 18 to 36 months. He timely appealed, and we moved the case to our docket on our own motion.[2]

ASSIGNMENTS OF ERROR

Barbeau assigns, restated, that the district court erred in (1) denying his motion to suppress and (2) finding him guilty based on evidence that should have been suppressed.

STANDARD OF REVIEW

[1] When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[3] Regarding historical facts, an appellate court reviews the trial 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.[4]

[2] The ultimate determinations of reasonable suspicion to conduct an investigatory stop 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]

ANALYSIS

Barbeau contends the traffic stop in this case violated the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, both of which protect individuals against unreasonable searches and seizures by the government. He argues the traffic stop was not supported by either probable

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

[3] *State v. Thalken*, 299 Neb. 857, 911 N.W.2d 562 (2018).

[4] *Id.*

[5] *State v. Woldt*, 293 Neb. 265, 876 N.W.2d 891 (2016).

cause or reasonable suspicion, and he also challenges the duration of the investigation, arguing that once Goltz approached the car and was able to read the in-transit tag, no further investigation was justified.

Because Barbeau's motion to suppress focused only on the lawfulness and duration of the traffic stop, and did not challenge whether the search of his car was supported by probable cause, we confine our analysis accordingly. We begin by setting out the constitutional principles governing traffic stops.

Traffic Stops Must Be Supported by Either Probable Cause or Reasonable Suspicion

[3,4] The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ," as does article I, § 7, of the Nebraska Constitution. A traffic stop is a seizure for Fourth Amendment purposes, and therefore is accorded Fourth Amendment protections.[6]

[5] As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.[7] We have long recognized that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.[8]

[6,7] But probable cause is not the only standard applied by courts to determine whether a traffic stop is reasonable under the Fourth Amendment. The U.S. Supreme Court has

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[6] *Heien v. North Carolina*, 574 U.S. 54, 135 S. Ct. 530, 190 L. Ed. 2d 475 (2014). See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[7] *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

[8] See, e.g., *Thalken, supra* note 3; *State v. Hill*, 298 Neb. 675, 905 N.W.2d 668 (2018); *State v. Jasa*, 297 Neb. 822, 901 N.W.2d 315 (2017); *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

recognized the Fourth Amendment permits brief investigative stops of vehicles based on reasonable suspicion when a law enforcement officer has a "'particularized and objective basis for suspecting the particular person stopped of criminal activity.'"[9] The reasonable suspicion needed to justify an investigatory traffic stop "'is dependent upon both the content of information possessed by police and its degree of reliability.'"[10] Like the probable cause standard, the reasonable suspicion standard "takes into account 'the totality of the circumstances—the whole picture.'"[11] A mere hunch does not create reasonable suspicion, but the level of suspicion required to meet the standard is "'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause."[12]

[8,9] Nebraska courts have also applied the reasonable suspicion standard when considering the lawfulness of a traffic stop.[13] In doing so, this court has recognized that "'[p]olice can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the [F]ourth [A]mendment.'"[14]

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[9] *Navarette v. California*, 572 U.S. 393, 396, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014), quoting *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). See, also, *Terry, supra* note 6.

[10] *Navarette, supra* note 9, 572 U.S. at 397, quoting *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990).

[11] *Id.*, quoting *Cortez, supra* note 9.

[12] *Id.*, quoting *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989).

[13] See, e.g., *Jasa, supra* note 8; *State v. Arizola*, 295 Neb. 477, 890 N.W.2d 770 (2017); *State v. Rodriguez*, 288 Neb. 878, 852 N.W.2d 705 (2014); *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014); *Au, supra* note 8; *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010); *State v. Wollam*, 280 Neb. 43, 783 N.W.2d 612 (2010).

[14] *State v. Childs*, 242 Neb. 426, 433, 495 N.W.2d 475, 479 (1993), quoting *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991).

We have explained that "'[r]easonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.'"[15] When determining whether there is reasonable suspicion for a police officer to make an investigatory stop, the totality of the circumstances must be taken into account.[16]

Traffic Stop Was Supported by Reasonable Suspicion

[10] Before analyzing whether there was reasonable suspicion to support this traffic stop, we pause briefly to address Barbeau's arguments focused on the district court's finding of probable cause. The district court found the initial traffic stop was supported by probable cause to believe a violation of § 60-399(2) had occurred, because some of the printing on the in-transit tag was not "plainly visible." Barbeau argues, on appeal, that he was not a resident of Nebraska and thus was only required to comply with the registration requirements of Neb. Rev. Stat. § 60-367 (Cum. Supp. 2016). Section 60-367 provides that nonresident vehicles must comply with the registration requirements of the owner's state of residence and "conspicuously" display registration numbers as required thereby. Barbeau argues that because he was not required to comply with the "plainly visible" requirement of § 60-399(2), there could be no probable cause to suspect a violation of that statute. Because we find the stop was investigatory in nature and was supported by reasonable suspicion, we do not address the district court's probable cause finding, and we express no opinion on whether the "plainly visible" requirement of § 60-399(2) applies to nonresidents. Where the record adequately demonstrates that the decision of a trial court is correct—although such correctness is based on a ground or reason

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[15] *Id.* at 433, 495 N.W.2d at 479-80.

[16] *Rodriguez, supra* note 13.

different from that assigned by the trial court—an appellate court will affirm.[17]

When considering whether there was reasonable suspicion to support the traffic stop in this case, our prior decisions in *State v. Childs*[18] and *State v. Bowers*[19] are instructive. Both cases involved investigatory traffic stops based on suspected vehicle registration violations.

[11] In *Childs*, police observed a car driving with in-transit tags and stopped the car to check whether the tags were still within the valid timeframe for use. On those facts, we concluded there was no reasonable suspicion for the stop, and we rejected the State's contention that whenever police see a vehicle operating on the street with an in-transit tag, they should suspect a violation of the motor vehicle registration laws. We found it significant that before stopping the vehicle, police noticed "nothing suspicious or out of the ordinary" about the operation of the vehicle, the appearance of the vehicle, or the appearance of the in-transit tag.[20] We held that "[r]easonable suspicion, as a prerequisite for a constitutional investigatory stop, cannot be based only on a police officer's desire to verify compliance with motor vehicle registration statutes."[21] Because police had no articulable facts upon which to suspect the driver "had been engaged in, was presently engaged in, or was about to engage in any criminal activity,"[22] we found the traffic stop was unconstitutional.

[12] Three years after *Childs*, we decided *Bowers*. In that case, we found police had reasonable suspicion to conduct an investigatory traffic stop of a car being operated without

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[17] *Jasa, supra* note 8.

[18] *Childs, supra* note 14.

[19] *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996).

[20] *Childs, supra* note 14, 242 Neb. at 427, 495 N.W.2d at 477.

[21] *Id.* at 433, 495 N.W.2d at 480.

[22] *Id.* at 435, 495 N.W.2d at 481.

license plates or in-transit tags. The driver in *Bowers* argued the absence of plates or in-transit tags did not provide reasonable suspicion to believe he was operating the car unlawfully. He reasoned that under Neb. Rev. Stat. § 60-320.01 (Reissue 1993), he could lawfully operate the car without plates or an in-transit tag for 30 days after purchase from a nonlicensed seller, provided he could produce the proper documentation of ownership upon demand. We agreed that the driver was in "full compliance with the motor vehicle licensing laws," but we observed that "[s]ome people who operate motor vehicles without license plates or in-transit tags clearly do so in an unlawful attempt to escape the requirements of the motor vehicle registration statutes."[23] We reasoned:

> When an officer observes a vehicle without license plates or in-transit tags, a particularized and objective basis exists to justify a reasonable, articulable suspicion that the driver may be criminally avoiding the motor vehicle registration statutes. The State's interest in enforcing its registration laws supports a brief investigatory stop to ascertain whether the driver possesses the necessary documentation to establish that he or she is within the 30-day grace period to register the vehicle.[24]

The Nebraska Court of Appeals applied similar reasoning in *State v. Kling*[25] and found police had reasonable suspicion to conduct an investigatory stop of a vehicle displaying handwritten in-transit tags. The driver in *Kling* argued that handwritten in-transit tags did not violate state law, and he relied on *Childs* for the proposition that an officer's desire to merely verify compliance with registration laws does not, without more, amount to reasonable suspicion. The State countered that handwritten in-transit tags should have the

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[23] *Bowers, supra* note 19, 250 Neb. at 159, 548 N.W.2d at 730.

[24] *Id.* at 161, 548 N.W.2d at 731.

[25] *State v. Kling*, 8 Neb. App. 631, 599 N.W.2d 240 (1999).

same legal effect as no in-transit tags, and thus relied on *Bowers* for the proposition that when a car is being operated without displaying plates or in-transit tags, police have a particularized and objective basis to suspect the vehicle registration laws are being violated.

The Court of Appeals reviewed our holdings in *Childs* and *Bowers* and concluded the facts presented in *Kling* were more akin to *Bowers*. That court observed that although Nebraska law did not prohibit handwritten in-transit tags, neither did it authorize them. Thus, the court held that when police saw the car being operated without plates or dealer-issued in-transit tags, that observation provided reasonable suspicion the driver was violating the motor vehicle registration laws and justified the investigatory stop.

[13,14] These cases illustrate that the determination of reasonable suspicion is fact specific and requires police to have a particularized and objective basis for suspecting a driver is violating the vehicle registration law. *Childs* teaches that an officer's desire to verify whether an in-transit tag is valid will not, without more, be sufficient to provide reasonable suspicion the vehicle is being operated in violation of the vehicle registration laws. But *Bowers* and *Kling* illustrate that when police have reliable information that provides a particularized and objective basis for suspecting the vehicle is being operated in violation of the vehicle registration laws, there is reasonable suspicion to conduct an investigatory traffic stop. This is so even if the reasonable suspicion is premised on an officer's mistake of fact or mistake of law, so long as the mistake was reasonable.[26] Moreover, a determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.[27] The inquiry is not whether some circumstances may be susceptible of innocent explanation, but whether, taken

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[26] *Heien, supra* note 6.

[27] *United States v. Arvizu*, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002).

together, they suffice to form a particularized and objective basis for the officer to suspect a crime is occurring, or is about to occur.[28]

The question of reasonable suspicion in this case, then, turns on whether, considering the totality of the circumstances, Goltz had reliable information that provided a particularized and objective basis for suspecting Barbeau was operating his car in violation of the motor vehicle registration laws.

Barbeau does not challenge the district court's factual findings concerning Goltz' information and observations, and we find no clear error in those findings. Applying the constitutional principles discussed above to those factual findings, we conclude Goltz had an objective basis, based on firsthand observation, for reasonably suspecting Barbeau was operating his car in violation of the registration laws.

First, as in *Bowers*, there were objective signs of possible noncompliance with Nebraska's registration laws. Under Nebraska law, a dealer-issued in-transit "sticker shall [have] plainly printed in black letters the words In Transit" and must be displayed either on the front and rear windows or on the rear side windows of the vehicle.[29] The in-transit tag on Barbeau's car was located on the rear bumper and included red handwriting. Goltz had never seen a Nebraska in-transit tag with red handwriting. Moreover, the tag was affixed inside a license plate frame that partially obstructed the information on the top and bottom of the tag, preventing Goltz from being able to read the state of issuance.

Unlike the police in *Childs*, Goltz did not initiate a traffic stop merely to check the validity of the tags without any reasonable suspicion they were noncompliant. Nor does the record support the conclusion that Goltz initiated the traffic stop based on nothing more than his inability to read the in-transit tag

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[28] See *id.*

[29] See Neb. Rev. Stat. § 60-376 (Cum. Supp. 2016).

while pursuing the car.[30] Rather, in addition to the inability of Goltz to read some of the information on the tag, the tag itself appeared suspect due to its location on the car, the red ink, and the fact that some information was covered by the license plate frame.

[15] Moreover, when considering the totality of the circumstances, we also consider that Goltz had seen Barbeau exit the Interstate immediately after passing a sign advising drivers there was a State Patrol checkpoint ahead. Exiting a highway after passing a sign indicating there is a police checkpoint ahead does not, without more, give rise to reasonable suspicion.[31] It is, however, "one factor which can be considered in the totality of the circumstances."[32] And here, Goltz' knowledge that Barbeau pulled off the Interstate immediately after passing a sign notifying drivers of an upcoming State Patrol checkpoint, when combined with the irregular appearance of the temporary tag and the fact that some information on the tag was covered by the frame, creates a particularized and objectively reasonable suspicion that the vehicle is not in compliance with the registration laws and that the driver wants to evade detection.

We therefore determine the investigatory stop of Barbeau's car was supported by reasonable suspicion and comported with the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution.

Investigation

Barbeau contends that even if the initial stop was lawful, Goltz should have ended the stop as soon as he approached

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[30] Compare *U.S. v. McLemore*, 887 F.3d 861 (8th Cir. 2018) (officer's inability to read temporary registration card in vehicle's rear window while following in police cruiser does not, without more, give rise to reasonable suspicion vehicle is being operated in violation of registration laws).

[31] See *U.S. v. Yousif*, 308 F.3d 820 (8th Cir. 2002). See, also, *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

[32] *Hedgcock, supra* note 31, 277 Neb. at 816-17, 765 N.W.2d at 480.

the car and was able to see the in-transit tag was from North Carolina. According to Barbeau, any continued investigation beyond that point was unreasonable, and thus unlawful.

[16] In *Rodriguez v. U.S.*,[33] the U.S. Supreme Court cautioned that a lawful traffic stop "'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission'" of the stop. When the mission of an investigative stop is addressing a suspected traffic violation, the stop may "'last no longer than is necessary to effectuate th[at] purpose'" and authority for the seizure "thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."[34] However, the U.S. Supreme Court has recognized that beyond just determining whether to issue a traffic citation or warning, an officer's mission in a traffic stop "includes 'ordinary inquiries incident to [the traffic] stop.'"[35] Typically, "such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance."[36]

[17] Similarly, this court has long held that once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.[37] This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel.[38] Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been

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[33] *Rodriguez v. United States*, 575 U.S. 348, 354, 35 S. Ct. 1609, 191 L. Ed. 2d 492 (2015).

[34] *Id.*, 575 U.S. at 354.

[35] *Id.*, 575 U.S. at 355.

[36] *Id.*

[37] *Nelson, supra* note 1.

[38] *Id.*

stolen and whether there are any outstanding warrants for any of its occupants.[39]

Having concluded the investigatory stop of Barbeau's car was lawful, we agree with the trial court that Goltz was justified in conducting an investigation related to the circumstances that justified the stop and gave rise to Goltz' reasonable suspicion that the car was being operated in violation of the motor vehicle registration laws. The record shows that after initiating the stop, Goltz approached the car, briefly inspected the in-transit tag, and then proceeded to contact the driver and ask many of the routine questions that this court, and the U.S. Supreme Court, have recognized as appropriate incidental to a traffic stop.

On appeal, Barbeau does not claim the scope of Goltz' investigation was too broad under the circumstances, nor does he argue the few minutes it took for backup and the canine unit to arrive unnecessarily extended the stop. Instead, he argues the entire investigation should have ended before Goltz made contact with the driver.

Barbeau's argument in this regard is premised on the flawed assumption that the only justification for the stop was Goltz' inability to read the state of issuance on the in-transit tag. Summarized, Barbeau argues that he was stopped because Goltz could not see the state of issuance on the in-transit tag, so he argues that once Goltz approached the car and was able to read "North Carolina," the purpose of the traffic stop was accomplished and no further investigation was warranted.

But as discussed above, the circumstances justifying the investigatory stop here included more than just Goltz' inability to read the state of issuance on the in-transit tag. In addition to being unable to read some of the information on the tag, the tag itself appeared suspect due to its location, the red ink, and the fact that it was partially covered by the license plate frame. The additional fact that Barbeau was seen exiting the

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[39] *Id.*

Interstate immediately after passing a sign notifying drivers of an upcoming State Patrol checkpoint, combined with the irregular appearance of the temporary tag, gave Goltz a particularized and objectively reasonable suspicion that the car was not in compliance with the registration laws and that the driver wanted to evade detection. Having lawfully stopped the car, Goltz was authorized to conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop,[40] and the record supports that he did just that.

There is no merit to Barbeau's claim that the investigatory stop should have ended before Goltz contacted the driver to begin his investigation.

CONCLUSION

For the reasons discussed above, the district court did not err in overruling the motion to suppress. Barbeau's assignments of error have no merit, and we therefore affirm the judgment of the district court.

Affirmed.

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[40] See *id*.

John J. Bower, appellant and cross-appellee, v. Eaton Corporation and Old Republic Insurance Company, appellees and cross-appellants.

918 N.W.2d 249

Filed October 12, 2018. No. S-17-1188.

1. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
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 that are clearly wrong in light of the evidence.
3. **Workers' Compensation.** Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court.
4. **Workers' Compensation: Appeal and Error.** The percentage of permanent partial loss of use for an injured member is a question of fact that an appellate court reviews for clear error.
5. **Workers' Compensation: Expert Witnesses.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
6. **Workers' Compensation: Rules of Evidence: Due Process.** The Workers' Compensation Court is empowered to admit evidence not normally admissible under the rules of evidence applicable in the trial courts of this state, subject to the limits of constitutional due process.
7. **Workers' Compensation: Evidence.** Given the beneficent purposes of workers' compensation law, the Workers' Compensation Court can admit evidence not normally admissible in order to investigate cases in the manner it judges is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act.

8. **Workers' Compensation: Physicians and Surgeons: Words and Phrases.** Only the supervising physician in a physician-physician assistant relationship falls under the definition of physician as stated in Workers' Comp. Ct. R. of Proc. 49(O) (2018).
9. **Workers' Compensation: Appeal and Error.** Whether an employee's compensable scheduled member injury has resulted in a whole body impairment and loss of earning power is a question of fact, which an appellate court reviews for clear error.
10. **Workers' Compensation.** Employees are not limited to benefits for a scheduled member injury when the effects of that injury have extended to other parts of the employee's body in a manner that impairs the employee's ability to work.
11. ____. The test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury.
12. **Workers' Compensation: Proof.** An employee has the burden to prove by a preponderance of the evidence compensability of a claim against an employer under the Nebraska Workers' Compensation Act.
13. **Workers' Compensation.** A workers' compensation award cannot be based on mere possibility or speculation.
14. **Workers' Compensation: Evidence.** An award of future medical expenses requires explicit evidence that future medical treatment is reasonably necessary to relieve the injured worker from the effects of the work-related injury.
15. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
16. **Workers' Compensation.** The Nebraska Workers' Compensation Act is construed liberally to carry out its spirit and beneficent purposes.
17. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
18. **Workers' Compensation: Jurisdiction: Contracts: Parties: Insurance.** The Nebraska Workers' Compensation Act does not afford the compensation court jurisdiction to resolve contractual disputes between employees and third-party insurers.
19. **Workers' Compensation: Jurisdiction: Contracts: Insurance.** A contractual dispute over private agreements for disability coverage that is not workers' compensation coverage is not ancillary to the compensation court's primary jurisdiction.
20. **Workers' Compensation: Jurisdiction: Termination of Employment.** Wrongful discharge in relation to filing a workers' compensation claim

does not fall under the compensation court's exclusive jurisdiction over accidents arising out of and in the course of employment.

21. **Workers' Compensation: Termination of Employment: Torts.** Wrongful discharge is not one of the tort actions for which employers receive relief in exchange for liability under the Nebraska Workers' Compensation Act.
22. **Workers' Compensation: Penalties and Forfeitures.** To avoid the penalty provided for in Neb. Rev. Stat. § 48-125 (Cum. Supp. 2016), an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation.
23. **Workers' Compensation: Penalties and Forfeitures: Time: Appeal and Error.** An appellate court reviews for clear error the compensation court's findings concerning reasonable controversy underlying its determination of waiting-time penalties.
24. **Workers' Compensation: Proof.** Depending on the circumstances, a reasonable controversy may exist regarding the employer's liability until an employee presents the employer with competent medical evidence that he or she is entitled to workers' compensation benefits.
25. **Attorney Fees.** The determination of the amount of attorney fees is necessarily a question of fact that requires a factual determination on several factors, including the value of legal services rendered by an attorney by considering the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

Appeal from the Workers' Compensation Court: Thomas E. Stine, Judge. Affirmed.

Vikki S. Stamm and Jerad A. Murphy, of Stamm, Romero & Associates, P.C., L.L.O., for appellant.

Kent M. Smith and Michael J. Lunn, of Scheldrup, Blades, Schrock & Smith, P.C., for appellees.

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

Freudenberg, J.

NATURE OF CASE

The employee appeals from an award of the Nebraska Workers' Compensation Court. The issues presented concern the employee's member impairment rating, whether an injured extremity caused a whole body impairment, the sufficiency of the evidence to prove out-of-pocket medical expenses and future medical expenses, whether a physician assistant is a "physician" for the purpose of admitting signed written reports in lieu of testimony, whether there was no reasonable controversy as to the compensability of the injury such that greater waiting-time penalties should have been imposed, the compensation court's jurisdiction to decide retaliatory discharge or a private disability insurer's right to reimbursement, the necessity of vocational rehabilitation, and the amount of attorney fees. We affirm.

BACKGROUND

John J. Bower worked for Eaton Corporation (Eaton) as a relief operator. Bower earned approximately $19 per hour and worked approximately 56 hours per week. On September 30, 2013, Bower injured his right shoulder in an accident arising out of and in the course of his employment.

Bower reported the incident to his supervisor that same day, but continued working until the end of his shift. Bower woke up the following morning with "the sharpest pain I've ever . . . felt before." He saw his general physician, Dr. Chadd Murray. An x ray did not reveal an injury.

When nonsurgical treatments did not alleviate continuing symptoms, Bower was referred to Dr. Heber Crockett, an orthopedic surgeon, for treatment of his injury. Magnetic resonance imaging on November 25, 2013, revealed a moderate partial rotator cuff tear.

Over the course of the next 3 years, the injury was treated with medication, steroid injections, physical therapy, and four surgical procedures. The surgical procedures were performed

on February 4 and May 20, 2014, and March 17 and December 22, 2015. During this time, Eaton did not acknowledge that the injury was work related and did not pay workers' compensation benefits.

Bower filed a workers' compensation claim on February 24, 2015. Bower reached maximum medical improvement on June 6, 2016, during the pendency of the workers' compensation proceedings. He submitted to an independent medical examination on July 7, conducted by Dr. Michael Morrison, an orthopedic surgeon.

Morrison opined that Bower suffered from a permanent 12-percent impairment of his right upper extremity as a result of the September 2013 injury. After receiving Morrison's report, Eaton determined that Bower had incurred a work-related injury on September 30, 2013. Eaton determined that the February and May 2014 and March 2015 surgical procedures were compensable. But Eaton determined that the December 2015 surgery was not compensable.

On August 12, 2016, Eaton paid Bower temporary total disability benefits representing the periods from February 4 until July 17, 2014, and March 17 until August 16, 2015, in a total amount of $33,073.72. Eaton also paid on August 12, 2016, $19,718.91 in permanent partial disability benefits based on Morrison's assessment of a 12-percent permanent impairment of Bower's right upper extremity.

On September 1, 2016, Eaton discharged Bower from his employment, explaining to Bower that Eaton could not accommodate the work restrictions for his injury. Bower had been performing his regular duties without any accommodations, believing that he was adequately compensating with his left arm in order to avoid lifting too much weight with his right. Moreover, Bower believed he was qualified to continue working at Eaton in different positions as the "lead" or supervisor of the line. Nevertheless, representatives of Eaton told him that he was not working within his restrictions and that he

would be discharged unless he could convince a physician to reduce them.

In his petition, Bower had sought temporary total disability benefits, vocational rehabilitation, and payment of medical bills incurred and to be incurred in the future, as well as waiting-time penalties and attorney fees. In a joint pretrial memorandum, the parties presented several issues for determination, including reimbursement for out-of-pocket medical expenses and entitlement to future medical expenses, entitlement to return to work at Eaton or vocational rehabilitation services, the amount of Bower's permanency rating to his right upper extremity and whether he suffered a whole body impairment, Eaton's insurer's entitlement to repayment for short-term disability payments made to Bower in relation to his injury, Bower's entitlement to attorney fees and a waiting-time penalty, and whether Bower was entitled to compensation for allegedly being discharged in retaliation for Eaton's payment of workers' compensation benefits.

The statement of issues for determination in the joint pretrial memorandum did not include reimbursement for vacation time used during treatment of the September 2013 injury. In the court's notice of trial and pretrial order, it had advised the parties that any issue not set forth in the joint pretrial memorandum would be deemed waived.

The court issued its award on October 16, 2017, following a trial.

Temporary Total Disability Awarded

In the court's award, it found that all the surgeries were compensable. Thus, in addition to the amount paid voluntarily by Eaton during the pendency of the proceedings, the court awarded temporary total disability benefits pertaining to the December 2015 surgery. This amounted to a total of $1,877.99, which neither party disputes on appeal.

Permanent Disability Based on Member Impairment Rating of 12 Percent

The court awarded permanent disability benefits based on a 12-percent impairment to Bower's right upper extremity. This member impairment rating was derived from Morrison's report.

Bower had submitted a report by Crockett's physician assistant, Yuji Kitabatake. Kitabatake opined in the report that Bower suffered a 15-percent permanent impairment to his right upper extremity. The report was signed "Yuji Kitabatake, PA-C for Heber C. Crockett, M.D." Crockett did not sign the document. Eaton objected to the report as hearsay and outside the scope of Workers' Comp. Ct. R. of Proc. 10 (2018). The court received the report into evidence, but stated it would give the report whatever weight it found was due after reviewing it.

In its award, the court concluded that the report was not due any weight. Citing to Neb. Rev. Stat. § 48-151(1) (Reissue 2010) and Workers' Compensation Court rule 10, the court found that the report failed to qualify as an expert medical opinion upon which it could rely for a determination of workers' compensation benefits.

No Whole Body Impairment

The court declined Bower's suggestion that his permanent disability benefits should be calculated based upon a loss of earning capacity under an impairment to the body as a whole. The only evidence of an impairment to the body as a whole was Kitabatake's report which stated, "Conversion from upper extremity to whole person is from 15% to 9% of whole person . . . ." Kitabatake did not otherwise describe how the shoulder injury caused a whole body impairment.

In refusing to calculate the permanent partial disability award based on impairment to the body as a whole, the court reasoned that the medical evidence showed Bower's residual

limitation and impairment were to his right upper extremity, and the court was "not persuaded that [Bower's] impairment to his right upper extremity has in some manner manifested itself as a . . . whole [body] impairment."

Partial Waiting-Time Penalty Awarded

The court awarded Bower a waiting-time penalty pursuant to Neb. Rev. Stat. § 48-125(3) (Cum. Supp. 2016), but only in relation to Eaton's failure to timely pay workers' compensation benefits for the December 2015 surgery and corresponding recovery period. The waiting-time penalty for such benefits was $939. The court found that there was no longer a reasonable controversy as to the compensability of Bower's injury and the resulting medical care, including the December 2015 surgery and recovery period, as of the date of Eaton's receipt of Morrison's report.

The court declined to award additional waiting-time penalties in relation to the remaining benefits that were paid by Eaton voluntarily on August 12, 2016, because it concluded that a reasonable controversy existed as to the compensability of Bower's injury until Eaton received Morrison's report. The court explained that the reasonable controversy stemmed from Murray's original progress note. The note described that Bower was seen on October 1, 2013, complaining of shoulder pain. And, in the "History of Present Illness" section, under the title, "Recent Interventions," Murry wrote, "He has no injury to his shoulder just woke up with the pain."

When an agent of Eaton advised Bower that Murray had failed to indicate the injury was work related, Murray revised the progress note. The revision was apparently faxed to Eaton on November 22, 2013. It added that Bower "had injured his shoulder at work when he was lifting a heavy item, he has had pain but it became much worse this morning." However, the amended note continued to include the contradictory language from the original progress note.

Exhibit 48 reflects that Eaton's workers' compensation insurer sent a letter to Murray on December 10, 2013, requesting that Murray explain the discrepancies between the initial report and the revised report and why it was changed. The letter stated that Eaton's workers' compensation insurer had attempted to speak with Murray on several occasions to discuss the discrepancy. There was no evidence that Murray responded to Eaton's inquiries.

No Out-of-Pocket Medical Expenses Awarded

The court denied Bower's claim for unpaid out-of-pocket medical expenses. In its pretrial order, the court had ordered the parties to file a joint pretrial memorandum, including, among other things, a "medical expense cover sheet setting forth an itemization of each medical expense incurred and unpaid, or for which reimbursement is claimed, by provider, date, and amount."

The parties jointly submitted a medical expense cover sheet that specified providers and amounts, but not dates. It showed a total paid by Bower in the amount of $3,975.41 and a total paid by Bower's insurer in the amount of $38,735.88. The cover sheet showed a total amount of medical expenses, by provider, of $104,356.87.

At trial, Bower entered into evidence voluminous medical billing statements and records. The medical billing statements are contained in exhibits 23 through 32, and the medical records are found in exhibits 16 through 20. The billing statements show numerous payments made by health care insurance and by patient, but several statements contain overlapping dates, and thus duplicative payment receipts.

The court additionally accepted into evidence exhibits 14 and 15, which contain Bower's summarization of his out-of-pocket expenses. Most, but not all, of the items summarized are detailed by date and provider. Exhibits 14 and 15 claimed a total of $12,315.94 in out-of-pocket expenses. Bower testified

that he was never reimbursed for any out-of-pocket expenses he paid during the treatment of his injury.

After trial, the court contacted counsel and requested additional information to clarify the medical expenses. Counsel were to submit the information by stipulation on October 6, 2017. Counsel did not provide the information as requested. Approximately 2 weeks later, the court again contacted counsel on October 10, requesting additional information. Counsel indicated they would have the information to the court by October 12; but counsel did not provide any additional information.

In denying compensation for any out-of-pocket medical expenses, the court explained, "The medical expense information provided by the parties falls woefully short of what was ordered to be provided by the Pretrial Order, and the Court is unable to meaningfully analyze the information." Specifically, the court noted that the cover sheet reflected medical expenses still owed in an amount of $61,645.58, which amount the court observed was not reflected in the exhibits entered into evidence. Furthermore, the court noted the discrepancy between the claimed amount of out-of-pocket medical expenses in exhibits 14 and 15 of $12,315.94 and the amount of $3,975.41 stated as being paid by Bower in the medical expenses cover sheet of the joint pretrial memorandum.

The court concluded that Bower had "failed to satisfy his burden to prove that the medical expenses submitted in Exhibits 14, 15, and 23 through 32, are fair, reasonable, and related to the work injury." With this reasoning, the court awarded Bower no out-of-pocket medical expenses.

Attorney Fees Awarded

Because the court had determined that Eaton failed to timely pay benefits relating to the December 2015 surgery, the court awarded attorney fees under § 48-125(2)(a), in the amount of $7,500. The court explained that it had reached the amount of attorney fees to be awarded based upon the general nature of the case, the time spent in preparing and trying the case, the

novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

No Future Medical Expenses Awarded

The court did not award future medical expenses. The court found that Bower had failed to establish by explicit medical testimony that future medical care would be reasonably necessary.

Bower had testified at trial that Crockett told him he might need additional cortisone injections if his pain increased; Crockett did not testify. The only other evidence submitted by Bower as to future medical treatment was Kitabatake's report, in which Kitabatake opined that "it is a reasonable degree of medical certainty that [Bower] may need injections and physical therapy in the future."

In contrast, Morrison opined in his report that "no other treatment is necessary other than a home program of passive stretching and shoulder girdle strengthening that could be carried out on a self-motivated program."

In denying an award of future medical expenses, the court reiterated that Kitabatake's opinions lacked foundation and were accordingly insufficient to support an award of benefits. Additionally, the court reasoned that Kitabatake's statement that Bower "may" need additional care lacked sufficient certainty to be considered explicit medical evidence of the necessity of future medical care.

Vocational Rehabilitation Services Awarded

The court concluded that Bower was entitled to vocational rehabilitation services and temporary total disability benefits during the time that Bower participates in an approved vocational rehabilitation plan.

The court had appointed a vocational rehabilitation counselor. The stipulation of facts in the joint pretrial memorandum stated, "[Bower] has been referred to a vocational rehabilitation expert through the Worker[s'] Compensation Court system."

The counselor submitted four reports between February and August 2017. The reports indicate that the counselor had attempted to find suitable employment for Bower with Eaton, but was unsuccessful. The counselor's labor market research indicated that if Bower returned to the labor market with his current qualifications, he could expect to obtain employment earning approximately 60 percent of the hourly wage he earned at Eaton, or approximately $12 per hour.

With the approval of the court, the counselor subsequently conducted a vocational evaluation. Based on the evaluation, the counselor recommended moving forward with developing a vocational rehabilitation plan.

The court found that Bower had met his burden to show he is entitled to vocational rehabilitation services. Referring to the stipulation of facts in the joint pretrial memorandum, the court reasoned, first, that "[t]he parties stipulated that [Bower] is entitled to vocational rehabilitation services and a counselor has been appointed by the Court to perform these services." Second, the court noted that there was medical evidence in the record that Bower was unable to return to work at Eaton after the December 2015 surgery, because Eaton was unable to accommodate the permanent work restrictions set forth by the functional capacity examination.

No Jurisdiction Over Short- and Long-Term Disability Payments

The court declined the parties' invitation to address whether Bower was liable to Eaton's private insurer for disability payments made in relation to Bower's injury. Bower had submitted into evidence demands by Eaton's insurance provider that Bower repay approximately $16,000 in short-term disability payments made by the insurer while Eaton refused

workers' compensation benefits. The short-term disability insurance plan, signed by Bower, provided that Bower would reimburse the insurer to the extent that benefits paid should be offset by reason of benefits received under any workers' compensation law. The court explained that this issue involved contract questions outside the jurisdictional scope of the Nebraska Workers' Compensation Act and the Workers' Compensation Court.

No Jurisdiction Over Wrongful Termination

Likewise, the court determined that it lacked jurisdiction to consider Bower's wrongful discharge allegations. Bower testified that he did not think Eaton had grounds to discharge him, because he believed he could perform his duties within the medical restrictions he had been given. The court concluded that any claim for retaliatory discharge is outside the framework of the Nebraska Workers' Compensation Act. Thus, Bower's potential remedy for the alleged retaliatory discharge must be brought in a different forum.

Reimbursement for Vacation Time

The court's award did not address any claim for compensation of vacation time used during periods Bower could not work because of the September 2013 injury. This was presumably because Bower did not include this issue in the pretrial statement of issues for determination.

ASSIGNMENTS OF ERROR

Bower assigns that the Workers' Compensation Court erred by failing to (1) award permanent disability based on a loss of earning capacity rather than a member impairment rating, (2) award permanent disability based on a 12-percent member impairment rating rather than a 15-percent member impairment rating, (3) award a waiting-time penalty from the date of the injury rather than the date of payment of benefits in August 2016, (4) award Bower out-of-pocket medical expenses

pursuant to the exhibits offered at trial, (5) award future medical expenses for cortisone injections, (6) award reimbursement of vacation time and short-term disability, (7) decide the issue of Eaton's right to reimbursement of disability payments made by its insurer, and (8) decide Bower's wrongful termination claim.

On cross-appeal, Eaton and its workers' compensation insurance carrier, Old Republic Insurance Company (Old Republic), assign that the court erred in awarding Bower (1) vocational rehabilitation services and (2) $7,500 in attorney fees.

STANDARD OF REVIEW

Under Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), the judgment made by the compensation court shall have the same force and effect as a jury verdict in a civil case and may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

[1] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[1]

[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 that are clearly wrong in light of the evidence.[2]

[3] Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court.[3]

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[1] See *Dragon v. Cheesecake Factory*, 300 Neb. 548, 915 N.W.2d 418 (2018).

[2] *Id.*

[3] *Anderson v. EMCOR Group*, 298 Neb. 174, 903 N.W.2d 29 (2017).

ANALYSIS

Bower claims on appeal that the court's award of a 12-percent impairment was insufficient and that, in any event, he should have been awarded permanent partial disability based on an injury to his body as a whole. Bower argues, further, that the court clearly erred in failing to award him any out-of-pocket medical expenses and that it should have awarded a waiting-time penalty for all the compensation and medical payments unpaid within 30 days of Murray's revised progress note. Finally, Bower asserts that the court should have addressed the merits of his retaliatory discharge claim, the employer's private disability insurer's right to reimbursement for temporary disability payments, and Bower's right to reimbursement of vacation time used as a result of his injury. On cross-appeal, Eaton and Old Republic contest the necessity of vocational rehabilitation and the amount of attorney fees awarded. We address each of these arguments in turn.

Member Impairment Rating

[4] We first address Bower's contention that the court should have given his scheduled member impairment a rating of 15 percent rather than 12 percent. The percentage of permanent partial loss of use for an injured member is a question of fact that we review for clear error.[4]

[5] Impairment to a scheduled member is measured on the basis of loss of physical function.[5] An impairment rating is simply a medical assessment of what physical abilities have been adversely affected or lost by an injury.[6] The extent of loss

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[4] See, *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999); *Schmid v. Nebraska Intergov. Risk Mgt. Assn.*, 239 Neb. 412, 476 N.W.2d 243 (1991); *Knuffke v. Bartholomew*, 106 Neb. 763, 184 N.W. 889 (1921).

[5] See, Neb. Rev. Stat. § 48-121 (Reissue 2010); *Yager v. Bellco Midwest,* 236 Neb. 888, 464 N.W.2d 335 (1991).

[6] *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

of use does not necessarily equal the extent of medical impairment, and testimony need not establish a specific percentage impairment rating to be legally sufficient.[7] Furthermore, the trial judge is not limited to expert testimony to determine the degree of disability, but instead may rely on the testimony of the claimant.[8] Nonetheless, the medical impairment rating given by a doctor may be an important factor.[9] And, as the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.[10]

Kitabatake's report was the only express medical opinion that Bower suffered from a 15-percent impairment to his right upper extremity. Bower asserts that the court erred as a matter of law in deciding not to give Kitabatake's report weight on the ground that it failed to comply with Workers' Compensation Court rule 10. We find no merit to this argument.

[6,7] The compensation court does not have the right to establish rules of evidence, procedure, or discovery that are more restrictive or onerous than the rules applicable to the trial courts in this state.[11] But it is empowered to admit evidence not normally admissible under the rules of evidence applicable in the trial courts of this state, subject to the limits of constitutional due process.[12] This is because the Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence.[13] Given the beneficent purposes of workers' compensation law, the court can admit such

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[7] See *id.*

[8] See *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016).

[9] See *Swanson v. Park Place Automotive, supra* note 6.

[10] *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996).

[11] *Cunningham v. Leisure Inn*, 253 Neb. 741, 573 N.W.2d 412 (1998).

[12] See, *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007); *Cunningham v. Leisure Inn, supra* note 11.

[13] *Cunningham v. Leisure Inn, supra* note 11.

evidence in order to investigate cases in the manner it judges is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act.[14]

Rule 10 is an evidentiary rule that we have held is not more restrictive than the rules applied to trial courts in this state.[15] Rather, rule 10 allows the compensation court to admit into evidence medical reports that would not normally be admissible in the trial courts of this state.[16] Rule 10 states in relevant part:

> **A. Medical and Vocational Rehabilitation.** . . . [W]ith respect to medical evidence on hearings before a judge of [the Workers' Compensation C]ourt, written reports by a physician or surgeon duly signed by him, her or them and itemized bills may, at the discretion of the court, be received in evidence in lieu of or in addition to the personal testimony of such physician or surgeon; with respect to evidence produced by vocational rehabilitation experts, physical therapists, and psychologists on hearings before a judge of said court, written reports by a vocational rehabilitation expert, physical therapist, or psychologist duly signed by him, her or them and itemized bills may, at the discretion of the court, be received in evidence in lieu of or in addition to the personal testimony of such vocational rehabilitation expert, physical therapist, or psychologist.

The only requirements for a medical report to be admissible under rule 10 are that the report be a medical report and be signed by the physician, surgeon, vocational rehabilitation expert, physical therapist, or psychologist.[17] Physician assistants are not listed in rule 10.

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[14] *Olivotto v. DeMarco Bros. Co., supra* note 12.

[15] See *Johnson v. Ford New Holland*, 254 Neb. 182, 575 N.W.2d 392 (1998).

[16] *Id.*

[17] See *Baucom v. Drivers Management*, 12 Neb. App. 790, 686 N.W.2d 98 (2004).

The court concluded that Kitabatake's signature did not satisfy the requirements of rule 10, because Kitabatake is not a "physician." We agree.

"Physician" is defined by Workers' Comp. Ct. R. of Proc. 49(O) (2018) as "any person licensed to practice medicine and surgery, osteopathic medicine, chiropractic, podiatry, or dentistry in the State of Nebraska or in the state in which the physician is practicing." Other statutes make clear that it is the supervising physician, not the physician assistant, who has the license to practice medicine. The Medicine and Surgery Practice Act,[18] under § 38-2047, specifies that physician assistants are considered agents of a supervising physician to perform activities delegated by the supervising physician. Under § 38-2050(1)(a), to be a supervising physician of a physician assistant, a person must "[b]e licensed to practice medicine and surgery under the Uniform Credentialing Act." Finally, in the context of the Interstate Medical Licensure Compact,[19] the Legislature has defined the practice of medicine as clinical prevention, diagnosis, or treatment of human disease, injury, or condition requiring a "physician" to obtain and maintain a license in compliance with the Medicine and Surgery Practice Act.

[8] As such, only the supervising physician in a physician-physician assistant relationship falls under the definition of physician as stated in Workers' Compensation Court rule 49(O). Kitabatake's report, signed only by Kitabatake, was not signed by a physician as required by rule 10.

We have upheld the compensation court's decision to exclude evidence that fails to strictly comply with rule 10. In *Johnson v. Ford New Holland*,[20] for example, we held that the court

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[18] See Neb. Rev. Stat. § 38-2001 et seq. (Reissue 2016 & Supp. 2017) and 2018 Neb. Laws, L.B. 701, §§ 5 and 6, and L.B. 1034, §§ 30 and 31 (effective July 19, 2018).

[19] See Neb. Rev. Stat. § 38-3603(j) (Supp. 2017).

[20] See *Johnson v. Ford New Holland, supra* note 15.

did not abuse its discretion in refusing to admit into evidence a physician's written report that failed to comply with rule 10 because it lacked a signature.

Similarly here, the court did not abuse its discretion in refusing to admit into evidence a report that was not signed by a physician, as is required by the relevant provisions of rule 10. The court's conclusion that Bower suffered from a 12-percent impairment to his right upper extremity was supported by Morrison's report and was not the result of erroneously failing to consider the written report signed only by Kitabatake, a physician assistant. The court did not clearly err in finding a permanent partial loss of 12 percent.

Whole Body Impairment

[9] We find no merit to Bower's alternative argument that he should have been awarded permanent total disability benefits for an injury to his body as a whole, rather than permanent partial disability benefits for his injury to his right upper extremity. Whether an employee's compensable scheduled member injury has resulted in a whole body impairment and loss of earning power is a question of fact, which we review for clear error.[21]

[10] Under Nebraska's workers' compensation statutes, an injury to the upper extremity constitutes a scheduled member injury.[22] Permanent total disability benefits are not generally available for a single scheduled member injury.[23] However, employees are not limited to benefits for a scheduled member injury when the effects of that injury have extended to other parts of the employee's body in a manner that impairs the employee's ability to work.[24] When a member injury

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[21] See *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013).

[22] See *Ideen v. American Signature Graphics, supra* note 4.

[23] *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

[24] *Moyera v. Quality Pork Internat., supra* note 21.

results in a whole body impairment, the court should enter an award for loss of earning capacity rather than for the member injury.[25]

[11] The test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury.[26] If, by the point of maximum medical improvement, an employee has developed a whole body impairment in addition to a scheduled member injury, the question is whether the work-related injury proximately caused the whole body impairment.[27] For instance, we have held that the compensation court did not err in finding that a foot injury proximately caused a whole body impairment, upon evidence that the resulting change in an employee's gait caused chronic pain in the employee's hips and lower back.[28]

But there was no evidence in this case that Bower's shoulder injury extended to other parts of his body. The only medical opinion that Bower suffered a whole body impairment was found in Kitabatake's report, which, as discussed, the court refused to give weight. Even in Kitabatake's report, however, there is no evidence that Bower suffered impairment to other parts of his body. Kitabatake simply reasoned that "[c]onversion from upper extremity to whole person is from 15% to 9% of whole person . . . ." Bower's testimony and the exhibits admitted at trial likewise failed to demonstrate that Bower suffered residual impairment in other parts of his body.

The court did not clearly err in concluding that Bower did not have a whole body impairment as a result of the September 2013 injury.

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[25] See *Bishop v. Speciality Fabricating Co.*, 277 Neb. 171, 760 N.W.2d 352 (2009).

[26] *Moyera v. Quality Pork Internat., supra* note 21.

[27] *Id.*

[28] See *id.*

Out-of-Pocket Medical Expenses

Neither did the court clearly err in concluding that Bower failed to satisfy his burden of proof to support an award of out-of-pocket medical expenses. This determination involved findings of fact, which will not be disturbed on appeal unless they are clearly wrong in light of the evidence.[29]

Neb. Rev. Stat. § 48-120(1)(a) (Cum. Supp. 2016) provides that the employer is liable for, among other things, all reasonable medical, surgical, and hospital services, and medicines, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment. Section 48-120(8) states in relevant part that the compensation court shall order "reimbursement to anyone who has made any payment to the supplier for services provided in this section." It states in full:

> The compensation court shall order the employer to make payment directly to the supplier of any services provided for in this section or reimbursement to anyone who has made any payment to the supplier for services provided in this section. No such supplier or payor may be made or become a party to any action before the compensation court.[30]

[12] An employee has the burden to prove by a preponderance of the evidence compensability of a claim against an employer under the Nebraska Workers' Compensation Act.[31] Where the evidence shows that certain medical and hospital expenses have been incurred by an injured employee, a prima facie case is made out.[32]

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[29] *Id.*

[30] § 48-120(8).

[31] See, *Brandt v. Leon Plastics, Inc.*, 240 Neb. 517, 483 N.W.2d 523 (1992); *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990).

[32] *Schoenrock v. School Dist. of Nebraska City*, 179 Neb. 621, 139 N.W.2d 547 (1966).

Bower presented exhibits 14 and 15, which are a detailed summary of $12,315,94 in out-of-pocket medical expenses. But, as the court pointed out, that amount is contradicted by the joint medical expense cover sheet claiming only $3,975.41 in out-of-pocket medical expenses. And it is difficult to surmise what the medical bills established in out-of-pocket medical expenses.

[13] The court twice sought clarification. The record does not reflect that the parties jointly or Bower individually attempted to provide such clarification. An award cannot be based on mere possibility or speculation.[33] The court did not clearly err in concluding that, based on the self-contradictory evidence presented by Bower and the confusing state of the medical bills presented, it would be mere speculation to determine a sum certain for out-of-pocket medical expenses.

Future Medical Expenses

[14] We find no error in the court's refusal to award future medical expenses. Before an order for future medical benefits may be entered, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease.[34] An award of future medical expenses requires explicit evidence that future medical treatment is reasonably necessary to relieve the injured worker from the effects of the work-related injury.[35]

Morrison opined that no other treatment would be necessary for the September 2013 injury other than a "self-motivated program" of stretching and strengthening. The only evidence to the contrary is found in Kitabatake's report. But, as discussed,

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[33] See *Maroulakos v. Walmart Associates*, 300 Neb. 589, 915 N.W.2d 432 (2018).

[34] *Tchikobava v. Albatross Express, supra* note 8.

[35] *Id.*

the court did not err in discounting the opinion expressed therein. Thus, the court did not err in failing to award future medical expenses.

Reimbursement for Vacation, Sick, Personal, and Holiday Time

We turn next to Bower's claims regarding reimbursement for vacation, sick, personal, and holiday time used when he was unable to work as a result of the 2013 injury. In its award, the court did not expressly address whether Bower had a right to reimbursement for any vacation, sick, personal, and holiday time. But the court had clearly advised the parties in its pretrial order that any issue not set forth in the joint pretrial memorandum would be waived. Bower did not set forth in the joint pretrial memorandum the issue of compensation for vacation, sick, personal, and holiday time. Indeed, this issue was only briefly mentioned in opening statements.

[15] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[36] Furthermore, we have on numerous occasions affirmed the limiting of the issues at trial to those specified in the pretrial order.[37] We will not reverse the court's award for failing to address an issue that Bower failed to present in the pretrial memorandum after the court had advised the parties that the issues at trial would be limited to those specified by the parties in the joint pretrial memorandum. We find no merit to this assignment of error.

Vocational Rehabilitation Services

Eaton and Old Republic argue on cross-appeal that there was insufficient competent evidence to warrant the court's award of vocational rehabilitation services. Further, Eaton disputes the court's conclusion that Eaton had stipulated that

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[36] *Turney v. Werner Enters.*, 260 Neb. 440, 618 N.W.2d 437 (2000).

[37] *Cockrell v. Garton*, 244 Neb. 359, 507 N.W.2d 38 (1993).

Bower was entitled to vocational rehabilitation services. We agree that the record fails to demonstrate a stipulation that Bower was entitled to vocational rehabilitation. However, we find that the court did not clearly err in concluding upon the evidence presented that Bower was entitled to vocational rehabilitation.

[16] Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the compensation court.[38] To determine whether findings of fact made by the compensation court support an order granting or denying vocational rehabilitation benefits, an appellate court must consider the findings of fact in light of the statute authorizing vocational rehabilitation benefits, Neb. Rev. Stat. § 48-162.01 (Reissue 2010). Furthermore, in considering the compensation court's factual findings, we are mindful that the Nebraska Workers' Compensation Act is construed liberally to carry out its spirit and beneficent purposes.[39]

Section 48-162.01(1) describes that "[o]ne of the primary purposes of the Nebraska Workers' Compensation Act is restoration of the injured employee to gainful employment" and that "[t]o this end the Nebraska Workers' Compensation Court may employ one or more specialists in vocational rehabilitation." Under § 48-162.01(3):

> When as a result of the injury an employee is unable to perform suitable work for which he or she has previous training or experience, he or she is entitled to such vocational rehabilitation services, including job placement and training, as may be reasonably necessary to restore him or her to suitable employment.

"'[S]uitable employment'" is "'employment which is compatible with the employee's pre-injury occupation, age, education, and aptitude.'"[40] We have affirmed vocational

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[38] *Anderson v. EMCOR Group, supra* note 3.

[39] *Id.*

[40] *Id.* at 182, 903 N.W.2d at 34.

rehabilitation services aimed at placing the employee into employment paying wages similar to those earned before the work-related injury[41] because the statutory goal of suitable employment includes a similar earning capacity.[42]

The vocational counselor's reports show that after much investigation, the counselor determined Bower could not return to his previous job with Eaton, return to his previous job with Eaton with modification, or return to employment at Eaton with a new job.[43] Bower had indicated that he preferred to continue working at Eaton, where he earned a wage and benefits commensurate with his 20 years of employment at the company. But while Bower believed that he could compensate for his injury and perform his past job within his medical restrictions, Eaton was clear that it would not employ Bower given the medical restrictions of his permanent partial disability.

The counselor's labor market research demonstrated that with Bower's current qualifications, Bower would not be able to obtain employment earning wages commensurate with his past wages at Eaton. Thus, the counselor recommended vocational rehabilitation so that Bower could obtain suitable employment.

Eaton and Old Republic argue on cross-appeal that vocational rehabilitation was not necessary in order for Bower to obtain suitable employment, because Bower testified that he believed himself to be physically capable of doing the same or similar jobs at Eaton or with another manufacturer. Eaton ignores the part of Bower's testimony where he explains that a job with another manufacturer would not pay as well as a

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[41] See, *Anderson v. EMCOR Group, supra* note 3; *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012); *Yager v. Bellco Midwest, supra* note 5.

[42] See, *Becerra v. United Parcel Service, supra* note 41; *Yager v. Bellco Midwest, supra* note 5.

[43] See § 48-162.01(3).

job with Eaton. Eaton also ignores the fact that it refused to continue to employ Bower. The court did not clearly err in finding that vocational rehabilitation was reasonably necessary to restore Bower to suitable employment.

Private Disability Payments and Wrongful Discharge

[17] We find as a matter of law that the compensation court did not err in concluding that it lacked jurisdiction to determine the merits of Bower's claims for damages for wrongful discharge and for a declaration as to his liability to reimburse Eaton's insurer for private disability payments. As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.[44] Under Neb. Rev. Stat. § 48-152 (Reissue 2010), the Nebraska Workers' Compensation Court has only the "authority to administer and enforce all of the provisions of the Nebraska Workers' Compensation Act, and any amendments thereof, except such as are committed to the courts of appellate jurisdiction."

[18] We have held that the Nebraska Workers' Compensation Act does not afford the compensation court jurisdiction to resolve contractual disputes between employees and third-party insurers.[45] Neb. Rev. Stat. §§ 48-130 and 48-147 (Reissue 2010) prohibit the compensation court from taking into consideration when determining workers' compensation any benefits independent of the act paid to the employee.

Still, Bower asserts that his alleged contractual obligation to reimburse Eaton's insurer for payments under a private disability policy is "ancillary" to resolution of his workers'

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[44] *Rader v. Speer Auto*, 287 Neb. 116, 841 N.W.2d 383 (2013).

[45] *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved in part, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005). See, also, *Nerison v. National Fire Ins. Co. of Hartford*, 17 Neb. App. 161, 757 N.W.2d 21 (2008).

compensation claim and within the compensation court's jurisdiction pursuant to Neb. Rev. Stat. § 48-161 (Reissue 2010).[46] Section 48-161 provides that the compensation court shall have jurisdiction to decide issues that are "ancillary" to resolution of the workers' compensation claim.

We have held that § 48-161 grants the compensation court jurisdiction to resolve contractual disputes concerning coverage by providers of workers' compensation insurance.[47] We have never held, however, that § 48-161 confers upon the compensation court jurisdiction to resolve contractual disputes for coverage that is not workers' compensation coverage. Bower seems to acknowledge that questions of contractual obligations under private disability insurance contracts would not usually be considered ancillary to the compensation court's primary jurisdiction. But he asserts the fact that "the disability provider and Eaton are one in the same"[48] is an unusual circumstance that makes a difference.

Bower fails to explain why this would make a difference. With the exception of reimbursement of health care insurance providers as specifically described in § 48-120(8), providers of insurance coverage other than workers' compensation coverage are third-party insurers outside the scope of the Nebraska Workers' Compensation Act. This is true regardless of whether the private insurance coverage was provided through the employer as a benefit of employment.

[19] A contractual dispute over private agreements for disability coverage that is not workers' compensation coverage is not ancillary to the compensation court's primary jurisdiction. As stated by §§ 48-130 and 48-147, nothing in the Nebraska Workers' Compensation Act shall affect any existing insurance

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[46] Brief for appellant at 38.

[47] See, also, *Kruid v. Farm Bureau Mut. Ins. Co.*, 17 Neb. App. 687, 770 N.W.2d 652 (2009).

[48] Brief for appellant at 32.

contract for benefits in addition to the compensation provided for by the act, and no insurance of the injured employee independent of the act shall be taken into consideration by the compensation court. Bower's contractual obligations toward Eaton's private disability insurer had no bearing on the court's determinations of the compensability of Bower's injury, the amount of the award, or Bower's ability to receive the award. The court did not err in refusing to address Bower's obligation to reimburse Eaton's private disability insurer under the offset provisions of the private insurance contract.

[20] Likewise, the court did not err in refusing to consider Bower's claim for wrongful discharge. We have recognized that an employee can state a claim in district court for wrongful discharge in retaliation for filing a claim under the Nebraska Workers' Compensation Act.[49] We have never said that the compensation court has jurisdiction over such a claim. To the contrary, by recognizing such a claim in district court, we have implicitly held that wrongful discharge in relation to filing a workers' compensation claim does not fall under the compensation court's exclusive jurisdiction over accidents arising out of and in the course of employment.[50]

[21] The Nebraska Workers' Compensation Act does not describe wrongful discharge, and as a statutorily created court, it is the role of the Legislature to determine what acts fall within the Workers' Compensation Court's exclusive jurisdiction.[51] Wrongful discharge is not one of the tort actions for which employers receive relief in exchange for liability under the act. The court was correct in concluding that it lacked jurisdiction over Bower's wrongful discharge claim.

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[49] *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

[50] See *Estate of Teague v. Crossroads Co-op Assn.*, 286 Neb. 1, 834 N.W.2d 236 (2013).

[51] See *id.*

Waiting-Time Penalty

We turn next to the penalties imposed by the court against Eaton for its failure to timely pay all amounts of compensation due to Bower. Eaton does not contest that it was liable for the $939 imposed for its failure to timely pay benefits relating to the December 2015 surgery. But Bower argues that the waiting-time penalty should have been more, because no reasonable controversy existed as to the compensability of his injury by November 8, 2013, the date of his initial medical visit to Crockett.

Section 48-125(1)(a) states that all amounts of "compensation" payable under the Nebraska Workers' Compensation Act "shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death." "Compensation" in reference to additional sums for waiting time, an attorney fee, and interest, means periodic disability or indemnity benefits payable on account of the employee's work-related injury or death.[52] Section 48-125(1)(b) provides for a 50-percent waiting-time penalty in the event such periodic payments are not timely made.

[22] Although "reasonable controversy" appears nowhere in the text of § 48-125, the phrase has been part of our waiting-time penalty jurisprudence for more than 90 years, and we have presumed that the Legislature acquiesced in such determination of the Legislature's intent because it has never amended the Nebraska Workers' Compensation Act to address reasonable controversy.[53] Thus, under § 48-125(1)(b), an employer must pay a 50-percent waiting-time penalty 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.[54]

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[52] *Bituminous Casualty Corp. v. Deyle, supra* note 31.

[53] *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015).

[54] *Id.*

To avoid the penalty provided for in § 48-125, an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation.[55]

[23] Whether a reasonable controversy exists is a question of fact.[56] Accordingly, we review for clear error the compensation court's findings concerning reasonable controversy underlying its determination of waiting-time penalties.[57]

[24] Depending on the circumstances, a reasonable controversy may exist regarding the employer's liability until an employee presents the employer with competent medical evidence that he or she is entitled to workers' compensation benefits.[58] Although the total amount of compensation due may be in dispute, the employer's insurer nevertheless has a duty to promptly pay that amount which is undisputed, and the only legitimate excuse for delay of payment is the existence of genuine doubt from a medical or legal standpoint that any liability exists.[59]

The court found that a reasonable controversy existed at the time of the injury and up until Morrison's report, because internally inconsistent and self-contradictory medical reports by Murray created genuine doubt from a medical standpoint whether Bower had an injury that was incurred at work. Murray's first report on October 1, 2013, stated that Bower had

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[55] *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

[56] *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998).

[57] See *Dragon v. Cheesecake Factory, supra* note 1.

[58] See *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999). Compare *Heesch v. Swimtastic Swim School*, 20 Neb. App. 260, 823 N.W.2d 211 (2012).

[59] See, *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989); *Kubik v. Union Ins. Co.*, 4 Neb. App. 831, 550 N.W.2d 691 (1996); 13 Arthur Larson et al., Larson's Workers' Compensation Law § 135.03 (2017).

"no injury to his shoulder just woke up with pain." Murray's revised report faxed to Eaton on November 22 did not eliminate that statement. Instead, Murray added that Bower "injured his shoulder at work when he was lifting a heavy item, he has had pain but it became much worse this morning." The evidence indicates that Eaton tried to speak with Murray on multiple occasions in order to obtain clarification as to why Murray had changed the medical record and why it was inconsistent. There is no evidence that Murray responded to these inquiries.

In reviewing workers' compensation cases, this court is not free to weigh the facts anew; rather, it accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case.[60] Applying these principles, we find that the court did not clearly err in finding there was a reasonable controversy as to the compensability of Bower's injury until the report of Eaton's independent medical examiner.

Attorney Fees

Lastly, we address attorney fees. Eaton does not contest that some assessment of attorney fees was appropriate as part of the penalty for its late payment of compensation relating to the December 2015 surgery. Rather, in their cross-appeal, Eaton and Old Republic assert that the amount of the fees is unreasonable. Section 48-125(2)(a) provides for a "reasonable attorney's fee" when the employer fails to timely pay compensation or medical payments.[61]

[25] The determination of an award of attorney fees pursuant to § 48-125 must be calculated on a case-by-case basis.[62] The determination of the amount of attorney fees is necessarily a question of fact that requires a factual determination on several factors, including the value of legal services rendered

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[60] *Rodriquez v. Prime Meat Processors*, 228 Neb. 55, 421 N.W.2d 32 (1988).

[61] See, *VanKirk v. Central Community College*, 285 Neb. 231, 826 N.W.2d 277 (2013); *Bituminous Casualty Corp. v. Deyle, supra* note 31.

[62] *Simmons v. Precast Haulers*, 288 Neb. 480, 849 N.W.2d 117 (2014).

by an attorney by considering the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.[63]

In arguing that the amount of $7,500 was unreasonable, Eaton focuses on the small award of $1,877.99 in contested temporary total disability benefits and $939 in penalty benefits. Eaton argues that Bower's attorney should not be compensated for that portion of the work attributable to Bower's unsuccessful claims for reimbursement of medical expenses, future medical expenses, loss of earning capacity, and wrongful termination.

We have said that while particular attention should be given to the amount of legal work performed in relation to the unpaid compensation and medical bills, the award is not necessarily limited to legal work performed in recovering a specific, unpaid medical bill or delinquent compensation.[64] Like other questions of fact, the compensation court's determination of reasonable attorney fees pursuant to § 48-125 will not be disturbed on appeal unless it is clearly wrong in light of the evidence.[65] The court's award of $7,500 was not clearly wrong.

CONCLUSION

For the foregoing reasons, we affirm the court's award.

Affirmed.

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[63] *Id.*

[64] *Simmons v. Precast Haulers, supra* note 62. See, also, *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999) (Gerrard, J., concurring; McCormack, J., joins).

[65] *Simmons v. Precast Haulers, supra* note 62; *Harmon v. Irby Constr. Co., supra* note 64.

State of Nebraska, appellee, v. Michael W. McCurdy, appellant.

918 N.W.2d 292

Filed October 19, 2018. No. S-17-061.

1. **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.
2. ____: ____: ____. When a defendant is charged in alternative ways with committing an offense, the jury can convict if it finds there is sufficient evidence of either alternative, and thus the judgment of conviction must be affirmed if the evidence is sufficient to support either of the State's alternative theories of guilt.
3. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
4. ____. When interpreting a statute, no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
5. **Sexual Assault: Words and Phrases.** "Coercion" in Neb. Rev. Stat. § 28-318(8)(a)(i) (Reissue 2016) includes nonphysical force.

Petition for further review from the Court of Appeals, Pirtle, Riedmann, and Arterburn, Judges, on appeal thereto from the District Court for Lancaster County, Darla S. Ideus, Judge. Judgment of Court of Appeals affirmed.

Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Michael W. McCurdy was convicted of three counts of first degree sexual assault of a child, one count of first degree sexual assault, and one count of intentional child abuse following a jury trial in the district court for Lancaster County. On appeal, the Nebraska Court of Appeals rejected McCurdy's assignments of error and affirmed his convictions and sentences. *State v. McCurdy*, 25 Neb. App. 486, 908 N.W.2d 407 (2018).

We granted McCurdy's petition for further review. On further review, he primarily claims that the Court of Appeals erred when it determined that there was sufficient evidence to support his conviction for first degree sexual assault. Although we employ a different analysis than that employed by the Court of Appeals, we agree with its conclusion that there was sufficient evidence. Further, we find no error in the Court of Appeals' disposition regarding McCurdy's other claims involving rulings and events at trial. We therefore affirm the Court of Appeals' affirmance of McCurdy's convictions and sentences.

STATEMENT OF FACTS

The five counts charged against McCurdy arose from allegations that over a period of years, he sexually abused his former girlfriend's two eldest daughters, J.U. and K.O. In three charges of first degree sexual assault of a child, the State alleged that McCurdy had (1) subjected J.U. to sexual penetration when she was under 12 years of age, (2) subjected J.U. to sexual penetration when she was at least 12 years of age but less than 16 years of age, and (3) subjected K.O. to

sexual penetration when she was at least 12 years of age but less than 16 years of age. In the charge of first degree sexual assault wherein the charge did not involve a "child" and is the subject of our analysis below, the State alleged that McCurdy had subjected J.U. to penetration without her consent or when he knew or should have known that J.U. was mentally or physically incapable of resisting or appraising the nature of his conduct; this charge of first degree sexual assault related to a time period when J.U. was over 16 years of age. The charge of intentional child abuse involved allegations regarding both J.U. and K.O.

The charges against McCurdy were tried to a jury in October 2016. Both J.U. and K.O. testified at the trial. The Court of Appeals summarized the evidence for which there is support in the record as follows:

> J.U. was 18 years old at the time of the trial. She testified that McCurdy has been in her life for as long as she can remember. J.U.'s mother and McCurdy used to be in a long-term romantic relationship, and they share three children together. J.U. testified that McCurdy had been sexually abusing her since she was in middle school. J.U. indicated that since the sexual abuse began, she and her family, including McCurdy, had lived in four different houses. She used these houses to organize her testimony about the years of sexual abuse.
>
> J.U. lived in the "yellow house" from the time she was 5 years old until she was almost 10 years old. While she lived there, she and her younger sister, K.O., shared a bedroom in the attic of the house. One day, when J.U. was approximately 9 years old, she was alone in the bedroom when McCurdy entered the room. J.U. testified, "[H]e came in the room and started taking my pants off and then had intercourse." J.U. testified that after this initial incident, McCurdy would come into her bedroom three to four times per week in order to have sexual intercourse with her. She testified that she would tell McCurdy

"no" and push him away, but that she was unable to stop McCurdy from having sexual intercourse with her. J.U. testified that she did not tell anyone what was happening because she was afraid she would get into trouble and no one would believe her.

J.U. and her family next moved into the "white house." They resided in this house from the time J.U. was 10 years old until she was 13 years old. While J.U. and her family lived in the white house, McCurdy continued to have sexual intercourse with J.U. three to four times per week in her bedroom. She testified that she continued to tell McCurdy "no," but that she did not push him away anymore. She explained that even if she tried to push him away, he would "still do it anyway." J.U. continued to keep the abuse a secret because she was scared.

J.U. and her family moved into the "blue house" when she was 13 years old. They lived at that house until J.U. was almost 15 years old. At the blue house, the abuse continued. J.U. testified that by this time, McCurdy was no longer in a romantic relationship with her mother; however, he continued to reside with the family. J.U. testified that McCurdy continued to have sexual intercourse with her three to four times per week, both in her bedroom and occasionally in her mother's bedroom. In addition, while they were living in the blue house, McCurdy began to rub J.U.'s vagina with his hands and put his mouth on her vagina. J.U. described that McCurdy would put lotion all over her body, including on her breasts, her buttocks, and her vagina. J.U. indicated that she had stopped saying "no" to McCurdy, "[b]ecause he still did it anyway." She continued to keep the abuse a secret.

When J.U. was almost 15 years old, she, her mother, and her siblings moved into "the Sandstone house." McCurdy did not reside at this residence; however, he stayed overnight at the home on a regular basis,

oftentimes without J.U.'s mother's knowledge. At the Sandstone house, J.U. slept in the basement on a futon. When McCurdy would sleep at the Sandstone house, he would typically sleep with J.U. on the futon. McCurdy had sexual intercourse with J.U. three to four times per week in her basement bedroom. In addition, McCurdy put his hands and mouth on her vagina. J.U. no longer resisted McCurdy's actions.

In 2014, just prior to J.U.'s turning 16 years old, she became pregnant. J.U. testified that McCurdy was the father of the baby. In fact, she testified that she had never had sexual intercourse with anyone other than McCurdy. When McCurdy discovered that J.U. was pregnant, he told her to tell her mother that someone else was the father. J.U. testified that she followed McCurdy's directions and "ma[d]e up a name" to tell her mother. J.U.'s pregnancy did not result in a live birth.

During the summer of 2015, when J.U. was 17 years old, she became pregnant for a second time. The parties stipulated at trial that McCurdy was the father of J.U.'s baby. J.U. testified that when McCurdy found out she was pregnant, he instructed her "[t]o make up a name again" to tell her mother. However, on August 7, 2015, J.U. told her mother that she was pregnant with McCurdy's baby. J.U.'s mother then called police.

K.O. was 16 years old at the time of the trial. She testified that she has known McCurdy for her entire life. She also testified that McCurdy had been sexually assaulting her since she was approximately 10 years old. Like J.U., K.O. organized her testimony about the years of sexual abuse using the houses where she and her family had lived in the last few years.

When K.O. lived in the blue house, she was between the ages of 11 years old and 13 years old. She testified that while she lived in this house, McCurdy gave her a video game system as a present. He took her out of school

so that they could play the game together all day and into the night. McCurdy then told K.O. to sleep in his bed so the younger children did not wake her up. McCurdy laid down with K.O. in the bed. K.O. testified that while they laid together, he attempted to "put[ ] his penis in [her] shorts." She pulled away from him and nothing further happened on this occasion. Subsequently, however, McCurdy asked K.O. to rub his penis and "scratch[ ]" his "balls." He would sometimes tell her to use lotion when she was touching his penis. Eventually, McCurdy put his penis in K.O.'s vagina. He then continued to have sexual intercourse with her twice per week. McCurdy also put his fingers in K.O.'s vagina.

K.O. testified that she tried to resist McCurdy by pushing him away or trying to get away from him. She also told him "no." She indicated that sometimes she was able to successfully resist his actions. However, other times, McCurdy would "punish" her for her resistance. Such punishment included using his fingers to "[g]o higher up . . . in [her] vagina" to cause her pain. Additionally, K.O. testified that McCurdy would be "violent" with her sometimes. He would slap her, punch her, choke her, and hold her arms down.

K.O. testified that she did not tell her mother what was happening because she did not think her mother would believe her. She also testified that before McCurdy began abusing her, she observed J.U. and McCurdy having sexual intercourse in her mother's bedroom.

When K.O. and her family moved to the Sandstone house, K.O. was 13 years old. K.O. testified that at the Sandstone house, the sexual intercourse and sexual contact continued. K.O. indicated that the sexual contact included McCurdy rubbing lotion all over her body. At the Sandstone house, McCurdy had sexual intercourse with K.O. approximately twice every other week. K.O. believed that the abuse happened less often at the

Sandstone house because she continued to resist McCurdy and actively tried to stay away from him.

K.O. described three specific instances of sexual contact at the Sandstone house that she remembered. First, she described one occasion where McCurdy attempted to have her put her mouth on his penis, but she successfully resisted him. Then, she described an occasion where McCurdy put his fingers in her vagina while they were in the living room watching a movie with her younger siblings. K.O. indicated that she and McCurdy were under a blanket. Finally, she described an incident where she resisted McCurdy and he got mad and put his hands around her neck.

K.O. testified that she did not tell her mother about what was happening because she did not think her mother would believe her. K.O. admitted that she had lied to her mother about other things. K.O. did not tell her mother about the abuse until after J.U. had reported her experiences to police.

The State offered evidence in addition to J.U.'s and K.O.'s testimony. Such additional evidence included DNA evidence from the Sandstone house, the testimony of an expert witness concerning behaviors of child sexual assault victims, and a recording of an interview between law enforcement and McCurdy which was conducted just prior to McCurdy's arrest. . . . The State also offered into evidence numerous photographs of J.U. and K.O. which were located on McCurdy's cellular telephone and on the family's computer under a user account titled "Mike." Some of these photographs had comments of a sexual nature electronically superimposed on them.

McCurdy did not testify at trial, nor did he offer any evidence in his defense. However, throughout the cross-examination of the State's witnesses and during closing arguments, McCurdy's counsel indicated that McCurdy did not dispute that he and J.U. engaged in sexual

> intercourse after she turned 16 years old. McCurdy contended that his sexual relationship with J.U. at that time was consensual. McCurdy did dispute that he had ever had sexual intercourse with K.O. He also disputed that he had sexual intercourse with J.U. prior to her turning 16 years old. Much of McCurdy's defense involved attacking the credibility of J.U. and K.O. during their cross-examinations. McCurdy pointed out numerous inconsistencies between J.U.'s and K.O.'s trial testimony and their prior statements about the sexual abuse.

State v. McCurdy, 25 Neb. App. 486, 489-93, 908 N.W.2d 407, 412-14 (2018). The jury found McCurdy guilty of all five counts, and the district court thereafter sentenced McCurdy to imprisonment for a total of 95 to 115 years for the five convictions.

McCurdy appealed to the Court of Appeals and made five assignments of error. The Court of Appeals rejected all of McCurdy's assignments of error and affirmed his convictions and sentences. We granted McCurdy's petition for further review.

ASSIGNMENTS OF ERROR

McCurdy claims on further review that the Court of Appeals erred when it determined that there was sufficient evidence to support his conviction for first degree sexual assault of J.U. without addressing whether there was sufficient evidence that J.U. lacked the mental capacity to consent.

McCurdy also claims that the Court of Appeals erred when it rejected his assignments of error (1) challenging the admission of expert testimony concerning the behaviors and testimonial patterns of child sexual assault victims, (2) claiming prosecutorial misconduct, and (3) admitting DNA evidence. We find no error in the Court of Appeals' disposition of these three issues, and we see no need for further comment on them. Therefore, our analysis below is limited to the sufficiency of the evidence to support McCurdy's conviction for first degree sexual assault of J.U.

STANDARD OF REVIEW

[1] 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. Wells*, 300 Neb. 296, 912 N.W.2d 896 (2018).

ANALYSIS

McCurdy claims on further review that the Court of Appeals erred when it determined that there was sufficient evidence to support his conviction for first degree sexual assault without addressing whether there was sufficient evidence that the victim, J.U., lacked the mental capacity to consent. McCurdy's argument presumes that the Court of Appeals affirmed his conviction for first degree sexual assault on the basis of a finding that he subjected J.U. to sexual penetration when he knew or should have known that she was mentally incapable of consent. Contrary to McCurdy's contention, we read the Court of Appeals' opinion as concluding that there was sufficient evidence to support McCurdy's conviction for first degree sexual assault on the basis of a finding that he subjected J.U. to sexual penetration without her consent. And, although we employ an analysis that differs in certain respects from that used by the Court of Appeals, we agree with its conclusion that there was sufficient evidence to find that McCurdy subjected J.U. to sexual penetration without her consent.

McCurdy claims on appeal that there was insufficient evidence to support his conviction for first degree sexual assault; he does not challenge the sufficiency of the evidence related to his other convictions. The first degree sexual assault statute,

Neb. Rev. Stat. § 28-319(1)(a), (b), and (c) (Reissue 2016), sets forth three ways in which one could be found guilty of the offense. Section 28-319(1) provides that one is guilty of first degree sexual assault if one

> subjects another person to sexual penetration (a) without the consent of the victim, [or] (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 . . . .

To prove guilt under § 28-319, it must be shown that the offender subjected the victim to sexual penetration along with one of the three alternatives set forth in § 28-319(1)(a), (b), and (c).

The State alleged that McCurdy committed first degree sexual assault against J.U. when she was 16 years of age or older. Therefore, § 28-319(1)(c), pertaining to victims "at least twelve but less than sixteen years of age," did not apply to the charge of first degree sexual assault in this case. Instead, the State alleged in the information that McCurdy subjected J.U. to sexual penetration either without the consent of J.U., in violation of § 28-319(1)(a), or, alternatively, when McCurdy knew or should have known that J.U. was mentally or physically incapable of resisting or appraising the nature of his conduct, in violation of § 28-319(1)(b). The district court in this case instructed the jury on both alternatives, using the language of § 28-319(1)(a) and (b), as well as the statutory definitions of certain terms, including the term "without consent."

The Court of Appeals concluded that there was sufficient evidence to support the charge of first degree sexual assault. The Court of Appeals' analysis focused on evidence showing that because McCurdy had sexually abused her in the past, J.U. found it futile or useless to resist McCurdy's sexual advances after she turned 16. The Court of Appeals concluded as follows:

> Based on J.U.'s testimony as a whole, the jury could have found that J.U. had repeatedly resisted McCurdy's sexual advances verbally and physically without success and that by the time she was 16 years old, any further resistance on her part would have been futile. Therefore, the jury could find the essential elements of the crime of first degree sexual assault beyond a reasonable doubt.

State v. McCurdy, 25 Neb. App. 486, 514, 908 N.W.2d 407, 425-26 (2018).

McCurdy claims on further review that the Court of Appeals erred because it did not address the argument that there was not sufficient evidence to support a finding that J.U. was rendered incapable of consent. In this regard, we note that the State had argued, at least in part, to the Court of Appeals that the evidence in this case supported a finding that McCurdy's sexual abuse of J.U. prior to her turning 16 years old rendered her incapable of resisting or appraising the nature of McCurdy's conduct after she turned 16 years old. We think that McCurdy's argument on further review misreads the basis on which the Court of Appeals concluded that there was sufficient evidence to support his conviction for first degree sexual assault: to wit, the sexual penetration was without J.U.'s consent.

McCurdy's argument focuses exclusively on § 28-319(1)(b) and whether there was sufficient evidence regarding J.U.'s mental capability in relation to consent. But we read the Court of Appeals' opinion as concluding that because there was sufficient evidence to find that sexual penetration occurred without the consent of J.U., there was sufficient evidence to support a conviction for first degree sexual assault under § 28-319(1)(a). Having concluded that the evidence was sufficient under § 28-319(1)(a), the Court of Appeals did not need to address whether there was also sufficient evidence to find that J.U. lacked the mental capacity to consent under § 28-319(1)(b).

[2] We have stated that when a defendant was charged in alternative ways with committing an offense, "the jury could

convict if it found there was sufficient evidence of either [alternative], and thus the judgment of conviction must be affirmed if the evidence is sufficient to support either of the State's alternative theories of guilt." *State v. Eagle Bull*, 285 Neb 369, 375, 827 N.W.2d 466, 471 (2013). See, also, *State v. Knutson*, 288 Neb. 823, 843, 852 N.W.2d 307, 324 (2014) ("judgment must be affirmed if [evidence] was sufficient to support any of the State's three theories of guilt"). In these cases, after we found sufficient evidence to support a conviction under one theory, we stated that we need not consider whether the evidence was sufficient to support the alternative theory or theories of guilt. In *Eagle Bull*, we noted that the defendant had not objected to the court's instructing on alternative theories on the basis that there was not sufficient evidence to support each alternative and that the defendant did not raise the instruction issue on appeal. In the present case, McCurdy did not object to the instruction and he did not assign error on appeal to the giving of the instruction.

The Court of Appeals' analysis focused on evidence that, because of McCurdy's prior sexual assault of J.U., it would have been useless or futile for J.U. to resist McCurdy's sexual advances after she turned 16 years old. As we discuss further below, this analysis was relevant to whether there was sufficient evidence that the sexual penetration was without J.U.'s consent. However, the Court of Appeals' analysis focused exclusively on one aspect of the statutory definition of "without consent" and did not focus on other relevant portions of the definition. In our discussion below, we supply the missing analysis.

Within Nebraska's sexual assault statutes, Neb. Rev. Stat. § 28-318 (Reissue 2016) provides definitions for terms used in § 28-319 and related statutes. Subsection 28-318(8) defines "without consent" as follows:

> Without consent means:
>
> (a)(i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the

> victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;
>
> (b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and
>
> (c) A victim need not resist verbally or physically where it would be useless or futile to do so[.]

The Court of Appeals' analysis in this case focused on § 28-318(8)(c) and whether there was evidence that it would have been useless or futile for J.U. to resist McCurdy. The Court of Appeals did not appear to comment on whether there was evidence that sexual penetration was "without consent" within one of the definitions set forth in § 28-318(8)(a).

As we read § 28-318(8), in order to determine whether sexual activity was "without consent" of the alleged victim, one of the four alternatives set forth in subsection (a) must be shown. That is, it must be shown that either (1) the defendant compelled the victim to submit due to the use of force or threat of force or coercion, (2) the victim expressed a lack of consent through words, (3) the victim expressed a lack of consent through conduct, or (4) the defendant used deception to obtain consent. We do not read § 28-318(8)(b) and (c) as setting forth additional independent alternative means to show that sexual penetration was "without consent." Instead, we read these subsections as informing the nature of the proof necessary to show one of the definitions set forth in subsection (a). That is, subsection (b) describes the nature of resistance which must be shown in circumstances where resistance by the victim is relevant to proving that sexual activity was "without consent." Subsection (c) describes circumstances in which it is not necessary to show resistance by the victim in order to prove that sexual activity was "without consent."

Therefore, the Court of Appeals' analysis of evidence showing that it would have been useless or futile for J.U. to resist verbally or physically was relevant to show that it was not necessary to prove that J.U. resisted in order to prove that sexual penetration was without her consent. The evidence of uselessness or futility was necessary but not sufficient to show that sexual penetration was without J.U.'s consent. Instead, to prove consent was lacking, it was also necessary to show that sexual penetration occurred in a manner described in one of the four alternatives set forth in § 28-318(8)(a). We perform that analysis below.

We first note that we do not find that there was evidence in this case that at the time relevant to the charge of first degree sexual assault, J.U. expressed a lack of consent through words or conduct. There was evidence that J.U. expressed her lack of consent when McCurdy first began sexually assaulting her, but J.U. testified that in the relevant time period, after she turned 16, she had stopped resisting and expressing her lack of consent, because it had not worked in the past. Therefore, there was no evidence that sexual penetration was "without consent" within the meanings set forth in § 28-318(8)(a)(ii) and (iii). We also find no evidence that McCurdy gained J.U.'s consent through deception, and therefore there was no evidence that sexual penetration was "without consent" within the meaning set forth in § 28-318(8)(a)(iv).

Having eliminated § 28-318(8)(a)(ii), (iii), and (iv), we consider whether the evidence supports a finding under § 28-318(8)(a)(i) that J.U. "was compelled to submit due to the use of force or threat of force or coercion." By its terms, § 28-318(8)(a)(i) sets forth three ways one might compel another person to submit: (1) use of force, (2) threat of force, or (3) coercion. "Use of force" and "threat of force" are defined in the statute, but "coercion" is not. With regard to "use of force" and "threat of force," § 28-318(9) supplies the following definitions:

> Force or threat of force means (a) the use of physical force which overcomes the victim's resistance or (b) the threat of physical force, express or implied, against the victim or a third person that places the victim in fear of death or in fear of serious personal injury to the victim or a third person where the victim reasonably believes that the actor has the present or future ability to execute the threat.

As noted above, there was no evidence in this case that J.U. actively resisted McCurdy at the times relevant to the charge of first degree sexual assault, when J.U. was over 16. Therefore, there was no evidence that McCurdy used physical force which overcame J.U.'s resistance and no evidence that McCurdy compelled J.U. to submit by "use of force" as that term is defined in § 28-318(9). We also do not think that the evidence shows that McCurdy compelled J.U. to submit by "threat of force," because the definition of that term in § 28-318(9) specifies "physical force" and further limits the threat to one that "places the victim in fear of death or in fear of serious personal injury." We believe the evidence in this case did not show that McCurdy threatened J.U. in a manner that put her in fear of death or serious personal injury.

Based on the foregoing, the issue before us is whether the evidence supported a finding that McCurdy compelled J.U. to submit to sexual penetration by "coercion." As noted, "coercion" as used in § 28-318(8)(a)(i) is not statutorily defined in § 28-318 or elsewhere, so we must look to the statute as a whole, as well as other sources, to understand "coercion" as it is used in § 28-318(8)(a)(i).

[3] Statutory language is to be given its plain and ordinary meaning. *State v. Clemens*, 300 Neb. 601, 915 N.W.2d 550 (2018). Black's Law Dictionary defines "coercion" as "[c]ompulsion of a free agent by physical, moral, or economic force or threat of physical force." Black's Law Dictionary 315 (10th ed. 2014). Under this definition, although "coercion"

includes physical force and the threat of physical force, it also includes other, nonphysical forms of force.

[4,5] We have said that when interpreting a statute, no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. See *State v. Clemens, supra*. Section 28-318(8)(a)(i) includes "force," "threat of force," and "coercion" as separate manners of compelling submission. Because "force" and "threat of force" are both defined in § 28-318(9) in terms of physical force, we determine that "coercion" would be redundant and even superfluous in the context of § 28-318(8)(a)(i) if it were limited to physical force. Accordingly, we hold that "coercion" in § 28-318(8)(a)(i) includes nonphysical force.

Having determined that "coercion" under § 28-318(8)(a)(i) includes nonphysical forms of force, we consider whether the evidence in this case supports a finding that McCurdy compelled J.U. to submit to sexual penetration due to the use of "coercion." We conclude that the evidence in this case regarding the history of McCurdy's sexual abuse of J.U. in the years prior to the time related to the charge of first degree sexual assault, as well as evidence regarding McCurdy's position of authority and dominion within J.U.'s life and household, was sufficient for the jury to find that at the times relevant to the charge of first degree sexual assault, McCurdy compelled J.U. to submit to sexual penetration by use of coercion, and therefore, the sexual acts were without consent.

In reaching this conclusion, we have looked to cases from other jurisdictions in which courts have found that circumstances similar to those in the present case supported a conviction for sexual assault. We note in this regard that statutes criminalizing rape or sexual assault in other states are not generally uniform and that the wording of such statutes varies among states. The cases discussed below generally involve statutes that do not use the word "coercion." However, whether or not the relevant statutes in these cases use the same wording and definitions as Nebraska's sexual assault statutes,

we find the cases informative as to whether the circumstances of this case support a finding of "coercion" under Nebraska's sexual assault statutes. The statutes commonly use the word "force," and the opinions often attempt to find whether the circumstances establish "force." As indicated below, the cases do not limit "force" to physicality. We think that if the circumstances establish that "force" under another state's statutes includes nonphysical means, it tends to support a conclusion that similar circumstances can establish "coercion" under our statutes, because "coercion" includes nonphysical forms of force.

As we have indicated, courts have recognized that a psychological rather than physical force can support a conviction for sexual assault. See *State v. Watkins*, 92 A.3d 172, 186 (R.I. 2014) ("psychological coercion is sufficient to prove the force or coercion element of sexual assault, even in the absence of physical force"). Such psychological force or coercion has particularly been found in circumstances where abuse is carried out by adult authority figures in family or household settings.

For example, in *State v. Meyers*, 799 N.W.2d 132 (Iowa 2011), the defendant was charged with, inter alia, sexual abuse in the third degree; the alleged victim was the defendant's stepdaughter who was 17 years old at the time of the alleged abuse. The State in *Meyers* offered two alternative theories of sexual abuse under the relevant Iowa statute—that the defendant performed sex acts by force or "'against the will'" of the victim or, alternatively, that he performed sex acts at a time when the victim was suffering from a mental defect or incapacity. 799 N.W.2d at 140.

In interpreting the "against the will" language of the statute, the Iowa Supreme Court stated, "Clearly, the 'against the will of another' standard seeks to broadly protect persons from nonconsensual sex acts, even under circumstances showing the victim had no opportunity or ability to consent due to the inherently *coercive* nature of the circumstances." *Meyers*,

799 N.W.2d at 143 (emphasis supplied). The Iowa Supreme Court noted that under the statute, "physical resistance is not required 'to establish that an act of abuse is committed by force or against the will of a person'" and that instead, "'the circumstances surrounding the commission of the act' [must] be considered in determining whether the act was 'by force or against the will of the other.'" *Id*. at 142-43. In concluding that the evidence in *Meyers* supported a finding that the sex acts engaged in between the defendant and the victim were "'by force or against the will'" of the victim, the Iowa Supreme Court noted evidence of the totality of the circumstances, including, inter alia, "the disparity in age between [the defendant] and [the victim], the background and history of their relationship," and "the authority exercised by [the defendant]." 799 N.W.2d at 147.

The Iowa Supreme Court in *Meyers* also specifically concluded that "psychological force or inability to consent based on the relationship and circumstance of the participants may give rise to a conviction under the 'against the will' element" of sexual abuse. 799 N.W.2d at 146. The court looked to other jurisdictions in considering whether "psychological force" can establish sexual abuse. The court cited *Com. v. Rhodes*, 510 Pa. 537, 555, 510 A.2d 1217, 1226 (1986), in which the Pennsylvania Supreme Court determined that the Pennsylvania rape statute's reference to "'forcible compulsion'" included not only physical force or violence, "but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will." To determine if force had been used, the Pennsylvania Supreme Court focused on a totality of the circumstances analysis and cited various factors, including:

> the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position

> of authority, domination or custodial control over the victim, and whether the victim was under duress.

Id.

In *U.S. v. Davis*, 875 F.3d 592, 596 (11th Cir. 2017), the Court of Appeals for the 11th Circuit considered whether a conviction under an Alabama statute criminalizing sexual abuse by forcible compulsion was a "violent felony" for purposes of sentence enhancement. After reviewing Alabama case law, the 11th Circuit determined that the Alabama statute did not necessarily require the use, attempted use, or threatened use of physical force. The 11th Circuit relied on, inter alia, *Powe v. State*, 597 So. 2d 721, 728 (Ala. 1991), in which the Alabama Supreme Court concluded that "a jury could reasonably infer that [the defendant] held a position of authority and domination with regard to his daughter sufficient to allow the inference of an implied threat to her if she refused to comply with his demands." The Alabama court limited its holding in *Powe* "to cases concerning the sexual assault of children by adults with whom the children are in a relationship of trust" and reasoned that such cases are distinct because of "the great influence and control that an adult who plays a dominant role in a child's life may exert over the child" and that "[w]hen a defendant who plays an authoritative role in a child's world instructs the child to submit to certain acts, an implied threat of some sort of disciplinary action accompanies the instruction." 597 So. 2d at 728-29.

In *State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987), the North Carolina Supreme Court emphasized the intrafamilial context when it determined that there was sufficient evidence to establish the statutory requirement of "force." The court determined that "constructive force could be reasonably inferred from the circumstances surrounding the parent-child relationship," and it noted that the victim "was conditioned to succumb to defendant's illicit advances at an age when he could not yet fully comprehend the implications of defendant's conduct." *Id*. at 47, 352 S.E.2d at 681. The court further noted

that the "incidents of abuse all occurred while the boy lived as an unemancipated minor in defendant's household, subject to defendant's parental authority and threats of disciplinary action." *Id*. at 47-48, 352 S.E.2d at 681. The court concluded in *Etheridge* that in cases of this sort,

> the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces. Coercion, as stated above, is a form of constructive force. For this reason, we hold that the state presented sufficient evidence from which the jury could reasonably infer that defendant used his position of power to force his son's participation in sexual acts.

319 N.C. at 48, 352 N.E.2d at 682.

The Ohio Supreme Court in *State v. Eskridge*, 38 Ohio St. 3d 56, 58, 526 N.E.2d 304, 306 (1988), "recognize[d] the coercion inherent in parental authority when a father sexually abuses his child" and concluded that under such circumstances, "[f]orce need not be overt and physically brutal, but can be subtle and psychological." We note that the Ohio Supreme Court in *State v. Schaim*, 65 Ohio St. 3d 51, 55, 600 N.E.2d 661, 665 (1992), a case involving a victim who was 20 years old, distinguished *Eskridge*, which involved a young victim. The court concluded that while a "threat of force can be inferred from the circumstances surrounding sexual conduct, . . . a pattern of incest will not substitute for the element of force where the state introduces no evidence that an adult victim believed that the defendant might use physical force against her." However, *Schaim* was applying a statute that required a showing that the defendant "'compel[led] the other person to submit by force or threat of force'" and that defined "force" and "threat of force" in terms of physical force. 65 Ohio St. 3d at 54, 600 N.E.2d at 665.

In the cases discussed above, the courts were generally dealing with statutes that required a showing of force and the courts found that "force" could be shown by nonphysical

coercion under the relevant circumstances. By comparison, Nebraska's statute includes "coercion," as well as "force," and as discussed above, we read "coercion" as a distinct means of compelling a person to submit that does not necessarily require a showing of physical force. We therefore think that under a totality of the circumstances analysis, coercion within the context of a family or household relationship between a minor and an adult authority figure can support a finding that a defendant compelled a victim to submit to sexual penetration by the use of "coercion."

The charge of first degree sexual assault in this case involved McCurdy's subjecting J.U. to sexual penetration when she was over 16 years of age. McCurdy did not dispute that he had sexual intercourse with J.U. when she was 16 and 17 years old, and he admitted that at the time he was arrested, J.U. was pregnant with his child. There was evidence that McCurdy had sexually assaulted J.U. over a period of years prior to her turning 16. J.U. testified that when McCurdy first began sexually assaulting her, she would tell him "'no'" and try to push him away but that she eventually stopped resisting, because "'he still did it anyway.'" See *State v. McCurdy*, 25 Neb. App. 486, 490, 908 N.W.2d 407, 412 (2018). She also testified that after she turned 16 years old, she did not want to have sex with McCurdy but she knew that resisting his advances had never worked for her. We think that evidence of a history of sexually assaulting J.U. combined with the authority McCurdy exerted as an adult in J.U.'s household were sufficient to establish "coercion" under § 28-318(8)(a)(i).

Given the foregoing, we determine that there was sufficient evidence from which the jury could have found that McCurdy subjected J.U. to sexual penetration "without consent"; specifically, he compelled J.U. to submit to sexual penetration by use of coercion. We therefore conclude that the Court of Appeals did not err when it determined that there was sufficient evidence to support McCurdy's conviction for first degree sexual assault.

CONCLUSION

We find no error in the Court of Appeals' disposition of McCurdy's assignments of error relating to (1) the admission of expert testimony concerning the behaviors and testimonial patterns of child sexual assault victims, (2) a claim of prosecutorial misconduct, and (3) the admission of DNA evidence. With regard to the sufficiency of the evidence to support McCurdy's conviction for first degree sexual assault of J.U., although our analysis differs from that of the Court of Appeals, we agree with the Court of Appeals' conclusion that there was sufficient evidence to support the conviction. We therefore affirm the Court of Appeals' affirmance of McCurdy's convictions and sentences.

Affirmed.

Freudenberg, J., not participating.

State of Nebraska, appellee, v. Avery R. Tyler, appellant.

918 N.W.2d 306

Filed October 19, 2018. No. S-17-870.

1. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.
2. **Postconviction: Constitutional Law: 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.
3. **Postconviction: Constitutional Law: Judgments.** Under the Nebraska Postconviction Act, a prisoner in custody may file a petition for relief on the ground that there was a denial or infringement of the prisoner's constitutional rights that would render the judgment void or voidable.
4. **Postconviction.** In the absence of alleged facts that would render the judgment void or voidable, the proper course is to dismiss a motion for postconviction relief for failure to state a claim.
5. **Postconviction: Appeal and Error.** A motion for postconviction relief is not a substitute for an appeal.
6. ____: ____. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal; such issues are procedurally barred.
7. **Postconviction: Prosecuting Attorneys: Appeal and Error.** Whether a claim of prosecutorial misconduct could have been litigated on direct appeal and is thus procedurally barred from being litigated on postconviction depends on the nature of the claim.
8. ____: ____: ____. Where the claim of prosecutorial misconduct is such that a determination of the merits is possible based on the record

on direct appeal, it is procedurally barred from being litigated on postconviction.

9. **Trial: Prosecuting Attorneys.** In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.
10. **Effectiveness of Counsel: Proof.** To show prejudice on 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.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Affirmed.

Michael J. Wilson and Glenn Shapiro, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

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

Funke, J.

Avery R. Tyler appeals from the district court's denial of postconviction relief without an evidentiary hearing. Tyler asserts claims of prosecutorial misconduct and ineffective assistance of trial and appellate counsel. For the reasons set forth herein, we affirm.

I. BACKGROUND

This appeal follows our decision in *State v. Tyler*,[1] which affirmed Tyler's jury trial convictions and sentences therefrom, including one count of premeditated first degree murder, a Class IA felony for which Tyler received a sentence of life imprisonment, and one count of use of a firearm to commit a

[1] *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015).

felony, a Class IC felony for which Tyler received a sentence of 20 to 30 years imprisonment. The trial court ordered the sentences to run consecutively.

1. Facts

On September 3, 2012, Delayno Wright was shot and killed outside Halo Ultra Lounge (Halo) in Omaha, Nebraska. Prior to the shooting, Wright, his girlfriend Brittany Ashline, and his cousin LaRoy Rivers were walking through the parking lot toward Wright's vehicle when two men walked past them. One of the men grabbed or brushed against Ashline, which led to Ashline and Wright's confronting the men. Rivers thought he recognized one of the men who was wearing a brown, striped shirt and saw that man break away from the group. Rivers saw a dome light turn on in a vehicle in the parking lot, heard the voice of the man he thought he recognized yelling, "'What's up now?'" and heard gunshots. Rivers could not see the shooter, but Ashline said she saw a man run to a tan or gold sport utility vehicle or Jeep and leave the scene after the shots were fired. Wright indicated he had been shot, was driven to a hospital, and was subsequently pronounced dead due to a gunshot wound to his torso.

When Rivers spoke to investigators, he informed them that he thought he recognized the man wearing the brown, striped shirt as a person he played basketball with in high school. Rivers explained that he thought the man's first name was Avery, but that he was unsure of his last name. While on a detective's computer, Rivers accessed a social media page, viewed Tyler's profile picture, and identified him as the individual in the brown, striped shirt.

During the investigation of the shooting, investigators obtained a photograph of Tyler from a wedding he attended the day before the shooting in which he was wearing a brown, striped shirt. Investigators also obtained security footage showing a sport utility vehicle leaving the scene near the time of the shooting at a high rate of speed. It was subsequently discovered Tyler's girlfriend owned a silver Jeep Commander. At the

scene of the shooting, investigators found eight shell casings. A crime laboratory technician reported that the casings were all fired from the same gun and that there are about 20 guns capable of firing them, including an "FN Five-seveN" pistol. It was discovered Tyler had purchased an FN Five-seveN pistol approximately 2½ months prior to the shooting.

Investigators obtained and executed four search warrants for Tyler's car and for his grandparents', mother's, and girlfriend's residences. During the searches, investigators discovered a cell phone from Tyler's car, a gunlock bearing the "FN" logo from his grandparents' residence, and a letter from his mother's residence. Tyler signed a consent form that allowed investigators to download and search the contents of the cell phone. On the cell phone, investigators discovered another picture of the September 2, 2012, wedding in which Tyler was wearing a brown, striped shirt; a deleted text message from September 2 that read, "What's it like and where is halo?"; and call records and location information.

Based upon this information, Tyler was arrested and charged for the shooting.

2. Trial

A jury trial was held in June 2014. At trial, the court heard testimony from 24 witnesses for the State and 5 for the defense. Among the State's witnesses were Ronald King and Jelani Johnson. Tyler's assignments of error in the current appeal concern King's and Johnson's testimony; therefore, a summary of their testimony and the State's arguments concerning their testimony is provided in relevant part below.

(a) King's Testimony

King testified he met Tyler and Johnson playing basketball for Bellevue University in Nebraska from 2008 to 2010. After those 2 years, King moved back to his hometown in Illinois.

In September 2012, King returned to Nebraska for the wedding of a former teammate and stayed with Johnson who was also attending the wedding. King testified that Tyler attended

the wedding and was wearing a brown, striped shirt. King testified that he left the wedding to go to Halo with Tyler in the vehicle Tyler was driving, a "light-colored Jeep." King explained that once they got to Halo, they parked in the parking lot and were walking on a sidewalk leading into the club when they passed two men and a woman. King testified that he brushed against the woman as she was walking by and that the woman and one of the men confronted them about the contact. King explained that Tyler and the man who confronted them got into a heated exchange and that the other man and King had to separate the two. King testified that Tyler left at some point and that when King walked back toward Tyler's Jeep, he saw Tyler walking from the Jeep toward the location where the confrontation happened with something in his hand. King testified he saw Tyler fire three to five gunshots in the direction where King had last seen the group of three people. After firing the shots, King testified that Tyler returned to the vehicle and Tyler drove them to a second bar. King then texted another friend for a ride and parted ways with Tyler. King testified that he returned to Illinois on his scheduled return flight. Later, King was arrested in Illinois for an unrelated matter and held for a Nebraska warrant. King obtained a lawyer when Omaha Police Department detectives began to question him about the shooting. Eventually, he was given immunity. King explained the terms of the immunity by describing that he gave a formal interview to the police and that if called to testify, he would "have to say the exact same thing."

During cross-examination, King was asked by Tyler's counsel to look at a letter leading to the following exchange:

> Q. Do you recognize [the letter]?
>
> A. Yes.
>
> Q. Is it something that you authored, you wrote it?
>
> A. Yes.
>
> Q. When?
>
> A. I don't believe that I wrote it. I probably was speaking and somebody else wrote it.

Q. Okay. What were the circumstances of you making those statements and giving that information?

A. You know, just follow-up on my reactions and how I felt about the situation.

Q. Okay. Was it before you spoke to the cops or after you spoke to the cops?

A. After.

Q. And who — you say you don't think you typed it, someone else did?

A. Yes.

Q. Who?

A. My attorney, possibly.

Q. Well, what do you mean "possibly?"

A. I don't remember who wrote it.

Q. Okay. But it's your words?

A. Yes.

Q. And you say this was done after the police spoke to you in Illinois?

A. Correct.

The letter was not offered into evidence, and King provided no other testimony concerning the letter outside of this exchange. However, Tyler attached a letter to his motion for postconviction relief and alleged the document was the letter his counsel questioned King about at trial. Tyler alleges his trial counsel was informed by the State during an off-the-record recess that the letter discussed was actually written by Johnson. Neither the State nor Tyler's trial counsel disclosed to the jury that Johnson had authored the letter.

(b) Johnson's Testimony

Johnson testified he has known Tyler since childhood. Johnson played basketball at Bellevue University with Tyler and King and asserted that he is friends with both men.

On September 2, 2012, King and Johnson attended a wedding where they saw Tyler. King and Tyler left the wedding reception without Johnson, and Johnson did not see King again until the next day. The next morning, Johnson

had a conversation with King about what had occurred the night before. Tyler showed up uninvited at Johnson's house, where he talked to Johnson and had a private conversation with King.

Johnson testified that days after the wedding, Tyler came to the restaurant where Johnson worked and told Johnson that Tyler's property had been searched by police. Tyler also told him that "his car couldn't be placed at Halo that night," to which Johnson agreed. Johnson further testified that after the meeting at Johnson's workplace, Tyler again came over to Johnson's house and used Johnson's cell phone to call King.

In October 2012, Omaha Police Department detectives initiated an interview with Johnson. Johnson testified that during the interview, detectives questioned him about the night of the wedding and Johnson lied and told them King had driven his car from the wedding and had come back to pick him up later. A couple weeks after this initial interview, detectives again attempted to interview Johnson. Johnson declined to talk with the detectives without an attorney and was charged with accessory to a felony. After Johnson hired an attorney, another interview was set up and Johnson admitted that King did not take his car the night of the wedding and that King did not return later to pick him up.

At trial, Johnson was questioned concerning whether he had a plea agreement. On direct examination, the following exchange occurred:

> Q. Are you testifying here today pursuant to any type of agreement with the Douglas County Attorney's Office?
>
> A. Are you asking if I do have an agreement?
>
> Q. Yes.
>
> A. No.
>
> Q. Okay. Has there been any type of plea agreement entered into between you and the Douglas County Attorney's Office regarding this case?
>
> A. No.

Q. Is there any reason why you haven't already pled to this charge?

A. I mean, I had conversations with my lawyer, and he told me just by coming . . . forth and being truthful that that would be the best route.

On cross-examination, Johnson again testified that he did not have a plea agreement worked out in exchange for his testimony. Johnson explained that after consulting with his attorney, he believed coming forward and being truthful would be the best thing to do. Johnson believed that testifying truthfully would lead to a lesser charge or a dismissal of the accessory charge.

(c) State's Closing Argument

In the State's closing argument, the State addressed both King's and Johnson's testimony and stated, in relevant part:

> King and . . . Johnson were put in a bad place. Their teammate and their friend did something very bad. He told them to be quiet about it. He told them to lie about it. When . . . King is approached by the police, sure, he's scared. He's worried he's going to get arrested. He was at a crime scene, a very serious crime scene, one where someone was killed, and he doesn't even bother calling the cops to tell them about it. He leaves the scene, doesn't tell anyone about it. He remains quiet. He was probably scared. He probably didn't want . . . Tyler to get in trouble because it's a friend of his.
>
> So when he's in jail and the police want to talk to him, he wanted a deal. And [defense counsel] criticizes us for giving him that deal. But keep in mind what the police knew versus what . . . King knew. And what I would argue to you is the police and prosecutors don't give deals to liars. We didn't give a deal to . . . Johnson. In fact, the police arrested him and that charge is still pending. But what we knew about . . . King when he said, "Hey, I want immunity," frankly, it's easy to give it to him. Why? Because all the evidence was pointing to

> . . . Tyler being the shooter; Jeep Commander leaving the scene that we tied to his girlfriend; FN Herstal gun was the weapon used to kill, we tied that to . . . Tyler; we have a witness, not only identify him at the scene, telling the . . . police, not coincidentally, what he was wearing that night and a picture of him. We have cell phone evidence of him using his phone that night. There was nothing to suggest . . . King was the shooter, and the cops knew that. So to tell . . . King, "We aren't going to arrest you as long as you tell the truth," was simple, which is why it was different with [Johnson]. He didn't tell the truth, so he was arrested.

3. Disposition and Direct Appeal

The jury found Tyler guilty of first degree murder and use of a firearm to commit a felony. Utilizing the same counsel he had at trial, Tyler filed a direct appeal with this court claiming errors relating to the district court's denial of various motions to suppress. We concluded the district court did not err by overruling Tyler's motions to suppress and affirmed Tyler's convictions.[2]

4. Tyler's Motion for Postconviction Relief

In October 2016, Tyler filed a motion for postconviction relief alleging prosecutorial misconduct and ineffective assistance of trial counsel. As to prosecutorial misconduct, Tyler claimed the State (1) allowed King's known, false testimony concerning the authorship of the letter provided by Tyler's counsel to go uncorrected; (2) introduced new and impermissible evidence during closing arguments in providing the reasoning for King's immunity deal; (3) improperly vouched for and bolstered King's testimony by stating during closing arguments that "'the police and prosecutors don't give deals to liars'"; (4) lied to the jury during closing arguments in

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[2] See *id.*

representing that Johnson would not receive a deal; and (5) failed to disclose to Tyler's counsel that Johnson's charge would be dropped in exchange for his testimony at trial. As to ineffective assistance, Tyler claimed trial counsel (1) allowed King's false testimony to go uncorrected, (2) failed to object to prosecutorial misconduct in introducing new and impermissible evidence during closing arguments and vouching for and bolstering a State's witness, and (3) failed to appeal the comments made by the county attorney. Tyler additionally argued the cumulative effect of these errors denied him a fair trial.

In an amended order, the district court denied Tyler's motion without an evidentiary hearing. The court found Tyler's claims were procedurally barred, insufficiently pled, and affirmatively refuted by the record. Tyler appeals this order.

II. ASSIGNMENTS OF ERROR

Tyler assigns, consolidated and restated, that the district court erred in finding an evidentiary hearing was not warranted and (1) dismissing his claims of prosecutorial misconduct regarding King's and Johnson's testimony and the State's closing argument and (2) dismissing his claims of ineffective assistance of counsel for not objecting, correcting, or appealing the alleged prosecutorial misconduct.

III. STANDARD OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.[3]

[2] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[4]

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[3] *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018).

[4] *State v. Collins*, 299 Neb. 160, 907 N.W.2d 721 (2018).

IV. ANALYSIS

[3] Under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2016), a prisoner in custody may file a petition for relief on the ground 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."[5]

[4] Section 29-3001(2) entitles a prisoner to an evidentiary hearing on a claim for postconviction relief, 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.[6] A prisoner is not entitled to an evidentiary hearing on the basis of claims that present only conclusory statements of law or fact.[7] 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.[8]

[5-8] A motion for postconviction relief is not a substitute for an appeal.[9] Therefore, a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal; such issues are procedurally barred.[10] Whether a claim of prosecutorial misconduct could have been litigated on direct appeal and is thus procedurally barred from being litigated on postconviction depends on the nature of the claim.[11] Where

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[5] *Haynes, supra* note 3, 299 Neb. at 260, 908 N.W.2d at 51.

[6] *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016).

[7] *Id.*

[8] See *State v. Ryan*, 287 Neb. 938, 845 N.W.2d 287 (2014).

[9] *State v. Torres*, 295 Neb. 830, 894 N.W.2d 191 (2017).

[10] *Id.*

[11] *Id.*

the claim of prosecutorial misconduct is such that a determination of the merits is possible based on the record on direct appeal, it is procedurally barred from being litigated on postconviction.[12] But where an evidentiary hearing is necessary to decide the merits of the claim, the failure to raise the issue on direct appeal does not preclude it from being litigated on postconviction.[13]

1. Prosecutorial Misconduct

On appeal, Tyler's allegations of prosecutorial misconduct include (1) the prosecutor knowingly misrepresented to the jury that Johnson would not receive a deal before dismissing his felony charge and committed a *Brady v. Maryland*[14] violation by failing to disclose the deal to Tyler, (2) the prosecutor failed to correct King's testimony about authoring the letter, (3) the prosecutor introduced new and impermissible facts during closing arguments, and (4) the prosecutor improperly bolstered a witness during closing arguments.

Prosecutors are charged with the duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial.[15] Because prosecutors are held to a high standard for a wide range of duties, the term "prosecutorial misconduct" cannot be neatly defined.[16] Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.[17]

(a) Plea Deal

Tyler claims that the State committed prosecutorial misconduct in failing to disclose to the jury that Johnson had

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[12] See *id.*

[13] *Id.*

[14] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[15] *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

[16] *Id.*

[17] *Id.*

received a plea deal. Tyler also claims that the State committed a violation of *Brady*[18] when it failed to disclose that Johnson had received a plea deal.

These claims center on Tyler's allegation that the prosecutor told the jury during his closing argument that Johnson would not be getting a deal and that after trial, Johnson had his criminal case dismissed as a result of his testimony. A determination of these claims on the merits is possible based on the record without further evidentiary hearing.

[9] In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper.[19] It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.[20]

A prosecutor must base his or her argument on the evidence introduced at trial rather than on matters not in evidence.[21] However, a prosecutor is entitled to draw inferences from the evidence in presenting his or her case, and such inferences generally do not amount to prosecutorial misconduct.[22] As we stated in *State v. Dubray*[23]:

> [W]hen a prosecutor's comments rest on reasonably drawn inferences from the evidence, he or she is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense. These types of comments are a major purpose of summation, and they are distinguishable from attacking a defense counsel's personal character or stating

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[18] *Brady, supra* note 14.

[19] *State v. Johnson*, 298 Neb. 491, 904 N.W.2d 714 (2017).

[20] *Id.*; *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015).

[21] *Johnson, supra* note 19.

[22] *Id.*

[23] *Dubray, supra* note 15, 289 Neb. at 227, 854 N.W.2d at 604-05.

> a personal opinion about the character of a defendant or witness.

During trial, Johnson testified that he did not have a deal with the State but that he hoped his cooperation would lead to a lesser charge or dismissal of his accessory charge. In closing arguments, the State asserted that Johnson had been arrested, had a charge pending, and did not have a deal in place at the time of trial.

Even if Johnson later received a dismissal or reduction of his charge, it would not make Johnson's testimony or the State's assertions during closing arguments untrue. In fact, in review of Johnson's testimony and the State's assertions during closing arguments, the record makes clear that Johnson believed it possible and the State did not dispute that Johnson's charge or sentence might be modified as a result of his testimony. As such, the State's assertions during closing arguments did not mislead or unduly influence the jury. As we have previously stated, a prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.[24] Tyler's claim that the prosecutor misled the jury is without merit.

In regard to an alleged *Brady* violation, the U.S. Supreme Court has held that the prosecution has a duty to disclose all favorable evidence to a criminal defendant prior to trial.[25] Favorable evidence includes both exculpatory and impeachment evidence.[26]

Tyler's motion for postconviction relief alleges that the State committed the *Brady* violation when the State gave Johnson a plea deal after telling the jury that Johnson would not be given a deal. More specifically, Tyler alleges the prosecutor stated

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[24] See *Johnson, supra* note 19.

[25] *Brady, supra* note 14.

[26] See *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), citing *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

in closing that Johnson would not be getting a deal and that therefore, the State was precluded from giving Johnson a deal after trial.

However, the record does not support this allegation. Instead, the record indicates that the prosecutor stated that "[w]e didn't give a deal to . . . Johnson." The prosecutor's statement was made during rebuttal argument in response to defense counsel's questioning as to why King wanted immunity. The prosecutor's statement was a correct statement of the evidence which indicated that Johnson lied to investigators, that he was charged with accessory to a felony, and that he did not have a deal at the time of trial.

Tyler's motion for postconviction relief did not allege that Johnson's testimony was false or that the State had a plea agreement with Johnson at the time of trial and failed to disclose that fact to Tyler. As a result, Tyler did not present allegations that the prosecution failed to disclose exculpatory or impeachment evidence to support a *Brady* violation. This assignment of error is without merit.

(b) False Testimony

Tyler alleges that the State committed prosecutorial misconduct in failing to correct King's testimony about authoring the letter provided by Tyler's counsel. In his motion for postconviction relief, Tyler noted that, though King testified he authored the letter, the State informed Tyler's counsel during an off-the-record recess that the letter was written by Johnson. Neither the State nor Tyler's counsel disclosed Johnson's authorship of the letter to the jury. Tyler claims he could not have brought this claim of prosecutorial misconduct on direct appeal, because the State's disclosure that Johnson, not King, authored the letter occurred off the record. However, Tyler acknowledges in his motion for postconviction relief that this issue was known to Tyler's counsel at the time of trial, and there is no evidence that it was raised on direct appeal. It is well settled that a motion for postconviction relief cannot

be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal.[27] Therefore, Tyler's claim of prosecutorial misconduct for failing to correct known, false testimony is procedurally barred.

(c) Comments During Closing

Tyler alleges that the State committed prosecutorial misconduct in introducing new and impermissible facts during closing arguments. On this claim, Tyler asserts the State committed prosecutorial misconduct in informing the jury that the reason King was offered immunity was because King was at the scene of a crime and failed to report it to the police. Tyler asserts this information was not introduced at trial and, as such, the State should have been precluded from discussing these facts during closing arguments.

A review of the trial record and the State's comments in closing is sufficient to determine whether the State introduced new and impermissible information during closing arguments. Therefore, Tyler could have raised this claim on direct appeal, but failed to do so. As such, this claim is procedurally barred.

(d) Witness Bolstering

Tyler alleges that the State committed prosecutorial misconduct by improperly bolstering a witness during closing arguments. Tyler argues that the prosecution's statement that "the police and prosecutors don't give deals to liars" bolstered King's credibility.

As with Tyler's previous claim, Tyler's bolstering claim is based on the record of what occurred during closing arguments. The issues of whether the State's comments were improper or materially prejudicial could have been resolved on direct appeal. Because Tyler failed to raise the claim on direct appeal, the claim is procedurally barred.

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[27] *Torres, supra* note 9.

In consideration of all of the above, we conclude that the district court did not err in dismissing Tyler's claims of prosecutorial misconduct without an evidentiary hearing.

2. Ineffective Assistance of Counsel

As to his claims for ineffective assistance, Tyler alleged that his trial counsel allowed King's false testimony to go uncorrected, failed to object to prosecutorial misconduct in introducing new and impermissible evidence during closing arguments and bolstering a State's witness, and failed to appeal the comments made by the county attorney. Tyler additionally argued the cumulative effect of these errors denied him a fair trial. Stated another way, Tyler claims his counsel was ineffective in failing to object, correct, or appeal the alleged instances of prosecutorial misconduct.

[10] Where trial counsel and appellate counsel are the same, a postconviction motion is a defendant's first opportunity to raise a claim of ineffective assistance.[28] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.[29] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[30] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[31] To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[32] A reasonable probability

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[28] *State v. Payne*, 289 Neb. 467, 855 N.W.2d 783 (2014).

[29] *State v. Vela*, 297 Neb. 227, 900 N.W.2d 8 (2017).

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

[31] *Vela, supra* note 29.

[32] *Id.*

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.[33] In determining whether counsel was ineffective in failing to object to prosecutorial misconduct, an appellate court must first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.[34]

(a) King's Testimony

In his motion for postconviction relief, Tyler alleged his counsel was ineffective for failing to correct King's known, false testimony that King authored the letter and, on direct appeal, in failing to allege prosecutorial misconduct that the State allowed known, false testimony to go uncorrected. This claim is without merit, because Tyler has failed to allege sufficient facts to show King's testimony misled or unduly influenced the jury.

Tyler contends that correcting the testimony about the letter would have provided the jury evidence relevant to King's credibility which was at issue as a primary witness for the State. However, Tyler's counsel cross-examined King at trial and questioned King's credibility, including the amount of alcohol he consumed on the day of the shooting, his receiving immunity for his cooperation, and his statements to law enforcement. The jury was able to compare King's testimony with the other witnesses' accounts and consider the terms of King's immunity deal. The authorship of a letter that the jury did not review or have substantive information about had little probative value to King's credibility. Tyler failed to show how evidence that King authored the letter caused any prejudicial effect.

Tyler also claims his counsel should have introduced the letter to impeach King's testimony that he saw Tyler firing

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[33] *Id.*

[34] *Johnson, supra* note 19.

the gun, because the letter allegedly states that the author did not see the shooting. However, Tyler admits that the letter was actually written by Johnson, so regardless of the alleged content of the letter, any statements about what the author of the letter observed are irrelevant to King's testimony about his own observations.

Therefore, based on all of the above, Tyler has failed to state sufficient allegations under the prejudice prong of *Strickland* to show that, but for counsel's failure to correct King's testimony about the letter and failure to allege on direct appeal that the State committed prosecutorial misconduct in not correcting King's testimony, the result of trial would have been different.

(b) Closing Arguments

Tyler's remaining claims of ineffective assistance consist of his counsel's failure to object to the State's statements during closing arguments and failure to raise the issue on appeal. Specifically, these claims concern the State's comments about King's immunity deal and Johnson's lack of a plea deal.

(i) New Evidence

Tyler claims his counsel failed to object to prosecutorial misconduct when the State discussed the reasoning for King's immunity deal. Specifically, Tyler claims prosecutorial misconduct in the State's explaining that the reason King was offered immunity was because King was at the scene of a crime and failed to report it to the police. According to Tyler, this amounts to misconduct, because "information was not introduced into evidence during the trial to show that King had broken the law in any way" for which he would need the immunity deal. He further asserts that "[w]ithout this evidence being introduced improperly, the jury very well could have concluded that King was hiding something or testifying falsely because most witnesses with no involvement in a crime do not need immunity to testify."

Here, the record shows King testified that he was with Tyler on the night of the offense, that King was involved in the altercation which eventually led to the shooting, that King saw Tyler shoot a gun toward the group with whom they had the altercation, that King rode in Tyler's vehicle after witnessing him shoot the gun, that King flew back to Illinois, and that King received an immunity deal before he gave an interview about the shooting. King did not testify to notifying the police of the shooting before the Omaha Police Department detectives initiated contact. In addition, Tyler's counsel argued in closing that if King was not the shooter, then he would not need immunity.

It was a reasonable inference for the State to draw from this testimony that King received his immunity deal to protect him from possible charges connected with his participation in the events surrounding the shooting, and it was appropriate to rebut Tyler's closing argument. As such, the State's assertion that King received his immunity deal in connection with witnessing the shooting and not reporting it does not amount to prosecutorial misconduct.

(ii) Witness Bolstering

Tyler claims his counsel was ineffective for failing to object to the State's improperly bolstering King's testimony. Specifically, Tyler points to the State's comment that "the police and prosecutors don't give deals to liars" while noting King received an immunity deal as opposed to Johnson, who did not. Such a statement, Tyler argues, implied that King must be honest because he got an immunity deal.

The trial testimony of both King and Johnson support the State's comments in closing. King testified that he was approached by investigators, that he demanded an immunity deal in exchange for an interview, and that he received the deal. Johnson, in turn, testified that he lied to investigators, that he was charged with accessory to a felony, and that he did not have a deal at the time of trial. The inferences made by the State were reasonable given these facts.

In addition, the jury was able to determine on its own the weight and credibility to be given to King's testimony as it heard King testify, heard King being cross-examined as to his credibility, heard testimony from other witnesses concerning King, and heard Tyler's closing argument which addressed concerns about King's truthfulness.

Further, the prosecutor's statement was made in the State's rebuttal argument. In *U.S. v. Delgado*,[35] the court held that the prosecutor did not commit misconduct by arguing during closing arguments that the defendant had lied. The court noted that "context is crucial" and that the prosecutor's statement was made in response to defense counsel's attack of government witnesses and after a detailed summary of the evidence.[36] The statement that the defendant lied, the court explained, was a commentary on what the evidence showed; it was not an assertion of the prosecutor's personal opinion or an attack on the defendant's character.[37]

Here, Tyler's counsel, during closing, raised the issue of King's credibility repeatedly. More specifically, Tyler's counsel questioned why King would need immunity if he had not done anything illegal. To rebut that contention, the prosecutor addressed the reason King was granted immunity and the reason Johnson was not granted immunity. The prosecutor's statement was a commentary on what the evidence showed; it was not an assertion of the prosecutor's personal opinion or a bolstering of King's credibility.

Lastly, the trial judge instructed the jury that the attorneys' statements were not to be taken as evidence. Therefore, absent other evidence, the State's comment that "the police and prosecutors don't give deals to liars" and the State's emphasis on King's having received an immunity deal does not amount to prosecutorial misconduct. Counsel is not ineffective for

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[35] *U.S. v. Delgado*, 672 F.3d 320 (5th Cir. 2012).

[36] *Id.* at 335.

[37] *Id.*

failing to make an objection that has no merit.[38] As a result, Tyler's trial counsel could not be ineffective for failing to object.

(iii) Plea Deal

Tyler argues that the State's comment during closing arguments, "what I would argue to you is the police and prosecutors don't give deals to liars[; we] didn't give a deal to . . . Johnson," amounted to prosecutorial misconduct, because Johnson received a deal to drop his pending charge after he provided his testimony. Such a statement, Tyler claims, bolstered Johnson's credibility with the jury, because it appeared as if Johnson were providing testimony against his own best interests even though he had not been given a plea deal.

As discussed in a previous section, however, this ignores Johnson's testimony concerning the status of his then-current charge. Johnson testified that he did not have an agreement with the State in exchange for his testimony and explained that he decided to testify after consulting with his attorney and determining that testifying would be the best decision to lead to his own best outcome. He further explained that the best outcome in his situation would hopefully be that his cooperation would lead to a reduction or dismissal of his accessory charge.

The State's assertion during closing arguments that Johnson had been arrested, had a charge pending, and did not have a deal in place at the time of trial aligns with this testimony. Further, the State's explanation that Johnson did not currently have a deal in place because he lied to police and "the police and prosecutors don't give deals to liars" is a natural inference from the evidence.[39]

Tyler further argues the State's assertion that Johnson lied to the police and "the police and prosecutors don't give deals to

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[38] See *State v. Stricklin*, 300 Neb. 794, 916 N.W.2d 413 (2018).

[39] See *Johnson, supra* note 19.

liars" implied the State meant Johnson would never be given a deal because of his untruthfulness. However, in review of the record, the State commented only that Johnson had been arrested and charged because he had lied and that Johnson did not have a deal at the time of trial. The State did not say Johnson could not redress his incorrect statements and rehabilitate himself to obtain a deal. Through Johnson's testimony, it is clear that he believed there was a possibility for a future deal if he testified truthfully at trial. Therefore, these claims fail to make sufficient factual allegations to lead to a finding of prosecutorial misconduct.

In consideration of all of the above, Tyler failed to allege sufficient facts that the complained-of remarks in the State's closing argument misled and unduly influenced the jury and constituted prosecutorial misconduct.[40] Therefore, the district court did not err in dismissing, without an evidentiary hearing, the claims of ineffective assistance of counsel for failing to object and appeal the alleged prosecutorial misconduct.

V. CONCLUSION

For the reasons stated above, we conclude that Tyler was not entitled to an evidentiary hearing on his claims of prosecutorial misconduct and ineffective assistance of counsel. We further conclude that the district court did not err in dismissing Tyler's motion for postconviction relief. Therefore, we affirm the district court's order.

Affirmed.

Freudenberg, J., not participating.

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[40] See *id*.

U.S. Specialty Insurance Company, a corporation, appellee, v. D S Avionics Unlimited LLC, appellant.

918 N.W.2d 589

Filed October 19, 2018. No. S-17-1101.

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. **Declaratory Judgments.** Whether to entertain an action for declaratory judgment is within the discretion of the trial court.
3. **Declaratory Judgments: Justiciable Issues.** The existence of a justiciable issue is a fundamental requirement to a court's exercise of its discretion to grant declaratory relief.
4. **Declaratory Judgments: Justiciable Issues: Words and Phrases.** A "justiciable issue" needed for declaratory judgment requires a present substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
5. **Actions: Declaratory Judgments: Parties: Judges: Jurisdiction.** A declaratory judgment action will not be entertained if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties, in which are involved and may be adjudicated the same identical issues that are involved in the declaratory action. A court abuses its discretion when it entertains jurisdiction over a declaratory judgment action in such a situation.
6. **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 the moving party is entitled to judgment as a matter of law.

7. **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.
8. **Declaratory Judgments.** Declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain.
9. ____. A declaratory judgment action cannot be used to adjudicate hypothetical or speculative situations which may never come to pass.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Reversed.

Thomas M. Locher, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellant.

Robert E. O'Connor, Jr., for appellee.

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

Johnson, District Judge.

D S Avionics Unlimited LLC (DSA) presented a theft claim under the physical damage coverage of an aircraft policy. The insurer denied coverage, then filed a declaratory judgment action seeking a determination that DSA's theft claim was not covered under the policy. The district court granted summary judgment in favor of the insurer, and DSA appeals. Because we conclude the district court abused its discretion in issuing declaratory relief on this record, we reverse.

BACKGROUND

At all relevant times, U.S. Specialty Insurance Company (USSIC) insured a 1964 Piper PA-30 aircraft owned by DSA. The agreed-upon value of the insured aircraft is $50,000. In November 2014, George Babcock, an authorized agent of

DSA, delivered the aircraft to Trey M. O'Daniel, a mechanic, for maintenance. O'Daniel operated his business from an airport hangar in Omaha, Nebraska, rented from the airport's owner, Keith B. Edquist.

In late November 2014, O'Daniel was notified that the hangar would no longer be available to him as of December 1. O'Daniel removed his belongings from the hangar, but DSA's aircraft remained in the hangar after December 1.

On December 2, 2014, O'Daniel returned to the hangar to remove DSA's aircraft and discovered the lock had been changed. With the help of an adjacent property owner, O'Daniel was able to access the hangar and move the aircraft onto the tarmac. Because O'Daniel was not authorized to fly the aircraft, he left it parked on the tarmac and advised Babcock where the aircraft could be found.

According to the record, DSA did not attempt to recover the aircraft until December 11, 2014. On that day, Babcock told O'Daniel to prepare the aircraft for flight on December 12. When O'Daniel went to the airport to verify the airworthiness of the aircraft, he discovered Edquist's plow truck was parked in front of the aircraft, blocking it. Edquist told O'Daniel he would not allow the airplane to be moved unless O'Daniel paid him a specified sum of money. It is clear that parking the truck in front of the aircraft was done intentionally to block its removal.

On December 12, 2014, after learning the aircraft was blocked by Edquist's truck and could not be flown away, Babcock met with a deputy from the Douglas County sheriff's office. The deputy told Babcock it would be lawful to hire a tow truck to move Edquist's truck, but advised that doing so might create the potential for a "violent breach of peace." Babcock decided not to hire a tow truck, and left the aircraft on the tarmac blocked by Edquist's truck. At some point between December 12 and 17, Edquist moved the aircraft from the tarmac into a hangar at the Omaha airport. Babcock was advised of this.

On December 17, 2014, Babcock reported the aircraft stolen. The same day, Babcock sent a letter to Edquist demanding that the aircraft be released. When contacted by law enforcement, Edquist said the aircraft would be released only if he was paid $1,750. Babcock refused to pay. Later that day, Edquist's attorney told law enforcement and Babcock that Edquist would release the aircraft if paid $340, which he claimed pursuant to Neb. Rev. Stat. § 52-601.01 (Reissue 2010). That statute applies to persons who "shall perform work or labor, or exert care or diligence, or who shall advance money or material upon personal property under a contract, expressed or implied."[1] After reviewing § 52-601.01, Babcock refused to make payment.

On December 18, 2014, law enforcement concluded no crime had been committed and advised Babcock the issues involving the aircraft were "civil" in nature. Later that day, Edquist told O'Daniel he would release the aircraft if paid $1,760. On December 20, Edquist again told Babcock the aircraft would be released if an unspecified amount of money were paid. On January 12, 2015, Edquist told O'Daniel he would release the aircraft for a $500 storage fee if paid by January 13 and for a $600 storage fee if paid at a later date.

On February 12, 2015, Edquist told Babcock the aircraft was being moved from the hangar and would be placed outside. Edquist demanded a sum of money, which Babcock refused to pay. On February 14, Edquist made another demand for payment of the "storage" bill, and Babcock again refused to pay.

USSIC Denies Claim

On February 18, 2015, on DSA's behalf, Babcock submitted a sworn "Proof of Loss" to USSIC, reporting that "[a] theft loss occurred on or about the 11th day of December, 2014."

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[1] § 52-601.01.

Babcock claimed the loss was caused by the "unlawful seizure, distraint, conversion, and theft of the aircraft." He claimed the amount of the loss was $50,000—the full insured value of the aircraft.

USSIC investigated DSA's theft claim and, in a letter dated April 21, 2015, denied coverage, explaining:

> You know where the plane is, who has it, and why they have it. There has been no damage to the aircraft, it sits in a hanger [sic]. Apparently law enforcement in Douglas County has determined that it is a civil matter. Yet, you have taken no action against O'Daniel.
>
> The facts as you have described them in your claim and claim summary, are not covered by your policy of insurance. Specifically your policy contains the following provisions applicable to your claim:
>
> 1. What We Cover
>
> a. Coverage F covers direct physical loss of or damage to your aircraft caused by an accident while the aircraft is not in motion.
>
> l. Accident means a sudden event during the policy period, neither expected nor intended by you, that involves your aircraft and causes physical damage to or loss of the aircraft during the policy period.
>
> . . . .
>
> 4. What We Will Not Pay
>
> We will not pay for physical loss of or damage to your aircraft:
>
> . . . .
>
> h. *Embezzlement, Conversion or Secretion*
>
> If anyone to whom you relinquish possession of the aircraft embezzles, converts or secretes [sic] the aircraft.
>
> We also will not pay for depreciation, loss of use, loss of profits, loss of guaranty or warranty, or any other economic or consequential damage of any kind.

(Emphasis omitted.)

USSIC Files Declaratory Judgment Action

In August 2015, USSIC filed a declaratory judgment action against DSA in the district court for Douglas County, Nebraska, seeking a declaration of noncoverage. DSA counterclaimed, seeking a declaration of coverage and alleging breach of contract and bad faith. Both parties moved for summary judgment.

A hearing was held, and during the presentation of evidence and argument, the court reserved ruling on objections to numerous exhibits. After the hearing, the court entered an order granting summary judgment in favor of USSIC on the coverage question and denying DSA's summary judgment motion. Summarized, the district court concluded DSA's claim was not covered under the physical damage coverage of the applicable policy. The court found that the undisputed evidence showed the aircraft was "being held by . . . Edquist under demand of payment" and that thus, there had been no "accident" within the meaning of the policy. The court also found the conversion exclusion applied.

Thereafter, DSA filed a motion to alter or amend the judgment. DSA asked the court to include in the judgment its rulings on exhibits on which the court previously had reserved ruling. DSA also asked the court to reverse its decision and instead enter summary judgment in favor of DSA. The district court granted DSA's first request and made express evidentiary rulings on the exhibits, but denied DSA's request to reverse the summary judgment rulings.

DSA timely appealed, and we moved the case to our docket on our own motion.[2]

ASSIGNMENTS OF ERROR

DSA assigns, combined and restated, that the district court erred in (1) sustaining USSIC's motion for summary judgment,

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

(2) overruling DSA's motion for summary judgment, and (3) admitting and excluding certain evidence and argument at the summary judgment hearing.

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3]

[2] Whether to entertain an action for declaratory judgment is within the discretion of the trial court.[4]

ANALYSIS

The procedural posture of this case affects the resolution of the appeal. Here, the district court (1) entertained USSIC's action for declaratory relief and (2) granted summary judgment in favor of USSIC.

[3,4] The existence of a justiciable issue is a fundamental requirement to a court's exercise of its discretion to grant declaratory relief.[5] A "justiciable issue" needed for declaratory judgment requires a present substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[6]

[5] A declaratory judgment action will not be entertained if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties, in which are involved and may be adjudicated the same identical issues that are involved in the

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[3] *Freeman v. Hoffman-La Roche, Inc.,* 300 Neb. 47, 911 N.W.2d 591 (2018).

[4] *Mansuetta v. Mansuetta*, 295 Neb. 667, 890 N.W.2d 485 (2017).

[5] *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010), *abrogated on other grounds, City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

[6] See *id*.

declaratory action.[7] A court abuses its discretion when it entertains jurisdiction over a declaratory judgment action in such a situation.[8]

[6,7] 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 the moving party is entitled to judgment as a matter of law.[9] 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.[10]

Much of the parties' briefing is devoted to arguing whether Edquist's conditional detention of the aircraft pending payment of a storage fee amounts to theft or tortious conversion, or at least whether a genuine issue of material fact exists on that issue. As we explain below, this record does not permit that question to be answered at this time in a declaratory judgment action. We conclude the district court abused its discretion in entertaining the declaratory action and express no opinion on the propriety of the summary judgment ruling.

Relevant Policy Provisions

Some additional background is necessary in order to frame the analysis. The aircraft policy's physical damage coverage provides in pertinent part:

> 1. What **We** Cover
>
> a. Coverage F covers direct physical loss of or damage to **your aircraft** caused by an **accident** while the **aircraft** is not **In motion**.

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[7] See *Mansuetta, supra* note 4.

[8] *Id.*

[9] *Jordan v. LSF8 Master Participation Trust,* 300 Neb. 523, 915 N.W.2d 399 (2018).

[10] *Id.*

. . . .

2. What **You** Must Pay or Bear (Deductible)

When **we** pay for loss of or damage to **your aircraft, you** must first pay or bear one of the following amounts unless no deductible applies:

. . . .

c. No Deductible

We will not subtract either deductible amount if the loss or damage is caused by:

(1) Fire, lightning, explosion, theft or vandalism;

. . . .

3. What **We** Will Pay (Less Deductible)

a. Destroyed **Aircraft**

If the cost of repair when added to the value of the **aircraft** after it is damaged and prior to repairs equals or exceeds the agreed **value** it is a destroyed **aircraft**.

If **your aircraft** is destroyed, **we** will pay the **agreed value** of the **aircraft** less the applicable deductible. **We** will take the destroyed **aircraft**.

b. Damaged **Aircraft**

If **your aircraft** is damaged and not destroyed, **we** will pay the reasonable cost of repair after the **aircraft** is repaired, but **we** will not pay more than the **agreed value** less the applicable deductible.

. . . .

If the estimated cost of repair . . . is more than the **agreed value** of the **aircraft, we** will pay the **agreed value** less the applicable deductible and **we** will take the damaged **aircraft.**

. . . .

4. What **We** Will Not Pay

We will not pay for physical loss or damage to **your aircraft:**

. . . .

> h. *Embezzlement, Conversion or Secretion*
>
> If **anyone** to whom **you** relinquish possession of the **aircraft** embezzles, converts or secretes [sic] the **aircraft**.
>
> **We** also will not pay for depreciation, loss of use, loss of profits, loss of guaranty or warranty, or any other economic or consequential damage of any kind.
>
> . . . .
>
> 7. Theft
>
> If **your aircraft** or any part of it is stolen and recovered before **we** have paid for it, **we** may return it to **you** along with payment for any physical damage to it.

"Accident" is defined in the policy as a "sudden event during the policy period, neither expected nor intended by [the insured], that involves [the aircraft] and causes physical damage to or loss of the aircraft during the policy period." (Emphasis omitted.)

Parties' Coverage Arguments

The policy's physical damage coverage "covers direct physical loss of or damage to [the aircraft] caused by an accident while the aircraft is not [i]n motion." (Emphasis omitted.) DSA makes no claim that the aircraft sustained any physical damage while in the possession of either Edquist or O'Daniel. The threshold coverage question thus turns on whether the undisputed evidence shows there has been no "direct physical loss" of the aircraft.

DSA argues there has been a "'direct physical loss'" of the aircraft because Edquist has either stolen the aircraft or converted it.[11] DSA claims that after it delivered the aircraft to O'Daniel, Edquist exercised "self-help" to unlawfully evict O'Daniel and seize the aircraft.[12] DSA claims that because Edquist has "no

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[11] Reply brief for appellant at 26 (emphasis omitted).

[12] *Id.* at 13.

lien or right to withhold the plane," his continued possession of the aircraft pending payment of storage fees is unlawful and amounts to either theft or tortious conversion.[13]

USSIC responds that Edquist's detention of the aircraft is lawful. USSIC contends that after O'Daniel was evicted from the hangar, the aircraft was made available to be flown away, but DSA left the aircraft on the tarmac for more than a week before attempting to fly it away. USSIC argues that Edquist is therefore entitled to storage fees and is lawfully refusing to release the aircraft until such fees are paid.

Assuming, without deciding, that proof of either a theft or a conversion of the aircraft would be sufficient under the policy to demonstrate "direct physical loss of or damage to [the aircraft] caused by an accident while the aircraft is not [i]n motion" (emphasis omitted), we must nevertheless conclude that a judicial determination of noncoverage, premised on such a theory, is not possible on this record.

Declaratory Judgment Was Premature

Here, determination of the coverage dispute turns, in large part, on whether Edquist's possession of the aircraft is lawful (as USSIC claims) or whether Edquist has stolen or converted the aircraft (as DSA claims). The evidence on lawfulness is controverted and lies at the center of what appears, from the record, to be an ongoing and unresolved civil dispute between Edquist, O'Daniel, and DSA. Although USSIC and DSA in this declaratory judgment action seek a judicial determination on the legality of Edquist's conditional possession of the aircraft pending payment of storage fees, neither Edquist nor O'Daniel were made parties to this action.[14]

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[13] Brief for appellant at 15.

[14] See Neb. Rev. Stat. § 25-21,159 (Reissue 2016) (when declaratory relief is sought, "all persons shall be made parties who have or claim any interest which would be affected by the declaration").

It is unclear from the record whether DSA has pursued direct legal action against either Edquist or O'Daniel. The briefs and motions filed with this court do conclusively show, however, that there is ongoing civil litigation between Edquist and O'Daniel, in which DSA has intervened. Importantly, the district court was aware of this litigation (although not of the intervention) at the time the declaratory judgment action was filed, as the lawsuit was clearly referenced in documents attached to USSIC's pleadings. It is a settled principle of law that relief via declaratory judgment should not be entertained if there is pending, at the commencement of the declaratory judgment action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action.[15]

[8,9] Further, the existence of a justiciable issue is a fundamental requirement to a court's exercise of its discretion to grant declaratory relief.[16] This court has long held that declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain.[17] Nor is a declaratory judgment action to be used to adjudicate hypothetical or speculative situations which may never come to pass.[18]

We conclude the unresolved civil dispute between Edquist, O'Daniel, and DSA over the legality of the aircraft's continued detention and Edquist's demand for storage fees renders the district court's declaration regarding the availability of insurance coverage premised on theft or conversion premature and thus an abuse of discretion.

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[15] *Polk Cty. Rec. Assn. v. Susquehanna Patriot Leasing*, 273 Neb. 1026, 734 N.W.2d 750 (2007).

[16] *Kotas, supra* note 5.

[17] See *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981).

[18] *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994).

We reach this conclusion because there are too many facts and issues that remain contingent and uncertain to enter a declaratory judgment regarding insurance coverage. There has been no determination of whether the aircraft is being lawfully detained, and the parties did not present the trial court with sufficient evidence, or the necessary parties, to allow for such a determination. The record also indicates that issues involved in this determination are being litigated in another forum and are thus not properly addressed in a declaratory action. And we cannot ignore the possibility that once the legality of Edquist's possession is determined, the aircraft may be returned to DSA, an outcome which could conceivably affect the coverage analysis.

We therefore conclude that the district court's order decided the legal effect of a state of facts which are future, contingent, or uncertain[19] and resulted in a declaratory judgment adjudicating hypothetical or speculative situations which may never come to pass.[20] As such, the court abused its discretion in entering declaratory relief, and we must reverse.

CONCLUSION

For the reasons set forth above, we reverse the district court's order granting declaratory relief.

Reversed.

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[19] See *Novak, supra* note 17.

[20] See *Rollins, supra* note 18.

Thomas Grady Photography, Inc., appellee, v. Amazing Vapor, Ltd., et al., appellees, and Thomas J. Anderson, appellant.

918 N.W.2d 853

Filed October 26, 2018. No. S-17-818.

1. **Appeal and Error.** Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error.
2. **Corporations: Principal and Agent: Contracts: Liability: Proof.** It is the agent's duty to disclose his or her capacity as an agent of a corporation if the agent is to escape personal liability for contracts made, and in the absence of such disclosure, the agent bears the burden of proof of showing that the contract was made while acting in a corporate, not individual, capacity.
3. **Courts: Jurisdiction: Equity.** Save for county probate and trust powers and county courts' limited jurisdiction in granting temporary restraining orders, jurisdiction in equity actions remains in district courts.
4. **Courts: Jurisdiction: Equity: Statutes.** Although by statute, county courts have concurrent original jurisdiction with the district court in all civil actions of any type when the amount in controversy is below a certain amount, this does not include equity actions.
5. **Corporations: Equity.** Proceedings seeking to pierce the corporate veil are equitable actions.

Appeal from the District Court for Douglas County, Gregory M. Schatz, Judge, on appeal thereto from the County Court for Douglas County, Stephanie R. Hansen, Judge. Judgment of District Court affirmed.

Thomas J. Anderson, P.C., L.L.O., pro se.

Justin A. Roberts, of Lustgarten & Roberts, P.C., L.L.O., for appellee Thomas Grady Photography, Inc.

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

Miller-Lerman, J.

NATURE OF CASE

The appellee, Thomas Grady Photography, Inc. (Grady Photography), sued Amazing Vapor, Ltd.; MCJC Companies, Inc. (MCJC); Manuel Guillermo Calderon; and Thomas J. Anderson for breach of contract for failing to pay on two oral contracts for photography services. Although Calderon and Anderson were directors of Amazing Vapor, in this appeal, Anderson is the sole appellant and appears in his individual capacity and is self-represented. The county court for Douglas County entered a default judgment in favor of Grady Photography against Amazing Vapor, MCJC, and Calderon. Thereafter, the county court held a trial solely on the contract issue and whether Anderson was individually liable for the debt. On February 7, 2017, the county court found that Anderson owed Grady Photography $2,400 under two oral contracts. Anderson appealed to the district court for Douglas County, which affirmed the county court's order. On appeal from the district court, Anderson contends for a variety of reasons that the district court erred when it affirmed the county court's order finding him liable. We affirm.

STATEMENT OF FACTS

In March 2014, Calderon and Anderson formed a corporation named "Amazing Vapor, Ltd.," and registered it in the State of Nebraska. The business wholesaled e-cigarette hardware, supplies, and liquids. The county court found that Grady Photography entered into two oral contracts during the spring of 2014 for promotional photography of these products, that Grady Photography was not paid for the work

performed, and that Anderson received distributions from Amazing Vapor during the period Grady Photography was owed money. Amazing Vapor stopped operating in August or September 2014, all of its assets were liquidated or removed from the corporate entity, and the corporation was ultimately dissolved.

The evidence supports the following facts: Anderson, a practicing business attorney, and Thomas Grady, a commercial photographer, met through a business networking group 2 or 3 years before the events giving rise to this case. Grady testified that sometime in the spring of 2014, Anderson approached Grady to hire him to photograph electronic vapor products. Grady orally agreed to work for one full day and explained that the rates for his photography services were $800 per day. Grady testified that he knew Anderson was the owner of a "vape business" or had a partner, which made him "part-owner." In a text message to Grady dated March 22, 2014, Anderson referred to Calderon as his "partner." There was evidence which the county court believed to the effect that Anderson did not inform Grady of the corporate status of Amazing Vapor.

Grady completed photography work in March 2014, and the files were received by Calderon and Anderson and ultimately utilized for promotional purposes. Grady testified that there was a strict deadline on the photographs, because Calderon and Anderson needed to use them in a trade show. Calderon and Anderson liked the work and, the next day, brought more products to Grady's house for him to photograph. Both Calderon and Anderson were present during the second photography session. Grady testified that between the two sets of products, he worked 3 days. Therefore, as discussed, he invoiced Calderon and Anderson on March 27, 2014, at his rate of $800 per day, for a total of $2,400 for the two photography jobs.

The invoice was unpaid in its entirety. After receiving the invoice, Anderson attempted to negotiate a reduction in the

price. Anderson offered to pay $1,800 on the promise of other work for Grady Photography in the future. Grady declined, stating that he would rather give a discount for future work and get paid what he was owed. Grady made numerous attempts to settle the invoice with Calderon and Anderson before ultimately filing suit in the county court for Douglas County.

Grady Photography initiated a breach of contract action against Amazing Vapor, MCJC, Calderon, and Anderson. Grady Photography alleged that it had not received payment due and owing from the named defendants after it fully performed its obligations under the two oral contracts for photography services. Grady Photography obtained a default judgment of $2,400, attorney fees, and court costs against Amazing Vapor, MCJC, and Calderon. Anderson, representing himself individually, filed an answer which denied the allegations against him. He further alleged that he was a minority owner of Amazing Vapor and that "Calderon closed the business, took the inventory and started his own business at an undisclosed location."

Following an unsuccessful motion to dismiss filed by Anderson, the case went to a bench trial on November 21, 2016. The subjects of the trial were contract issues and whether Anderson was personally liable for the debt. On February 7, 2017, the county court filed an order in which it found the existence of two oral contracts which had been breached and entered judgment in favor of Grady Photography and against Anderson, individually. The county court offered several rationales pursuant to which Anderson was found personally liable under the contracts. Using the language of the equitable principles surrounding "piercing the corporate veil," see *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008) (noting piercing corporate veil is equitable principle), the county court stated: "Anderson shall be held personally liable in order to prevent fraud and injustice." The county court further noted that Anderson had taken

corporate distributions during the time that money was owed to Grady Photography, see Neb. Rev. Stat. § 21-252(c) (Cum. Supp. 2016).

Anderson appealed the county court's decision to the district court. Anderson failed to file a statement of errors. See Neb. Ct. R. §§ 6-1452(A)(7) (rev. 2011) and 6-1518. The district court decided to ignore Anderson's failure to file a statement of errors. The district court concluded that the county court did not err in its decision that Anderson should be personally liable under the contracts, because (1) Grady believed he was contracting with Calderon and Anderson and, alternately, (2) piercing the corporate veil would prevent fraud and injustice to Grady Photography.

Anderson appeals the order of the district court sitting as an appellate court which affirmed the county court's order concluding Anderson was personally liable to Grady Photography.

STANDARD OF REVIEW

[1] Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error. *State v. Nielsen, ante* p. 88, 917 N.W.2d 159 (2018); §§ 6-1452(A)(7) and 6-1518.

ANALYSIS

We note initially that the failure of Anderson to file a statement of errors in his appeal from the county court to the district court limited the district court's and our review to plain error. *State v. Nielsen, supra*. For the reasons discussed below, we do not find plain error by the district court sitting as an appellate court with regard to its order which affirmed the county court's decision finding Anderson liable under a breach of contract theory.

This case was filed as a breach of contract action. We have reviewed the record and determined that the record supports the finding of two oral contracts between Grady and Anderson. As the district court stated, the record showed that "[Grady

Photography] had made [its] initial agreement with Defendant Anderson, and had the right to rely on Defendant Anderson's personal liability, as well as that of his partner, for services provided by [Grady Photography]."

[2] The cases provide that it is the agent's duty to disclose his or her capacity as an agent of a corporation if the agent is to escape personal liability for contracts made, and in the absence of such disclosure, the agent bears the burden of proof of showing that the contract was made while acting in a corporate, not individual, capacity. See, *Purbaugh v. Jurgensmeier*, 240 Neb. 679, 483 N.W.2d 757 (1992); 3 C.J.S. *Agency* § 565 (2013). The uncontradicted testimony at trial was that neither Calderon nor Anderson disclosed Amazing Vapor's incorporated status during discussions leading up to the agreements. In text messages, Anderson referred to Calderon as his "partner." At Anderson's request, Grady sent the March 27, 2014, invoice to Anderson's personal or attorney email, not an address associated with Amazing Vapor. The invoice reads, "Art Buyer: Tom Anderson & Manny Calderon Client: Amazing Vapor," indicating that Grady believed the buyers were Calderon and Anderson for their client, Amazing Vapor. After the invoice remained unpaid after several attempts to collect on the contract, Grady texted Anderson: "You are also part owner. It's time for you to pay and take it up with [Calderon] on your own. . . . [Y]ou are responsible for hiring me . . . and therefore you are responsible just as much as [Calderon]." The series of communications between Grady and Anderson leading up to and following the photography services supports the county court's finding of a breach of two oral agreements for which Anderson was liable, and we find no plain error with regard to the district court's affirmance thereof.

[3-5] For completeness, we note that our analysis is based on contract jurisprudence, and to the extent the lower courts' reasoning was based on equitable principles, it is disapproved.

Within its reasoning, the county court relied on an equitable principle of piercing the corporate veil. But, the county court did not have equity jurisdiction. Save for county probate and trust powers and county courts' limited jurisdiction in granting temporary restraining orders, jurisdiction in equity actions remains in district courts. Although by statute, county courts have "[c]oncurrent original jurisdiction with the district court in all civil actions of any type" when the amount in controversy is below a certain amount, this does not include equity actions. Neb. Rev. Stat. § 24-517(5) (Reissue 2016). See, Neb. Rev. Stat. § 30-3814 (Reissue 2016); *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991) (discussing predecessor statute). As noted, proceedings seeking to pierce the corporate veil are equitable actions. *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008). Thus, the county court lacked authority to consider equitable theories of recovery based on piercing the corporate veil and the district court incorrectly approved of the county court's approach.

CONCLUSION

Although our reasoning differs somewhat from the lower courts, we find no plain error in the determination and affirmance thereof in which it was found that two oral contracts had been breached by Anderson and held him individually liable for $2,400 in damages.

Affirmed.

Dr. Robert F. Colwell, Jr., D.D.S., and Dr. Robert F. Colwell, DDS, P.C., appellants, v. Sean Mullen, J.D., and Hancock & Dana, P.C., appellees.

918 N.W.2d 858

Filed October 26, 2018. No. S-17-889.

1. **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 normally will not be set aside by an appellate court unless clearly wrong.
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. **Limitations of Actions: Negligence.** The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit. If a claim for professional negligence is not to be considered time barred, the plaintiff must either file within 2 years of the alleged act or omission or show that its action falls within an exception to Neb. Rev. Stat. § 25-222 (Reissue 2016).
5. **Limitations of Actions.** The 1-year discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 2016) is a tolling provision, but it applies only in those cases in which the plaintiff did not discover and could not have reasonably discovered the existence of the cause of action within the applicable statute of limitations.
6. **Limitations of Actions: Malpractice.** In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the

same or related subject matter after the alleged professional negligence. Continuity does not mean the mere continuity of the general professional relationship.

7. ____: ____. Even where a continuous relationship exists, the continuous relationship rule is inapplicable when the claimant discovers the alleged negligence prior to the termination of the professional relationship.
8. **Limitations of Actions: Torts.** It is well accepted that when an individual is subject to a continuing, cumulative pattern of tortious conduct, capable of being terminated and involving continuing or repeated injury, the statute of limitations does not run until the date of the last injury or cessation of the wrongful action.
9. ____: ____. The continuing tort doctrine requires that a tortious act—not simply the continuing ill effects of prior tortious acts—fall within the limitation period.
10. **Appeal and Error.** Claims not presented to or decided by the district court need not be addressed on appeal.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

John A. Svoboda and Adam J. Wachal, of Gross & Welch, P.C., L.L.O., for appellants.

William F. Hargens and Lauren R. Goodman, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees.

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

Heavican, C.J.

INTRODUCTION

Dr. Robert F. Colwell, Jr., D.D.S., and his self-named professional corporation (collectively Colwell), filed suit alleging malpractice against Sean Mullen and against Hancock & Dana, P.C. (collectively Mullen). Sean Mullen is an attorney licensed to practice law and works as a tax attorney at Hancock & Dana, an accounting firm. The district court granted Mullen's motion for summary judgment, concluding that Colwell's malpractice claims were barred by the statute of limitations set forth in Neb. Rev. Stat. § 25-222 (Reissue 2016). We affirm.

FACTUAL BACKGROUND

Dr. Colwell was a dentist practicing primarily in Douglas County, Nebraska. In 2004, he agreed to purchase 50 percent of a dental practice currently being operated by Jeffrey Garvey. The purchase agreement envisioned that Dr. Colwell and Garvey would form separate professional corporations in their respective names and that those professional corporations would each own half of the practice. The practice would be operated as Midlands Oral Health, LLC (Midlands).

Colwell hired Mullen to assist him in forming his professional corporation. Mullen had apparently worked for Garvey in the past and was again retained by Garvey to form Garvey's professional corporation. In addition, Mullen was retained by Dr. Colwell's professional corporation, Garvey's professional corporation, and Midlands as an accountant and tax attorney.

Midlands was formed as a going concern complete with various assets, including dental and office equipment and employees. In 2005, Midlands transferred control of its employees to a new corporation, Grobell, P.C. Grobell was owned by Garvey; apparently, Mullen assisted Garvey in the creation of Grobell and the transfer of the employees. Employees from a different dental practice that had been purchased by Midlands in 2004 were also transferred to Grobell. All employees were then leased by Grobell to Midlands, apparently at an 18-percent leasing fee. Colwell claims that this was all done without his knowledge and that he was damaged because as a 50-percent owner of Midlands, he had to pay half of the lease fee. Colwell alleges that he learned of the transfer of employees in mid-March 2011 and of the leaseback fee in August 2011.

In addition, with Mullen's assistance, Garvey also formed Vanguard Dental Solutions, Inc. (Vanguard). Vanguard was a service which charged a membership fee to participate, with members receiving a discount on dental services from participating care providers. Midlands was a participating provider with Vanguard, and Vanguard members paid less for dental services at Midlands. Colwell denies that he was ever informed

of Garvey's interest in Vanguard or of Mullen's assistance in the formation of Vanguard. It is not clear from the record when Vanguard was created; Colwell apparently learned of its creation in August 2011.

In October 2010, Colwell formed RMR Enterprises, L.L.C. (RMR), for the purpose of constructing a new office building for Midlands. RMR expended over $100,000 to buy land and pay fees associated with the purchase. In February 2011, Mullen reviewed certain provisions of an operating agreement for RMR and billed Colwell for those services.

In April 2011, Colwell terminated his professional relationship with Mullen. He later engaged counsel to file suit against Garvey. Colwell and Garvey eventually settled in December 2011. This current action for professional malpractice was filed on March 4, 2013. As amended, Colwell's complaint alleged six acts of legal and accounting malpractice: that Mullen (1) failed to advise Colwell of Mullen's conflict of interest; (2) transferred Midlands employees to Grobell without Colwell's knowledge; (3) caused Colwell to pay 50 percent of an 18-percent administrative leaseback fee for the Grobell employees; (4) prepared and filed an erroneous Schedule K-1 (K-1) for 2010 (alleged as legal malpractice) and for 2011 (alleged as both legal and accounting malpractice), causing Colwell to pay income tax of $150,000 on income never realized; (5) allowed certain overpayments to Garvey; and (6) billed Colwell for work not performed.

Mullen filed several motions to dismiss and motions for summary judgment. One motion for summary judgment was partially granted on August 11, 2015. In that order, the district court granted summary judgment on Colwell's claims that Mullen failed to disclose his conflict of interest, that Mullen transferred employees of Midlands to Grobell without Colwell's knowledge, that Mullen prepared and filed an erroneous 2010 K-1, and that Mullen allowed certain overpayments to be made to Garvey. As to each, the district court concluded that the claims were barred by the statute of limitations as set forth in

§ 25-222. A later motion for summary judgment addressed the remaining claims, specifically the leaseback fee, the erroneous 2011 K-1, and the billing for work not performed. In an order dated September 16, 2015, the district court also found those claims to be barred by the applicable statute of limitations.

Colwell appeals.

ASSIGNMENTS OF ERROR

Colwell assigns, restated and consolidated, that the district court erred in (1) granting Mullen's motion for summary judgment, (2) finding that his action was barred by § 25-222, (3) failing to find that Mullen's actions constituted a continuing tort, (4) failing to find that the continuous representation applied to toll § 25-222, and (5) failing to find that there were numerous separate acts of malpractice which were timely brought under § 25-222.

STANDARD OF REVIEW

[1] 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 normally will not be set aside by an appellate court unless clearly wrong.[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]

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[1] *Behrens v. Blunk*, 284 Neb. 454, 822 N.W.2d 344 (2012).

[2] *Jordan v. LSF8 Master Participation Trust*, 300 Neb. 523, 915 N.W.2d 399 (2018).

[3] *Id.*

ANALYSIS

On appeal, Colwell argues that a variety of Mullen's actions were malpractice and that the district court erred in dismissing the claims for being time barred by the statute of limitations set forth in § 25-222. Colwell contends that the statute of limitations on these claims was tolled, either because the claims alleged continuing torts or because there was a continuous representation between him and Mullen. Colwell further asserts that additional acts of malpractice occurred within 2 years prior to the filing of the malpractice action. Because these matters were disposed of by summary judgment, we view the evidence in the light most favorable to Colwell.

Statute of Limitations for Professional Malpractice.

Section 25-222 sets forth the statute of limitations applicable to actions for professional malpractice and provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided,* if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

[4] The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right

to institute and maintain suit.[4] If a claim for professional negligence is not to be considered time barred, the plaintiff must either file within 2 years of the alleged act or omission or show that its action falls within an exception to § 25-222.[5]

Discovery Exception.

[5] This court has said that the 1-year discovery exception of § 25-222 is a tolling provision, but that it applies only in those cases in which the plaintiff did not discover and could not have reasonably discovered the existence of the cause of action within the applicable statute of limitations.[6] Under the discovery principle,

> "a cause of action accrues and the . . . discovery provision . . . begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. . . . It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed."[7]

Continuous Relationship Exception.

[6,7] This court has also, upon occasion, considered whether a continuous relationship might operate to toll the statute of limitations set forth in § 25-222. In order for such a relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.[8] Continuity does not mean the mere continuity of the general professional

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[4] *Behrens v. Blunk, supra* note 1.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 460, 822 N.W.2d at 349.

[8] *Behrens v. Blunk, supra.*

relationship.[9] But even where a continuous relationship exists, this rule is inapplicable when the claimant discovers the alleged negligence prior to the termination of the professional relationship.[10]

Continuing Tort.

[8,9] It is well accepted that when an individual is subject to a continuing, cumulative pattern of tortious conduct, capable of being terminated and involving continuing or repeated injury, the statute of limitations does not run until the date of the last injury or cessation of the wrongful action.[11] This "continuing tort doctrine" requires that a tortious act—not simply the continuing ill effects of prior tortious acts—fall within the limitation period.[12] Nor can the necessary tortious act merely be the failure to right a wrong committed outside the statute of limitations, because if it were, the statute of limitations would never run because a tort-feasor can undo all or part of the harm.[13] Rather, when a tort is continuing, although the initial tortious act may have occurred longer than the statutory period prior to the filing of an action, an action will not be barred if it can be based upon the continuance of that tort within that period.[14]

Mullen's Actions Were Not Continuing Torts.

Colwell argues that some of the actions made by Mullen were continuing torts and that to the extent the actions continued within the 2 years prior to the filing of his complaint, his claims are not barred by the statute of limitations. On appeal, Colwell specifically references (1) the transfer of employees

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[9] *Id.*

[10] See *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

[11] *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007).

[12] *Id.*

[13] *Id.*

[14] *Id.*

from Midlands to Grobell, which required Midlands to pay an 18-percent leaseback fee; (2) the loss of income due to the formation of Vanguard; (3) damages from conflict of interest to dissolve Midlands without Colwell's knowledge, occurring on or after March 9, 2011, and including June 30; (4) damages incurred by RMR in expending funds in preparation for building a new building for Midlands; (5) damages incurred as a result of falsification of a 2010 Form 1065 tax return and the accompanying K-1, which Colwell alleges Mullen continued to prepare from and after March 2011; (6) losses incurred as a result of preparation of the falsified 2011 Form 1065 and K-1; and (7) damages sustained as a result of Mullen's providing personal accounting and legal services to Garvey, done to conceal Mullen's and Garvey's misconduct or to advocate for positions in conflict with Colwell's interests.

[10] As an initial matter, we observe that while Colwell pled facts regarding Vanguard, RMR, and the dissolution of Midlands, as set forth in claims (2) through (4) above, he did not specifically allege any cause of action with regard to any alleged malpractice on these issues. Nor were these claims presented to or decided by the district court. As such, we need not address them on appeal.[15]

Moreover, Colwell's complaint failed to allege that Mullen committed malpractice by working with Garvey to provide personal legal and accounting services to conceal their wrongdoing, as set forth in claim (7) above. As such, we also need not address those claims. Finally, the record establishes that the receiver for Midlands at the time of its dissolution, and not Mullen, filed the 2011 Form 1065 and associated K-1. As such, there is no merit to this claim, set forth as claim (6) above.

On these facts, the key time period this court is concerned with is between March 3, 2011, which was 2 years prior to the

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[15] See *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002).

filing of this action, and April 23, the day Colwell terminated his professional relationship with Mullen. Prior to that time, any claim would be barred by the statute of limitations; any subsequent action would not be malpractice for purposes of § 25-222 because Mullen was no longer authorized to provide professional services for Colwell.

With this background, we turn to Colwell's claim regarding Grobell, set forth above as claim (1). As the district court found, Mullen created Grobell on Garvey's behalf in 2001 and Midlands employees were transferred at about that same time. Colwell contends that he continues to be injured by this transfer because Grobell charged Midlands an 18-percent leaseback fee on those employees, of which he paid 9 percent as a part owner of Midlands.

The record shows that the transfer of employees from Midlands to Grobell occurred in 2005, with no indication from the record that Mullen did anything further with respect to Grobell after that point. Colwell merely alleges that he lost money in the form of the 18-percent leaseback fee. Such is an ill effect of an earlier act, and not in itself a tortious act that occurred within the statute of limitations.[16] There is no merit to this claim.

Colwell also alleges, set forth above as claim (5), that Mullen committed malpractice by filing a falsified 2010 Form 1065 and associated K-1 for Midlands. Assuming that Colwell can maintain this cause of action, we conclude that it is barred by the statute of limitations. While Colwell now argues that Mullen's billing records suggest that the 2010 forms were prepared in April 2011, in an interrogatory answered during discovery, Colwell indicated that he was aware in "January, 2011 [or p]ossibly early February, 2011" that the 2010 K-1 was erroneous. This is supported by Mullen's affidavit testimony that he filed the 2010 Form 1065 and K-1 "[i]n early 2011." We find no error in the district court's factual finding that the

[16] See *Alston v. Hormel Foods Corp., supra* note 11.

2010 K-1 was prepared in January 2011. This date is prior to the March 3 date relevant to this analysis and is outside the limitations period.

There is no merit to Colwell's assertion that the statute of limitations was tolled by the continuing tort doctrine.

Continuous Representation Doctrine Is Inapplicable.

Colwell also argues that the continuous representation doctrine applies to toll the statute of limitations as to Mullen's alleged malpractice claim in assisting Garvey in the formation and organization of Vanguard. As noted above, Vanguard was the discounted dental fee arrangement in which members paid a fee to belong to a corporation owned by Garvey, then paid a reduced rate for dental services to Midlands, of which Colwell was half owner. Colwell argues that he was damaged because he earned half of a reduced fee, while Garvey earned the other half, as well as income from his ownership interest in Vanguard.

We again observe that while Colwell set forth some facts as to Vanguard in his first amended complaint, he did not set forth a cause of action specific to Mullen's role in creating Vanguard. But in any case, we find the continuous representation doctrine inapplicable. The continuous representation doctrine requires "a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence."[17] Continuity does not mean the mere continuity of the general professional relationship. Colwell claims that he was not aware of Vanguard's existence. Colwell and Mullen could not have had a continuous relationship over a matter Colwell did not know existed and in which Mullen most decidedly did not represent Colwell. Rather, any continuity would have to be based on only the general professional relationship; we have held that this is insufficient to support the application

[17] *Behrens v. Blunk, supra* note 1, 284 Neb. at 462, 822 N.W.2d at 350.

of this doctrine. Colwell's argument regarding the continuous representation doctrine's applicability to Vanguard is without merit.

Remaining Allegations of Malpractice Either Were Not Pled or Are Without Merit.

Colwell also argues that several of his claims allege separate acts of malpractice that occurred in the 2 years preceding the filing of his complaint. Specifically, Colwell alleges that Mullen (1) had a conflict of interest when he advised Garvey to dissolve Midlands; (2) billed Midlands for matters notwithstanding the pendency of the receivership, in violation of an ongoing conflict of interest; (3) knew that Midlands would likely be dissolved yet allowed Colwell to expend funds in connection with RMR; (4) falsified the 2010 Form 1065 and associated K-1; (5) falsified the 2011 Form 1065 and associated K-1; (6) failed to return Colwell's file upon request; and (7) billed Midlands for personal work done for Garvey.

Most of these claims were not pled. Colwell did not plead that Mullen had a conflict of interest in advising Garvey to dissolve Midlands or that Mullen billed Midlands for work done during the pendency of the receivership. Nor did Colwell specifically plead any cause of action relating to RMR, the refusal to return his file, or any work on Garvey's behalf billed to Midlands. In addition, as is noted above, the 2011 Form 1065 and associated K-1 were not prepared by Mullen.

The only remaining claim regards the 2010 Form 1065 and associated K-1, which claim, as noted above, was barred by the statute of limitations. As such, there is no merit to any of Colwell's arguments on his separate claims of malpractice.

CONCLUSION

The order of the district court granting Mullen's motion for summary judgment is affirmed.

Affirmed.

Papik, J., not participating.

State of Nebraska, appellee, v. Rashad Washington, appellant.

918 N.W.2d 597

Filed October 26, 2018. Nos. S-17-1002, S-17-1026.

1. **Judgments: Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Courts: Appeal and Error.** The order of an appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.

Appeals from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Brian S. Munnelly for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Heavican, C.J.

INTRODUCTION

Rashad Washington appeals from the district court's denial of his motion to vacate and the subsequent reinstatement of sentences originally ordered on April 18, 2011. Washington appeals. We affirm.

BACKGROUND

This case is procedurally complex. Following a jury trial, Washington was convicted of nine counts for first degree assault; second degree assault; possession of a firearm by a prohibited person; discharging a firearm in certain cities, villages, and counties; three counts of use of a weapon to commit a felony; possession of a firearm by a prohibited person; and possession of a stolen firearm. These charges result from separate incidents occurring on March 17 and 27, 2010.

On April 18, 2011, the district court sentenced Washington to a combined total of 70 to 110 years' imprisonment. The district court then informed Washington, incorrectly, that he would be eligible for parole in 35 years, less the 387 days already served, and released in 55 years, less the 387 days already served. Two days later, on April 20, the district court attempted to resentence Washington to reflect the court's intent that Washington would be eligible for parole in a certain number of years or be released in a certain number of years.

Washington appealed, but on June 29, 2011, in case No. A-11-402, his appeal was dismissed by the Nebraska Court of Appeals for lack of jurisdiction, because a poverty affidavit had not been filed.

The State filed a petition to docket error proceedings, which was granted. In its petition, the State argued that the April 20, 2011, attempt to resentence Washington was of no effect. The Court of Appeals agreed and on February 27, 2012, in case No. A-11-416, held that the April 18 sentence remained in effect, but the court remanded the matter for a new advisement on good time calculations. The district court held a hearing to that effect on May 1, 2012, with a written order following on May 3.

By this time, Washington was represented by new counsel. That counsel filed a notice of appeal on Washington's behalf, arguing insufficiency of the evidence, excessiveness of the sentences imposed, and ineffectiveness of counsel at the April

18, 2011, sentencing hearing.[1] The Court of Appeals declined to reach the assigned errors, but found plain error in the sentences imposed based upon this court's decision in *State v. Castillas*.[2]

The Court of Appeals relied upon our statement in *Castillas* that "'[m]andatory minimum sentences cannot be served concurrently. A defendant convicted of multiple counts each carrying a mandatory minimum sentence must serve the sentence on each count consecutively,'" to conclude that the district court's imposition of concurrent sentences for the second degree assault and discharging a firearm convictions were error.[3] Accordingly, the Court of Appeals remanded the matter for resentencing on those convictions, with recalculated good time advisements. Washington was so resentenced on September 30, 2013, with a written order filed on October 1.

In January 2014, Washington filed various motions seeking postconviction relief in the form of a new direct appeal and the appointment of counsel for that appeal. Those motions were granted, an evidentiary hearing was held, and a new direct appeal granted.

In an unpublished memorandum opinion dated December 29, 2016, in consolidated cases Nos. A-15-317 and A-15-323, the Court of Appeals affirmed Washington's convictions, but based on this court's clarification of *Castillas*,[4] reversed and vacated the sentences imposed by the district court on September 30, 2013. The Court of Appeals further ordered that the district court reinstate the sentences imposed on April 18, 2011.

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[1] *State v. Washington*, No. A-12-470, 2013 WL 2326983 (Neb. App. May 28, 2013) (selected for posting to court website).

[2] *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), *disapproved in part, State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

[3] *State v. Washington, supra* note 1, 2013 WL 2326983 at *3.

[4] See *State v. Lantz, supra* note 2.

The Court of Appeals also found that all but two of Washington's ineffective assistance of counsel claims were without merit, except for Washington's claim that counsel failed to preserve a constitutional challenge to Neb. Rev. Stat. § 28-1212.04 (Reissue 2016) and that counsel failed to fully discuss and advise Washington concerning each count of the information and amended information. As to those two claims, the Court of Appeals found an insufficient record. Washington's motion for rehearing to the Court of Appeals and petition for further review to this court were both denied.

Upon remand, Washington filed a motion to vacate his conviction for discharge of a firearm in certain cities, villages, and counties under § 28-1212.04, arguing the statute is unconstitutional on its face. Washington requested that the motion to vacate be taken up before the court reinstated the sentences as directed by the mandate. The district court concluded that it lacked jurisdiction to do anything other than reinstate the sentences imposed on April 18. Accordingly, the district court denied the motion to vacate and reinstated the April 18 sentences. Washington appeals the denial of his motion to vacate.

ASSIGNMENTS OF ERROR

On appeal, Washington assigns that (1) § 28-1212.04 is facially unconstitutional, as violative of the prohibition against local and special laws as stated in Neb. Const. art. III, § 18, and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, and (2) the district court's failure to consider the merits of the federal equal protection challenge on the basis of state procedural grounds violated the Supremacy Clause of article VI, clause 2, of the U.S. Constitution.

STANDARD OF REVIEW

[1] The construction of a mandate issued by an appellate court presents a question of law on which an appellate court

is obligated to reach a conclusion independent of the determination reached by the court below.[5]

ANALYSIS

The issue presented by this appeal is whether the district court was obligated to consider the constitutional claim raised by Washington in his motion to vacate, when that motion was filed after remand from a decision of the Court of Appeals which ordered the district court to resentence Washington in a particular way. The district court declined to reach the motion, concluding that the mandate from the Court of Appeals allowed it only to resentence Washington. But Washington contends that the federal constitutional challenge trumps the state procedural rules under the Supremacy Clause of the U.S. Constitution, requiring the district court to address his claim.

We have reviewed the cases upon which Washington relies and find them inapplicable here. Washington primarily relies upon cases which involve the collateral review of a statute already found to be unconstitutional and simply hold that the sentence imposed for such a violation is void.[6] But the statute which Washington argues is unconstitutional has not yet been found to be unconstitutional, and the cases he relies upon do not opine on the underlying procedure that should be followed in making such a determination. We are therefore unpersuaded by Washington's assertion that the lower court was obligated under the Supremacy Clause to address his constitutional claims.

[2] This court has held that when a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The

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[5] *State v. Payne*, 298 Neb. 373, 904 N.W.2d 275 (2017).

[6] See, *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016); *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013); *State v. Nollen*, 296 Neb. 94, 892 N.W.2d 81 (2017); *State v. Castaneda*, 287 Neb. 289, 842 N.W.2d 740 (2014).

order of an appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.[7] Thus, pursuant to the mandate of the Court of Appeals, the district court had the power only to resentence Washington. There is no merit to Washington's assertions to the contrary.

CONCLUSION

The district court did not err by not addressing Washington's constitutional challenge. We affirm.

Affirmed.

Cassel and Freudenberg, JJ., not participating.

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[7] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001).

Michelle Weatherly, appellee, v. Luke J. Cochran, appellant.

918 N.W.2d 868

Filed October 26, 2018. No. S-17-1329.

1. **Moot Question: Jurisdiction: Appeal and Error.** Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Jurisdiction.** An actual case or controversy is necessary for the exercise of judicial power.
4. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Judgments: Time.** Once a protection order has expired, the respondent is no longer affected by it.
6. **Moot Question: Appeal and Error.** Under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination.
7. **Moot Question: Words and Phrases.** In determining whether the public interest exception should be invoked, the court considers 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.
8. **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 that are plain, direct, and unambiguous.

9. **Statutes: Legislature: Intent.** The court, in discerning the meaning of a statute, should determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
10. **Statutes: Words and Phrases.** The meaning of "appear" in the context of Neb. Rev. Stat. § 28-311.09(8)(b) (Reissue 2016) includes both personal appearances by the respondent and appearances through counsel.

Appeal from the District Court for Douglas County: John E. Huber, County Judge. Appeal dismissed.

Diana J. Vogt, of Sherrets, Bruno & Vogt, L.L.C., for appellant.

William H. Selde, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellee.

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

Freudenberg, J.

NATURE OF CASE

Luke J. Cochran appeals the issuance of a harassment protection order and denial of a motion to vacate the ex parte harassment protection order against him. During a show cause hearing, the district court stated that because Cochran appeared through counsel rather than appearing in person, the ex parte harassment protection order would be automatically extended for 1 year. However, the court proceeded to allow the petitioner, Michelle Weatherly, to testify and allowed Cochran's counsel to cross-examine Weatherly. After the hearing, the district court found that Weatherly had presented evidence sufficient to extend the harassment protection order for 1 year, to expire on October 5, 2018. The central issues raised on appeal are (1) whether Weatherly was entitled to a harassment protection order under the terms of Neb. Rev. Stat. § 28-311.09

(Reissue 2016) and (2) whether a respondent against whom a harassment protection order is sought must appear in person rather than through counsel. We find that the appeal is moot, but apply the public interest exception to mootness to address the second inquiry.

FACTS

Weatherly and Cochran were involved as partners in a roofing contractor business. Weatherly and Cochran worked together in a building owned by Cochran and leased to the business.

In July 2017, Cochran gave notice of his intent to resign his position at the roofing contractor business. Believing that Cochran would potentially depart negatively, Weatherly had an off-duty officer present for the removal of his belongings on his final day of employment.

When Cochran arrived at the office to remove his belongings, he met with Weatherly in her office. During this meeting, Cochran allegedly made threatening statements. Specifically, Cochran purportedly stated, "'Do you recall what happened to . . . Roofing? It's rumored that that was a business deal gone bad and that person was murdered because of that. I hope that doesn't happen to us.'" Although Weatherly noted that the environment was hostile throughout the rest of the day, Weatherly continued to talk to Cochran.

Later, after Cochran left the building, the off-duty officer suggested that Weatherly should go into Cochran's office to retrieve company documents and property before the locksmiths came to change the locks for the building. Upon entering Cochran's office, Weatherly and the officer found a handgun in Cochran's desk drawer. Weatherly subsequently told the off-duty officer that Cochran was a convicted felon, and the officer took possession of the weapon to ensure that an on-duty officer could seize it.

While Weatherly was waiting for the arrival of the on-duty officer, Cochran returned and attempted to enter the building.

When Cochran was stopped from entering the building by the off-duty officer, Weatherly alleged that Cochran made "a threatening gesture" that she interpreted to insinuate that she was "'going to get it.'" The actual gesture was not further described in the record.

On August 2, 2017, Weatherly filled out the application for the protection order. However, the application was not filed with the court until October 5. An ex parte harassment protection order was granted in favor of Weatherly, and a show cause hearing was requested by Cochran and held December 7, 2017.

At the show cause hearing, Weatherly and her counsel were in attendance, but Cochran appeared only through his attorney. Weatherly's testimony asserting and describing the aforementioned events was the only evidence received at the hearing. Cochran's counsel did not attempt to cross-examine Weatherly regarding her recitation of the relevant events on Cochran's final day with the company, but did question her as to her motivation for filing the protection order.

Cochran's counsel contended that a demand letter sent to Weatherly by Cochran's attorney regarding a civil lawsuit between Weatherly and Cochran was a motivation for Weatherly to file the protection order on October 5, 2017, more than 2 months after the events at issue. The letter and authenticating affidavit were marked as exhibit 1 and offered by Cochran. The letter was objected to by Weatherly on relevancy grounds. The district court sustained the objection and did not further allow this line of cross-examination. The court noted that Cochran's counsel was not entitled to go over the parties' history and the potential relevance of the demand letter because of Cochran's failure to appear at the hearing. The ex parte petition and affidavit were never offered at the show cause hearing.

The court made multiple statements throughout the hearing indicating that Cochran was required to appear in person to challenge the issuance of the harassment protection order

and was not allowed to appear through counsel. But, at the conclusion of the hearing, the district court ruled that, based exclusively on Weatherly's testimony of the events, the protection order would remain in effect for 1 year. Cochran appeals.

ASSIGNMENTS OF ERROR

Cochran assigns that the district court erred in (1) granting the protection order on the evidence presented, (2) finding that Cochran was required to appear in court in person rather than through counsel to contest the issuance of the protection order, and (3) refusing to admit exhibit 1 into evidence.

STANDARD OF REVIEW

[1] Mootness does not prevent appellate jurisdiction.[1] But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, we have reviewed mootness determinations under the same standard of review as other jurisdictional questions.[2] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.[3]

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[4]

ANALYSIS

Cochran asserts on appeal that the district court erred in finding that there was sufficient evidence to continue the harassment protection order against him for 1 year. Weatherly argues that the evidence was sufficient and that, in any event, the harassment protection order was appropriately granted as

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[1] *BryanLGH v. Nebraska Dept. of Health & Human Servs.*, 276 Neb. 596, 755 N.W.2d 807 (2008).

[2] *Id.*

[3] *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

[4] *Dean v. State*, 288 Neb. 530, 849 N.W.2d 138 (2014).

a matter of law under § 28-311.09, because Cochran failed to appear at the hearing in person. Cochran counters that "appear" under Nebraska's harassment protection order statutes permits an appearance through counsel.

Mootness

[3] Before reaching the legal issues presented, the issue we must first confront is whether this appeal has become moot in the pendency of its litigation and appeal. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[5] An actual case or controversy is necessary for the exercise of judicial power.[6]

[4] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.[7] Usually, in the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.[8] Therefore, as a general rule, a moot case is subject to summary dismissal.[9]

[5] In the case on appeal, the harassment protection order expired on October 5, 2018. At this point in time, no harassment protection order exists against Cochran. We have held in other protection order cases that once an order has expired, the respondent is no longer affected by it.[10] We have also

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[5] *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

[6] *In re Interest of Anaya, supra* note 3.

[7] *BryanLGH v. Nebraska Dept. of Health & Human Servs., supra* note 1.

[8] *Id.*

[9] *Id.*

[10] *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000); *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999).

previously noted that because of the 1-year timeframes for protection orders, such cases will almost always be moot by the time the appeal is heard.[11] Similarly, this case is moot because the parties no longer have a cognizable interest in the outcome of the determination of whether the court erred in extending the harassment protection order under the terms of § 28-311.09.

[6,7] Nonetheless, under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination.[12] In determining whether the public interest exception should be invoked, the court considers 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.[13]

Although the appeal is moot, we choose to address the issue of whether a respondent against whom an ex parte harassment protection order has been issued must appear in person at a show cause hearing to challenge the issuance of the order, or can instead waive his or her appearance in person and appear through counsel at such hearing. Authoritative guidance on the matter is desirable because it is likely to reoccur in the future. This question is also public in nature, as it is not specific to the parties of this case. Rather, the interpretation of this issue may affect any respondent in a harassment protection order hearing.

In an effort to provide direction to the public, we address the "appearance" issue on appeal. Interpreting the meaning of "appear" under § 28-311.09 demands an authoritative

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[11] *Id.*

[12] *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000); *Elstun v. Elstun, supra* note 10.

[13] *Id.*

adjudication for future guidance of public officials.[14] However, we do not find it necessary under the public interest exception to address whether the evidence presented at the show cause hearing was sufficient to warrant the 1-year extension of the harassment protection order, which has since expired.[15]

Meaning of "Appear" Under § 28-311.09

[8,9] Whether a respondent at the show cause hearing for the continuation of a harassment protection order is required to appear in person as opposed to appearing solely through counsel hinges on the statutory interpretation of the language in § 28-311.09.[16] 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 that are plain, direct, and unambiguous.[17] The court, in discerning the meaning of a statute, should determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[18]

In 2012, § 28-311.09(8)(b) was amended to include the following language: "If the respondent has been properly served with the ex parte order and fails to appear at the hearing, the temporary order shall be deemed to be granted and remain in effect . . . ." On its face, § 28-311.09(8) provides that a court is required to grant a temporary order when a respondent was properly served with the ex parte order and fails to appear at the show cause hearing. It was plainly meant to address

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[14] See *Hron v. Donlan, supra* note 10.

[15] See *Courtney v. Jimenez*, 25 Neb. App. 75, 903 N.W.2d 41 (2017) (holding that moot issue of sufficiency of evidence to support domestic abuse protection order does not fall under public interest exception).

[16] See § 28-311.09.

[17] *Dean v. State, supra* note 4.

[18] *Farmers Co-op v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017).

the situation where a respondent fails to "appear" at a show cause hearing.

But the parties dispute the meaning of the word "appear." Cochran argues that by failing to specifically require in § 28-311.09(7) that a respondent appear in person, the Legislature plainly indicated that a respondent may appear solely through counsel to challenge the protection order. This is because, Cochran asserts, the plain meaning of "appear" in the context of a court hearing includes appearance through counsel. Cochran bolsters this argument by citing case law in which we have held in other civil proceedings that defendants were entitled to appear through counsel as opposed to attending in person.[19]

Conversely, Weatherly contends that to "appear" is limited to appearing in person. Weatherly's sole authority for this assertion is an unpublished Nebraska Court of Appeals case, *Kahm v. Wiester*.[20] In *Kahm*, the Court of Appeals held that as long as the respondent was served with the ex parte order, and he further failed to appear at the show cause hearing, the temporary order would be deemed to be granted and remain in effect.[21] *Kahm*, however, is distinguishable from the present matter, because the appellant in *Kahm* failed to appear in person *or through counsel*.[22]

The Legislature has not provided a controlling definition of the term "appear," but we look to the plain and ordinary meaning of the word within the context of this statute.[23] We

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[19] See *Turbines Ltd. v. Transupport, Inc.*, 285 Neb. 129, 825 N.W.2d 767 (2013) (allowing defendant to appear through counsel to contest default judgment). See, also, *Rorick Partnership v. Haug*, 228 Neb. 364, 422 N.W.2d 365 (1988).

[20] *Kahm v. Wiester*, No. A-12-1157, 2013 WL 4713590 (Neb. App. Sept. 3, 2013) (selected for posting to court website).

[21] *Id.*

[22] See *id*.

[23] See *Farmers Co-op v. State, supra* note 18.

must look to the statutory language and apply its ordinary and grammatical construction, unless an intent appears to the contrary or unless, by following such construction, the intended effect of the provisions would apparently be impaired.[24]

We find no merit to Weatherly's contention that to "appear" in the context of § 28-311.09(7) means solely to appear in person and does not include appearance through counsel. Under Black's Law Dictionary, "appearance" is defined to mean "[a] coming into court as a party or an interested person, *or as a lawyer on behalf of a party or interested person* . . . ."[25] Further, American Jurisprudence defines in detail what constitutes an "appearance" in a legal context:

> An "appearance" is a coming into court as party to a suit, either in person or by attorney, whether as plaintiff or defendant. An "appearance" in an action involves some submission or presentation to the court by which a party shows his intention to submit himself to the jurisdiction of the court; the determining factor is whether he takes a part in the particular action which in some manner recognizes the authority of the court to proceed.[26]

The American Jurisprudence definition of "appearance" explicitly states that an appearance may occur either in person or *by an attorney*.

"Appear" as it is found in § 28-311.09(8)(b) is not narrowly confined to require the presence of a respondent in person. Rather, it is the same as any other "appearance" in court. Through a plain reading of this statute, we hold that a respondent is entitled to appear by and through his or her counsel. The determining factor is whether the respondent takes a part in the particular action in some manner that recognizes the authority of the court to proceed.

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[24] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

[25] Black's Law Dictionary 118 (10th ed. 2014) (emphasis supplied).

[26] 4 Am. Jur. 2d *Appearance* § 1 at 630 (2018).

CONCLUSION

[10] We conclude that the meaning of "appear" in the context of § 28-311.09(8)(b) includes both personal appearances by the respondent and appearances through counsel. For the reasons set forth above, however, the instant appeal is moot. Therefore, we dismiss the present appeal.

Appeal dismissed.

301 Nebraska Reports
IN RE ADOPTION OF MICAH H.
Cite as 301 Neb. 437

In re Adoption of Micah H., a minor child. Daniel H. and Linda H., appellees, v. Tyler R., appellant.

918 N.W.2d 834

Filed October 26, 2018. No. S-18-146.

1. **Jurisdiction: Juvenile Courts: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law. An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.
4. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Adoption.** The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.
6. **Adoption: Parent and Child: Parental Rights.** Consent of a biological parent to the termination of his or her parental rights is the foundation of our adoption statutes, and an adoption without such consent must come clearly within the exceptions contained in the statutes.
7. **Adoption: Parent and Child.** A determination regarding parental consent, a finding under Neb. Rev. Stat. § 43-104(2) (Reissue 2016), or a determination regarding substitute consent does not end the court's inquiry as to whether the petition for adoption should be approved.
8. **Adoption.** Upon a hearing in an adoption proceeding, if the statutory requirements are otherwise satisfied, the court may decree an adoption after finding that such adoption is in the best interests of the child.

9. **Due Process: Parent and Child.** An established familial relationship is a liberty interest entitled to substantial due process protection.
10. **Constitutional Law: Parent and Child.** Concerning a parent-child relationship, the mere existence of a biological link does not merit equivalent constitutional protection.
11. ____: ____. The constitutional protection given to the familial relationship stems from the emotional attachments that derive from the intimacy of daily association.
12. **Constitutional Law: Parent and Child: Adoption: Notice.** When a biological father has not taken the opportunity to form a relationship with his child, the constitution does not afford him an absolute right to notice and an opportunity to be heard before the child may be adopted.
13. **Indian Child Welfare Act: Parental Rights.** The Nebraska Indian Child Welfare Act provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than does the Indian Child Welfare Act; therefore, the Nebraska Indian Child Welfare Act controls.
14. ____: ____. Under the Nebraska Indian Child Welfare Act, there is no precise formula for active efforts; the active efforts standard requires a case-by-case analysis and should be judged by the individual circumstances.
15. ____: ____. Under the Nebraska Indian Child Welfare Act, active efforts are required even if the parent is incarcerated, but may include programs offered by the Department of Correctional Services.
16. ____: ____. Under the Nebraska Indian Child Welfare Act, a parent's demonstrated lack of willingness to participate in treatment may be considered in determining whether the state has taken active efforts.
17. **Adoption: Abandonment: Time.** Consent for an adoption is not required when a parent has abandoned the child for at least 6 months next preceding the filing of the adoption petition.
18. **Abandonment: Evidence: Proof.** In order for a court to find that abandonment has occurred, the petitioning party bears the burden of proving by clear and convincing evidence that the parent abandoned the child.
19. **Abandonment: Proof.** To constitute abandonment, it must appear that there has been, by the parents, a giving up or total desertion of the minor child. There must be shown an absolute relinquishment of the custody and control of the minor and thus the laying aside by the parents of all care for the minor.
20. **Abandonment: Words and Phrases.** Abandonment may be found where there is willful or intentional conduct on the part of the parent which evinces a settled purpose to forgo all parental duties and relinquish all parental claims to the child, or a willful neglect and

refusal to perform the natural and legal obligations of parental care and support.

21. **Abandonment: Evidence.** The conduct constituting abandonment must appear by clear and convincing evidence to be willful, intentional, or voluntary, without just cause or excuse.
22. **Adoption.** Adoption statutes will be construed strictly in favor of the rights of the natural parents in controversies involving termination of the relation of the parent and child.
23. **Abandonment: Evidence: Appeal and Error.** The various definitions of abandonment do not require an appellate court to view the statutory period defined in Neb. Rev. Stat. § 43-104(2)(b) (Reissue 2016) in a vacuum. One may consider the evidence of a parent's conduct, either before or after the statutory period, because this evidence is relevant to a determination of whether the purpose and intent of that parent was to abandon his or her child or children.
24. **Parental Rights: Abandonment.** In considering the issue of abandonment, parental incarceration may be considered as a basis for termination of parental rights.
25. ____: ____. Consideration of parental abandonment is not to say that criminal conduct or imprisonment alone necessarily justifies an order of permanent deprivation.
26. ____: ____. In a parental termination proceeding, a court may consider a parent's inability to perform his or her parental obligations because of imprisonment and the nature of the crime committed, which considerations are relevant to the issue of parental fitness and child welfare, as is the parent's conduct prior to and during the period of incarceration.
27. **Indian Child Welfare Act: Intent.** The policy behind the Indian Child Welfare Act was to further the nation's interest in protecting the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards.
28. **Constitutional Law: Parental Rights.** It is a well-established maxim of constitutional law that the Due Process Clause of the 14th Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.
29. **Adoption: Parental Rights: Abandonment: Final Orders.** Despite a finding of abandonment, a parent retains parental rights until the final judgment denying or granting the petition for adoption, and the parent may still participate in the proceedings to present evidence that adoption is not in the child's best interests.
30. **Adoption: Parental Rights.** If the court finds that adoption is not in the child's best interests, then the rights of the parent, who was deemed to have abandoned the child, are returned to the status quo.

31. **Adoption: Abandonment.** Abandonment, for purposes of adoption, is not always determined in proceedings separate from the underlying adoption, because nothing in the adoption statutes absolutely requires bifurcated proceedings.

Appeal from the County Court for Saunders County: Patrick R. McDermott, Judge. Affirmed in part, and in part vacated and remanded with directions.

Jennifer D. Joakim for appellant.

Michael J. Novotny, of Fredericks, Peebles & Morgan, L.L.P., for appellees.

Evelyn N. Babcock and George T. Babcock, of Law Offices of Evelyn N. Babcock, for amici curiae Evelyn N. Babcock and George T. Babcock.

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

Heavican, C.J.

INTRODUCTION

This is an adoption case we first visited in *In re Adoption of Micah H.*,[1] where we concluded that the county court applied the wrong standard of proof in determining abandonment. We further concluded that the active efforts requirement of the Nebraska Indian Child Welfare Act (NICWA)[2] applied to cases involving the termination of parental rights over Indian children, even when the parent is not of Native American descent. We remanded the cause to the county court.

On remand, the county court, applying the correct standard of clear and convincing evidence, found that (1) the petitioning grandparents, Linda H. and Daniel H., had made active efforts to provide remedial and rehabilitative programs designed to "unite the parent . . . with the Indian child," under

[1] *In re Adoption of Micah H.*, 295 Neb. 213, 887 N.W.2d 859 (2016).

[2] Neb. Rev. Stat. §§ 43-1501 to 43-1517 (Reissue 2016).

§ 43-1505(4), and (2) Linda and Daniel presented clear and convincing evidence that Tyler R., the biological father, had abandoned Micah H., the child in question. Tyler appeals. This case presents issues regarding the interpretation of the relevant adoption statutes, as well as NICWA, and whether Tyler abandoned Micah. We affirm in part, vacate the adoption decree, and remand the cause to the county court with directions.

BACKGROUND

Micah is the 10-year-old biological child of Tyler and Allison H. Allison is a member of the Oglala Sioux Tribe. As such, Micah is an "Indian child" pursuant to the federal Indian Child Welfare Act of 1978 (ICWA)[3] and NICWA.

For the majority of Micah's life, he has resided with his legal guardians, Linda and Daniel, who are Allison's adoptive parents and do not share Allison's Native American heritage. Linda and Daniel sought to become Micah's guardians in March 2012, due to Allison's concerns regarding her ability to maintain sobriety. In April, the Saunders County Court appointed Linda and Daniel as Micah's guardians.

According to the record, Tyler also struggles with drug and alcohol addiction. He has been incarcerated since February 2012 for an alcohol-related motor vehicle homicide and has a projected release date of August 2019, at the earliest. Prior to his 2012 incarceration, Tyler had numerous encounters with the criminal justice system, many of those drug or alcohol related.

In January 2014, Micah was taken to see a psychologist for an evaluation. The psychologist's report concluded that "[g]iven obvious stressors (i.e.; [Allison's] and [Tyler's] substance abuse, [Tyler's] incarceration, alternate placement [with Linda and Daniel], and [grandparent] visitations [with Tyler's mother]) and Micah's symptoms of anxiety, including stuttering, nightmares, and general worry, a diagnosis of Adjustment Disorder with Anxiety appears appropriate."

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[3] 25 U.S.C. §§ 1901 to 1963 (2012).

Linda and Daniel filed a petition for adoption and termination of parental rights in Saunders County Court. During the course of the adoption proceedings, Allison voluntarily relinquished all parental rights to, and custody of, Micah, asking that Micah be permitted to be adopted by Linda and Daniel. Tyler objected to Linda and Daniel's petitioned adoption. Linda and Daniel also served a copy of the complaint on the president of the Oglala Sioux Tribe, as required by § 43-1505(1), and the tribe declined to intervene.

In 2015, the Saunders County Court denied Linda and Daniel's petition. Linda and Daniel appealed, assigning as error that (1) the county court erred in finding that ICWA applied at the request of Tyler, a non-Indian, and (2) the county court erred in applying a higher burden of proof to the abandonment element under Neb. Rev. Stat. § 43-104(2) (Reissue 2016) by requiring that Linda and Daniel demonstrate abandonment "beyond a reasonable doubt."

On appeal, we determined that the county court erred in applying the "'beyond a reasonable doubt'" standard to the abandonment element and also in finding that Linda and Daniel were not required to show that active efforts had been made, under NICWA, to unite Tyler and Micah.[4] We noted that the appropriate standard concerning abandonment under § 43-104(2) is "clear and convincing evidence" of abandonment.[5] Further, we explained that under NICWA, Linda and Daniel were required to show active efforts to unite Tyler and Micah or that attempts to provide active efforts had been made to the extent possible under the circumstances. We remanded the cause to the county court for further proceedings.[6]

On remand, the county court found in favor of Linda and Daniel. Specifically, the county court concluded that Linda and

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[4] *In re Adoption of Micah H., supra* note 1, 295 Neb. at 225, 887 N.W.2d at 868.

[5] *Id.*

[6] *Id.*

Daniel had demonstrated active efforts to unite Micah with Tyler by contacting the tribe in an attempt to establish services, as well as directing Tyler to the same treatment programs that they had used for Allison. The county court also found that Tyler had abandoned Micah.

Although the county court found there was evidence that Tyler had engaged in some treatment programs, it noted that Tyler continued to use drugs and alcohol, leading to his conviction for motor vehicle homicide. The county court also found there was no evidence that Tyler even attempted to acquaint himself with the history, cultural norms, and practices of the tribe, or any customs that have bearing on the parent-child relationship.

Linda and Daniel testified that as far as they were aware, prior to his incarceration, Tyler maintained a residence in his mother's basement and had the means to acquire transportation. Prior to 2011, Linda and Daniel assisted in providing for visitation as well as instruction regarding the appropriate interactions with and care for a toddler. Linda indicated that she had conversations with Tyler concerning scheduling visits and obtaining help with drug and alcohol addiction, and even assisted with the parenting plan provided by the court.

Daniel noted that after Micah began demonstrating inappropriate behaviors, Allison retained the services of an attorney in order to send Tyler a letter expressing her concern and requesting assurances with regard to the monitoring of Tyler's visitation with Micah. The letter was dated May 16, 2011. Daniel indicated that after Tyler's receipt of the letter, he discontinued his visitations with Micah. Daniel further indicated that he had supported Tyler's visitations with Micah until Micah began exhibiting concerning behaviors.

Tyler indicated that since his incarceration, he had obtained a certificate from every level of the "Designated Dad Program." The record indicates that Tyler attended one Alcoholics Anonymous meeting for the stated purposes of "[s]upport[ing] others there." However, Tyler testified that

Linda and Daniel never spoke with him about rehabilitation services and that he did not believe that he required any alcohol rehabilitation services. This was despite the fact that Tyler had a lengthy criminal history involving alcohol and drug possession.

Tyler admitted that he had not had any face-to-face contact with Micah since about 2011, or for over a year prior to his incarceration. Despite Tyler's incarceration, he has continued to send letters to Micah. Tyler has attempted to utilize money he earned during his incarceration to pay the child support he owes. However, due to the minimal earnings, the State rejected Tyler's request to direct funds to the Department of Health and Human Services. The record demonstrates that Tyler's mother pays the child support and that Tyler assists when he is able. Despite claims that Linda and Daniel have prevented Micah from visiting Tyler, the court below noted that no formal request had been made by Tyler to have Micah visit him in prison.

During the course of the adoption proceedings, and while discussing preliminary matters, the court observed that it was aware that "these kinds of cases" have two procedural stages. But the court indicated that the guardian ad litem had been informed that he may be called to testify at the completion of the proceedings regarding abandonment and Micah's best interests, rather than the usual procedure of holding a hearing on the matter at a later date. In fact, the guardian ad litem did testify and was cross-examined regarding Micah's best interests at that same hearing.

At the conclusion of the trial, the county court judge noted that he was "not turning this case over to some other judge to read the record and come to a conclusion. I am the one that's heard all the live evidence." The judge further stated that "[i]t would be unfair to a colleague and really unfair to all of the litigants because . . . those observations are important in the context of *the whole case*." (Emphasis supplied.) The county court then found that Tyler had abandoned Micah and terminated

Tyler's parental rights, further finding that adoption by Linda and Daniel was in Micah's best interests. Accordingly, a decree granting the adoption was entered.

Tyler appeals.

ASSIGNMENTS OF ERROR

Tyler assigns that the trial court erred in (1) finding that Linda and Daniel had used active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of an Indian family or to unite the parent or Indian custodian with the Indian child within the meaning of NICWA, (2) finding by clear and convincing evidence that Tyler abandoned Micah under § 43-104(2), (3) finding that the adoption was in the best interests of the child, (4) granting the decree without notice and an opportunity to be heard at a further hearing on the best interests of Micah after terminating Tyler's parental rights, and (5) not adhering to statutory adoption requirements.

STANDARD OF REVIEW

[1-4] A jurisdictional issue that does not involve a factual dispute presents a question of law.[7] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[8] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[9] Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.[10] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to

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

[8] *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

[9] *Id.*

[10] *Jeremiah J. v. Dakota D.*, 287 Neb. 617, 843 N.W.2d 820 (2014).

the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[11]

ANALYSIS

Relevant Legal Principles.

[5,6] In Nebraska, the matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.[12] Consent of a biological parent to the termination of his or her parental rights is the foundation of our adoption statutes, and an adoption without such consent must come clearly within the exceptions contained in the statutes.[13] As relevant to this case, § 43-104(2) provides that "[c]onsent shall not be required of any parent who . . . has abandoned the child for at least six months next preceding the filing of the adoption petition . . . ."

[7,8] A determination regarding parental consent, a finding under § 43-104(2), or a determination regarding substitute consent does not end the court's inquiry as to whether the petition for adoption should be approved.[14] Upon a hearing, if the statutory requirements are otherwise satisfied, the court may decree an adoption after finding that such adoption is in the best interests of the child.[15]

[9-12] The U.S. Supreme Court has long recognized that state intervention in a parent-child relationship is subject to constitutional oversight.[16] The Court has held that an established familial relationship is a liberty interest entitled to substantial due process protection, but made clear that "the mere existence of a biological link does not merit equivalent

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[11] *Id.*

[12] *In re Adoption of Madysen S. et al., supra* note 7.

[13] *Id.*

[14] *Id.*

[15] *Id.* (citing Neb. Rev. Stat. § 43-109(1) (Reissue 2016)).

[16] See *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). See, also, *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

constitutional protection."[17] The Court explained that the constitutional protection given to the familial relationship stems from the emotional attachments that derive from the intimacy of daily association.[18] Thus, when a biological father has not taken the opportunity to form a relationship with his child, the constitution does not afford him an absolute right to notice and opportunity to be heard before the child may be adopted.[19] However, adoption cases become even more complex when the adoption involves a child of Native American descent.

In cases involving Indian children under ICWA or under NICWA, certain additional safeguards provide heightened protection to the rights of parents and tribes in proceedings involving custody, termination of parental rights, and adoption of Indian children.[20] These additional safeguards are provided to protect "the essential tribal relations and best interests of an Indian child by promoting practices consistent with [ICWA]."[21]

The purpose behind ICWA is

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[22]

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[17] *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).

[18] *Id.*

[19] See *In re Adoption of Baby Girl H.*, 262 Neb.775, 635 N.W.2d 256 (2001), *disapproved on other grounds, Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012).

[20] *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007).

[21] See § 43-1502.

[22] 25 U.S.C. § 1902.

NICWA was enacted by the Nebraska Legislature in 1985 "to clarify state policies and procedures regarding the implementation by the State of Nebraska of [ICWA]."[23]

As this court has previously noted, the applicability of ICWA and NICWA to an adoption proceeding turns not on the Indian status of the person who invoked the acts, but on whether an "Indian child" is involved.[24] As we have previously noted, there is no dispute that Micah is an "Indian child" under NICWA.[25] But, as stated in *In re Adoption of Micah H.*, this does not mean that every provision of ICWA and NICWA applies to a non-Indian parent.[26] And U.S. Supreme Court precedent has limited the applicability of ICWA to certain cases based on specific facts as discussed below.[27]

As noted, ICWA and NICWA set forth an "active efforts" element. The federal statute provides in part:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[28]

This statute was interpreted by the U.S. Supreme Court in *Adoptive Couple v. Baby Girl*.[29] In *Baby Girl*, the adoptive parents of a young Indian girl petitioned the U.S. Supreme Court for certiorari after the South Carolina Supreme Court

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[23] § 43-1502.

[24] See §§ 43-1504 and 43-1505. See, also, *In re Adoption of Kenten H., supra* note 20.

[25] See *In re Adoption of Micah H., supra* note 1.

[26] *Id.*

[27] *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013).

[28] 25 U.S.C. § 1912(d).

[29] *Adoptive Couple v. Baby Girl, supra* note 27.

interpreted provisions of ICWA to require that the child be removed from her adoptive parents' care and placed with her biological father. The child's biological father, a member of the Cherokee Nation, had previously attempted to relinquish custody of the child that had never met him. The U.S. Supreme Court reversed, interpreting the "active efforts" provision of ICWA to apply "only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights."[30] Because the Indian father in *Baby Girl* never had custody of the Indian child, the court concluded that the "active efforts" element did not apply to the termination of the Indian father's parental rights.[31]

[13] NICWA provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than does ICWA; therefore, NICWA controls.[32]

NICWA provides in part:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family or unite *the parent* or Indian custodian with the Indian child and these efforts have proved unsuccessful.[33]

The Nebraska statute is almost identical to the federal statute, except it adds that "active efforts" must be made to "unite the parent . . . with the Indian child."[34] Pursuant to NICWA, "[p]arent means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian

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[30] *Id.*, 570 U.S. at 651.

[31] *Id.*

[32] See § 43-1513 and 25 U.S.C. § 1921.

[33] § 43-1505(4) (as amended by 2015 Neb. Laws, L.B. 566) (emphasis supplied).

[34] See § 43-1505(4) and 25 U.S.C. § 1912(d).

child, including adoptions under tribal law or custom."[35] As a result, we determined that "active efforts" must be made to unite an Indian child with both biological parents, regardless of whether they are of Native American descent.[36] As such, in this case, the county court was directed to determine whether *attempts were made to provide active efforts to the extent possible under the circumstances*.[37] We review that determination de novo.

Active Efforts.

In his first assignment of error, Tyler argues that the evidence adduced at trial failed to establish by clear and convincing evidence that Linda and Daniel had used "active efforts" to unite Tyler and Micah. We disagree.

The crux of Tyler's contention is his assertion, made without authority, that § 43-1503(1)(a) to (h) is a checklist, with a requirement that Linda and Daniel comply with each subsection. This is a question of statutory interpretation, which this court reviews de novo.

[14] There is no precise formula for active efforts; the active efforts standard requires a case-by-case analysis[38] and should be judged by the individual circumstances.[39] We have observed that efforts made under § 43-1503 should generally be "'culturally relevant.'"[40]

In *In re Interest of Walter W.*,[41] we found that the State demonstrated by clear and convincing evidence that it had

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[35] See § 43-1503(14).

[36] *In re Adoption of Micah H., supra* note 1.

[37] See § 43-1505(4).

[38] See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). See, also, § 43-1505(4); Judiciary Committee Hearing, L.B. 566, 104th Leg., 1st Sess. 4 (Feb. 26, 2015).

[39] See *In re Adoption of Micah H., supra* note 1. See, also, § 43-1503(1)(a).

[40] See *In re Interest of Walter W., supra* note 38, 274 Neb. at 865, 744 N.W.2d at 61.

[41] See *In re Interest of Walter W., supra* note 38.

made active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family. In that case, we noted that the State's efforts consisted of providing transportation, foster care and medical care for the child, vouchers for rent, clothing, bills, and drug testing. Additionally, the case manager provided the mother with information regarding both inpatient and outpatient chemical dependency programs and encouraged her to apply. Further, the case manager followed up on the mother's progress—or lack thereof, as was the case.

[15,16] In *Philip J. v. State*,[42] the Alaska Supreme Court noted that active efforts are required even if the parent is incarcerated, but may include programs offered by the Alaska Department of Corrections. However, the court stated that "'a parent's demonstrated lack of willingness to participate in treatment may be considered in determining whether the state has taken active efforts'" and noted that the court had excused "'further active efforts once the parent expresses an unwillingness to participate.'"[43]

In this case, Tyler was counseled by Linda concerning his drug and alcohol problems. The record shows that Linda suggested multiple treatment programs in which Tyler could seek rehabilitation for his addiction. However, Linda and Daniel had no control with regard to forcing Tyler to seek treatment.

The record demonstrates that Linda and Daniel discussed proper parenting techniques and interactions with small children. Further, Linda and Daniel assisted with scheduling visitation and the implementation of a parenting plan. Tyler demonstrated no need for housing, financial support, or transportation to unite with Micah. Despite Tyler's numerous criminal convictions involving drugs and alcohol, Tyler maintained that he does not suffer from drug or alcohol addiction.

With the exception of completing parenting classes while in prison, Tyler has not sought to actively participate in drug

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[42] *Philip J. v. State*, 314 P.3d 518 (Alaska 2013). See 25 U.S.C. § 1912(d).

[43] *Philip J. v. State, supra* note 42, 314 P.3d at 528.

and alcohol treatment or support programs. In fact, Tyler has attended only one Alcoholics Anonymous meeting while in prison, at the invitation of another, and suggested to the court below that his presence at the meeting was for the purpose of supporting others in the program.

Based on the specific facts and circumstances of this case, we find that Linda and Daniel undertook active efforts to provide remedial services and rehabilitative programs designed to unite Tyler and Micah.

Abandonment.

In his second assignment of error, Tyler argues that there was not clear and convincing evidence that he had abandoned Micah.

[17] Generally, for a court to grant an adoption petition, § 43-104(1) requires that the biological parents of the child must execute written consent to the adoption. However, under § 43-104(2)(b), consent is not required when a parent has "abandoned the child for at least six months next preceding the filing of the adoption petition."

[18-20] In order for a court to find that abandonment has occurred, the petitioning party bears the burden of proving by clear and convincing evidence that the parent abandoned the child.[44] In *In re Adoption of Simonton*,[45] this court defined the word "abandoned" when used in the context of adoption proceedings. To constitute abandonment, it must appear that there has been, by the parents, a giving up or total desertion of the minor child.[46] In other words, there must be shown an absolute relinquishment of the custody and control of the minor and thus the laying aside by the parents of all care for the minor.[47]

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[44] See *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987).

[45] *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982).

[46] *Id.*

[47] *In re Application of S.R.S. and M.B.S., supra* note 44 (quoting *In re Adoption of Christofferson*, 89 S.D. 287, 232 N.W.2d 832 (1975)).

We have further noted that abandonment may be found where there is willful or intentional conduct on the part of the parent which evinces a settled purpose to forgo all parental duties and relinquish all parental claims to the child, or a willful neglect and refusal to perform the natural and legal obligations of parental care and support.[48]

[21,22] The conduct constituting abandonment as defined above must appear by clear and convincing evidence to be willful, intentional, or voluntary, without just cause or excuse.[49] As a general rule, adoption statutes will be construed strictly in favor of the rights of the natural parents in controversies involving termination of the relation of the parent and child. This is especially true in those cases where it is claimed that owing to the willful abandonment of the child, the consent of the parent to the adoption is not required.[50]

[23] Pursuant to § 43-104(2)(b), the critical period of time during which abandonment must be shown is the 6 months immediately preceding the filing of the adoption petition. However, various definitions of abandonment do not require us to view this statutory period in a vacuum. One may consider the evidence of a parent's conduct, either before or after the statutory period, because this evidence is relevant to a determination of whether the purpose and intent of that parent was to abandon his or her child or children.[51]

[24-26] In considering the issue of abandonment, we have held that parental incarceration may be considered as a basis for termination of parental rights under Neb. Rev. Stat. § 43-292(1) (Reissue 2016).[52] Further, nothing in Nebraska law prevents us from applying this consideration in cases under § 43-1501. Of course, this is not to say that criminal

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[48] *Id*. (quoting *In re Cardo*, 41 N.C. App. 503, 255 S.E.2d 440 (1979)).

[49] *In re Application of S.R.S. and M.B.S., supra* note 44.

[50] *In re Adoption of Simonton, supra* note 45.

[51] *Id.*

[52] See *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

conduct or imprisonment alone necessarily justifies an order of permanent deprivation.[53] But we can, in a parental termination proceeding, consider "'"a parent's inability to perform his parental obligations because of imprisonment [and] the nature of the crime committed[, which considerations] are . . . relevant to the issue of parental fitness and child welfare, as [is] the parent's conduct prior to . . . and during the period of incarceration." . . .'"[54] Additionally, we have often stated that although incarceration itself may be involuntary, the criminal conduct causing the incarceration is voluntary.[55]

In *In Interest of L.V.*,[56] the father spent much of his child's life bouncing in and out of the prison system. We held that although the father sent his child cards, letters, gifts, small amounts of money, a framed photograph, and a painting he had made while in prison, that was not sufficient to overcome the conclusion that he had abandoned his child.

In *In re Interest of M.L.B.*,[57] we upheld the termination of a mother's parental rights based on her years of incarceration, lack of monetary support, lack of gainful employment when not incarcerated, and overall lack of cooperation with services intended to assist her in maintaining custody of her child. The termination was upheld even though the mother demonstrated an interest by sending gifts to the child.

In this case, the evidence demonstrates that since the birth of Micah in 2007, Tyler has lived with Micah for a mere 7

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[53] See *id*. See, also, *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

[54] *In re Interest of L.V., supra* note 52, 240 Neb. at 420, 482 N.W.2d at 260-61. See, also, *In Interest of M.L.K.*, 804 S.W.2d 398 (Mo. App. 1991); *In re Juvenile Appeal (84-6)*, 2 Conn. App. 705, 483 A.2d 1101 (1984); *In re Pawling*, 101 Wash. 2d 392, 679 P.2d 916 (1984); *Matter of Adoption of Doe*, 99 N.M. 278, 657 P.2d 134 (N.M. App. 1982); *In re Brannon*, 340 So. 2d 654 (La. App. 1976); *In re Welfare of Staat*, 287 Minn. 501, 178 N.W.2d 709 (1970).

[55] See *In re Interest of Kalie W., supra* note 53.

[56] *In re Interest of L.V., supra* note 52.

[57] *In re Interest of M.L.B.*, 221 Neb. 396, 337 N.W.2d 521 (1985).

to 10 days. While Tyler did sometimes have visitation with Micah, those visits were by court order and were supervised. There is no indication from the record that Tyler ever sought unsupervised or increased visitation. Moreover, Tyler never had custody of Micah and there is no evidence that Tyler ever sought custody. Finally, the record demonstrates that the last face-to-face contact between Tyler and Micah was May 8, 2011. Tyler never requested that Micah visit the prison where he has resided since 2012, and will remain until 2019 at which time he will be eligible for parole.

As stated above, the court can look beyond the 6 months immediately preceding Linda and Daniel's filing in order to determine whether Tyler had abandoned Micah. In considering Tyler's actions prior to his incarceration, it is clear that he had ceased visiting Micah in May 2011. Tyler has never paid child support and instead relied on the generosity of his mother in order to meet his obligations. In addition, Tyler began corresponding with Micah only upon Tyler's incarceration. Tyler refuses to acknowledge or seek treatment for his substance abuse problems, despite the fact that treatment is available to him in prison.

The trial court concluded that "[w]hen [Tyler] was at liberty he . . . never sought to enforce any visitation with [Micah]. During that period he deliberately withheld from [Micah] normal parental care . . . associated with [a] normal parent-child relationship."

We observe the evidence at trial indicated that Tyler had sent letters, drawings, and puzzles to Micah, thus making some attempt to maintain contact with him. However, as this court has noted, where there has been a protracted period of totally unjustified failure to exercise parental functions, an isolated contact or expression of interest does not necessarily negate the inference that a person no longer wishes to act in the role of parent to a child.[58]

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[58] *In re Adoption of Simonton, supra* note 45. See, also, *Matter of Thomas F. L.*, 87 Misc. 2d 744, 386 N.Y.S.2d 726 (1976).

These facts, coupled with the fact that Tyler will remain incarcerated for the next 1 to 3 years, gives significant weight to a finding of abandonment under our precedent.[59] As we have stated, "'"[W]e will not gamble with [a] child's future; [a child] cannot be made to await uncertain parental maturity."'"[60]

There is no merit to Tyler's second assignment of error.

Micah's Best Interests.

In his third assignment of error, Tyler contends that the court erred in finding that adoption by Linda and Daniel was in Micah's best interests.

[27] The policy behind ICWA was to further the nation's interest in protecting the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards.[61] In determining the best interests of the child, NICWA at § 43-1503 states:

> (2) Best interests of the Indian child shall include:
>
> (a) Using practices in compliance with [ICWA], [NICWA], and other applicable laws that are designed to prevent the Indian child's voluntary or involuntary out-of-home placement; and
>
> (b) Whenever an out-of-home placement is necessary, placing the child, to the greatest extent possible, in a foster home, adoptive placement, or other type of custodial placement that reflects the unique values of the Indian child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe or tribes and tribal community.

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[59] See, generally, *In Interest of L.V., supra* note 52.

[60] See *In re Interest of M.L.B., supra* note 57, 221 Neb. at 397, 337 N.W.2d at 522.

[61] See 25 U.S.C. § 1902.

Here, in complying with NICWA, Linda and Daniel served the Oglala Sioux Tribe with notice of their petition. The tribe subsequently declined to intervene in the matter.

As noted in the record, Tyler is a non-Indian. The only evidence of Tyler's efforts to promote Micah's Native American heritage is his own testimony that he has taken Micah to tribal events. Conversely, Linda and Daniel raised Allison, a member of the Oglala Sioux Tribe, since the age of 4. Linda and Daniel raised Allison to know of her Native American heritage, to be familiar with Native American artifacts, and to read about Native American culture using books that are kept in their home.

The record demonstrates that Linda and Daniel have made efforts to expose Micah to his Native American heritage through reading books, attending tribal events, and keeping Native American artifacts in the home. Additionally, Allison, a member of the Oglala Sioux Tribe, continues to interact with Micah at Linda and Daniel's home.

It appears clear from the record that Linda and Daniel took measures to facilitate and encourage appropriate interactions between Tyler and Micah. Linda and Daniel used active efforts to provide and promote appropriate visitation by assisting in the implementation of a parenting plan. Upon noticing certain anxious and inappropriate behaviors displayed by Micah, Linda and Daniel, along with Allison, sought professional assistance in addition to clarification of the parenting plan and visitation to ensure a safe environment.

Micah has lived with Linda and Daniel for the majority of his life, and they have been his only source of stability. The guardian ad litem independently testified that in his opinion, based upon his own independent investigation, the adoption of Micah by Linda and Daniel was in Micah's best interests.

Based on the foregoing, we agree that adoption by Linda and Daniel is in Micah's best interests. We accordingly find Tyler's third assignment of error to be without merit.

Tyler's Due Process Rights.

In his fourth assignment of error, Tyler argues that the trial court failed to allow him to participate in the adoption proceeding, specifically concerning the determination of the best interests of Micah. Tyler bases his argument on the proposition that despite a finding of abandonment, a parent retains parental rights until the final judgment concerning the petition for adoption.

[28] It is a well-established maxim of constitutional law that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[62]

[29-31] Tyler properly contends that in *In re Adoption of Madysen S. et al.*,[63] we held that parental rights are not terminated by an order deciding the limited issue of abandonment. Despite a finding of abandonment, the parent retains parental rights until the final judgment denying or granting the petition for adoption, and the parent may still participate in the proceedings to present evidence that adoption is not in the child's best interests.[64] Ultimately, if the county court finds that adoption is not in the child's best interests, then the rights of the parent, who was deemed to have abandoned the child, are returned to the status quo.[65] However, we have also stated that abandonment, for purposes of adoption, is not always determined in proceedings separate from the underlying adoption, because nothing in the adoption statutes absolutely requires bifurcated proceedings.[66]

Here, Tyler challenges that his understanding was that the hearing was bifurcated. Tyler fails to provide any evidence in

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[62] See *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000).

[63] *In re Adoption of Madysen S. et al., supra* note 7.

[64] *Id.*

[65] *Id.*

[66] *Id.*

the record that bifurcation was requested or ordered. In discussing preliminary matters, the court stated that it was aware that "these kinds of cases" have two procedural stages, and then indicated that the guardian ad litem had been warned that he may be called when the court reached the end of the case "for his comments on the adoption portion of it." Further, at the conclusion of the trial, the lower court judge was quite clear in stating, "I am not turning this case over to some other judge to read the record and come to a conclusion. I am the one that's heard all the live evidence." The judge further stated that "[i]t would be unfair to a colleague and really unfair to all of the litigants because . . . those observations are important in the context of *the whole case*." (Emphasis supplied.) Counsel made no objection at this point, despite being given the opportunity to do so.

Notwithstanding this apparent claim of unfair surprise, Tyler was not prejudiced, because he was given a full and fair opportunity to call witnesses at the hearing and was able to cross-examine witnesses, specifically the guardian ad litem. While Tyler now argues that he was not aware that the hearing was not bifurcated, that fact was stated at the hearing and Tyler did not object, otherwise seek to offer additional evidence, or ask for a continuance.

We therefore find Tyler's fourth assignment of error to be without merit.

Noncompliance With Statutory Requirements.

Tyler's final assignment of error is that the trial court erred in not strictly adhering to the requirements of Neb. Rev. Stat. §§ 43-107 to 43-109 (Reissue 2016).

Section 43-107(b)(i) provides that "[f]or adoption placements occurring on or after January 1, 1994, a preplacement adoptive home study shall be filed with the court prior to the hearing [on the petition for adoption]." Additionally, anyone seeking to adopt a child in the State of Nebraska must submit to a criminal history check conducted by the Nebraska

State Patrol. And § 43-108 holds that "[t]he minor child to be adopted, unless such child is over fourteen years of age, and the person or persons desiring to adopt the child *must* appear in person before the judge at the time of hearing . . . ." (Emphasis supplied.)

Finally, § 43-109(1) states in relevant part that the child must reside with the petitioners for at least 6 months preceding the adoption hearing. The statute further provides that "[n]o decree of adoption shall be entered unless . . . (b) the medical histories required by subsection (2) of section 43-107 have been made a part of the court record, [and] (c) the court record includes an affidavit or affidavits signed by the relinquishing biological parent . . . ."[67]

We turn first to § 43-107. Linda and Daniel argue that the trial court waived the home study pursuant to their discretion under § 43-107(b)(ii), noting that Micah has resided with them for the majority of his life and, further, that Linda and Daniel are his current legal guardians. This argument misinterprets the plain meaning of § 43-107(b)(ii), which states:

> An adoptive home study shall not be required when the petitioner is a stepparent of the adoptee unless required by the court. An adoptive home study may be waived by the court upon a showing of good cause by the petitioner when the petitioner is a *biological grandparent* or a step-grandparent who is married to the biological grandparent at the time of the adoption if both are adopting the child.

(Emphasis supplied.)

The Legislature, in enacting § 43-107(b)(ii), limited the courts' discretion to a clearly defined list of petitioners which includes biological grandparents, but is silent as to adoptive grandparents. We note that the Legislature defined "grandparent" in Neb. Rev. Stat. § 43-1801 (Reissue 2016) to include both biological and adoptive grandparents, but limited its

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[67] See § 43-109(1).

definition of grandparent to § 43-1801 and Neb. Rev. Stat. §§ 43-1802 and 43-1803 (Reissue 2016). Therefore, we must conclude that the Legislature intentionally excluded adoptive grandparents from the waiver permitted under § 43-107(b)(ii).

Linda and Daniel contend that the trial court relied on the criminal history check done when Linda and Daniel became Micah's legal guardians in 2012 and that in so relying, Linda and Daniel had complied with § 43-107. The record indicates that during the guardianship proceedings, the criminal history check was waived pursuant to Neb. Rev. Stat. § 30-2602.02 (Reissue 2016), but does not provide any information concerning the required criminal history check.

We next address § 43-108, which requires Micah's presence at the time of the adoption hearing. Micah was present during some of the proceedings below; however, it does not appear from the record that Micah was present at the adoption hearing.

Finally, Linda and Daniel counter that the information required under § 43-109 was met by the fact that Micah has resided with them for more than 6 months preceding the adoption petition and that the medical records were provided in the May 12, 2015, adoption proceeding. But the medical records do not appear to be included in the record as argued by Linda and Daniel.

As to § 43-109(c), a document relinquishing her parental rights was signed by Allison and the county court judge on June 3, 2015. The document appears in the record and operates as a valid and effective relinquishment of all parental rights.

Based on the above discussion, we find that Tyler's fifth assignment of error has merit, as the county court failed to strictly comply with the statutory requirements.

CONCLUSION

The county court did not err in finding by clear and convincing evidence that Linda and Daniel made active efforts to reunite Micah with Tyler, in finding that Tyler abandoned

Micah for at least 6 months prior to his incarceration, and in finding that adoption was in Micah's best interests. But the county court erred when it failed to comply with §§ 43-107 to 43-109 when granting the adoption.

We therefore affirm the county court's finding of active efforts, abandonment, and best interests of the child. However, we vacate the decree of adoption and remand the cause to the county court. On remand, the county court shall provide Linda and Daniel the opportunity to comply with §§ 43-107 to 43-109. The county court shall make the ultimate determination of compliance with §§ 43-107 to 43-109 and proceed accordingly. If the county court proceeds to enter a decree of adoption, the county court shall be bound by this court's determinations in regard to active efforts, abandonment, and best interests of the child factors already litigated.

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

Elisa Gerber, appellant, v. P & L Finance Co., Inc., a Nebraska corporation, doing business as Elisa Ilana, et al., appellees.

919 N.W.2d 116

Filed November 2, 2018. No. S-17-710.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **Pleadings.** When the title of a filing does not reflect its substance, it is proper for a court to treat a pleading or motion based on its substance rather than its title.
3. **Attorney Fees: Statutes: Words and Phrases: Appeal and Error.** "Proceeding" as used in Neb. Rev. Stat. § 21-2,114 (Supp. 2017) includes appeals, and therefore, the statute applies to indemnification for attorney fees incurred in an appeal.
4. ____: ____: ____: ____. Because Neb. Rev. Stat. § 21-2,114 (Supp. 2017) provides that a director may apply for indemnification for attorney fees "to the court conducting the proceeding" and because "proceeding" includes an appeal, § 21-2,114 provides that a director may apply to an appellate court for indemnification related to an appeal that took place in the appellate court.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Pirtle and Arterburn, Judges, on appeal thereto from the District Court for Douglas County, Peter C. Bataillon, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Brian E. Jorde and Christian T. Williams, of Domina Law Group, P.C., L.L.O., for appellant.

Edward D. Hotz, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellees P & L Finance Co. and Laurie Langdon.

James Polack, P.C., L.L.O., for appellee Paul Gerber.

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

Miller-Lerman, J.

NATURE OF CASE

We granted appellee Paul Gerber's petition for further review of the order of the Nebraska Court of Appeals which overruled his motion in which he sought to recover attorney fees from coappellee P & L Finance Co., Inc. (P & L). Paul styled his pleading as a "Motion for Attorney Fees." However, in the filing, Paul sought an order requiring P & L, of which he is a director, to indemnify him for attorney fees he incurred in the appeal of a case where he was made a party because he was a director. We reverse the order of the Court of Appeals which denied Paul's request, and we remand the cause to the Court of Appeals with directions to consider the filing as an application for an order for indemnification rather than as a motion for an award of attorney fees.

STATEMENT OF FACTS

Elisa Gerber filed an action in the district court for Douglas County against P & L seeking, inter alia, issuance of a stock certificate. She also named as defendants Laurie Langdon and Paul, who are directors of P & L. The defendants moved for summary judgment. The district court determined that Elisa's claim for issuance of a stock certificate was barred by the statute of limitations and, consequently, that her other claims were also barred. The district court granted summary judgment in favor of the defendants. Elisa appealed to the Court of Appeals. On April 24, 2018, the Court of Appeals affirmed the district court's grant of summary judgment in a memorandum opinion. *Gerber v. P & L Finance Co.*, No. A-17-710, 2018 WL 1920600 (Neb. App. Apr. 24, 2018) (selected for posting to court website).

After the Court of Appeals filed its decision, Paul filed a motion titled "Motion for Attorney Fees." Paul, an appellee

in the appeal, did not seek an award of attorney fees from the appellant, Elisa. Instead, Paul requested an order requiring another appellee, P & L, to pay his attorney fees. In his motion, Paul made reference to Neb. Ct. R. § 2-109(F) (rev. 2014) (Rule 2-109(F)), which provides in part:

> Any person who claims the right under the law or a uniform course of practice to an attorney fee in a civil case appealed to the Supreme Court or the Court of Appeals must file a motion for the allowance of such a fee supported by an affidavit which justifies the amount of the fee sought for services in the appellate court.

The affidavit of his attorney setting forth attorney fees in the amount of $ 5,381.25 incurred in connection with the appeal to the Court of Appeals was attached to the motion. Paul also referred to P & L's articles of incorporation.

Paul alleged in the motion that he was made a party to this case based solely on his status as an officer, director, and shareholder of P & L. He further alleged that P & L's "Articles of Incorporation" provided that P & L indemnify him for attorney fees he incurred in the appeal of this action. Paul cited provisions of the Nebraska Model Business Corporation Act, Neb. Rev. Stat. §§ 21-201 through 21-2,232 (Cum. Supp. 2016 & Supp. 2017), which, he asserted, require that he be indemnified and authorized the Court of Appeals to order such indemnification.

P & L and Langdon objected and noted that Rule 2-109(F) provides for an award of attorney fees when a party is entitled to such "under the law or a uniform course of practice." Supplemental brief for appellees P & L and Langdon in response to petition for further review at 1. P & L and Langdon argued that under the law and uniform course of practice in Nebraska, one can recover attorney fees only from an adverse party, not from a "co-party." *Id.* at 2. They asserted that Paul's request should be denied, because Paul was seeking attorney fees from a coparty and "[t]here is no law or uniform course of procedure which recognizes the recovery of attorney fees from a non-adverse party . . . ." *Id.* at 1.

The Court of Appeals denied Paul's request. In a minute entry, the Court of Appeals stated, "Appellee, Paul Gerber's motion for attorney fees is denied. There is no law or uniform course of practice in the appellate courts which recognizes the recovery of attorney fees from a non-adverse party. See [Rule] 2-109(F)."

We granted Paul's petition for further review of the order of the Court of Appeals which overruled his motion.

ASSIGNMENT OF ERROR

Paul generally claims that the Court of Appeals erred when it overruled his request for attorney fees.

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *In re Guardianship of S.T.*, 300 Neb. 72, 912 N.W.2d 262 (2018).

ANALYSIS

Paul claims that the Court of Appeals erred when it overruled his request for attorney fees. We determine that, although the request was fashioned as a motion for an award of attorney fees pursuant to Rule 2-109(F), the substance of Paul's filing was a request for an order for indemnification from P & L under the Nebraska Model Business Corporation Act. We further determine that under the relevant statute, a director may apply to an appellate court which conducted the proceeding for an order for indemnification. We therefore reverse the order which overruled Paul's request and remand this appeal to the Court of Appeals with directions to consider Paul's filing consistent with § 21-2,114 as an application for an order for indemnification rather than a motion for an award of attorney fees.

Paul contends that the Court of Appeals erroneously read a "'non-adverse party' requirement" into Rule 2-109(F) and erred when it stated that there was "no law" that would allow recovery in the Nebraska appellate courts of attorney fees from a nonadverse party. He asserts that the Nebraska Model

Business Corporation Act is the law that authorizes recovery of attorney fees in this case. In response, P & L and Langdon contend that Rule 2-109(F) controls and allows attorney fees only when a prevailing party is seeking an award of attorney fees from an adverse party. Although our reasoning differs somewhat, we agree with Paul that the Court of Appeals may determine whether he is entitled to indemnification for attorney fees in this appeal.

[2] Our review of the proceedings shows that certain parties and the Court of Appeals focused on the form of Paul's request but failed to consider its substance. As noted, Paul fashioned the filing as a motion for an award of attorney fees; he titled it as a "Motion for Attorney Fees" and stated that it was filed pursuant to Rule 2-109(F). But, given the content of the motion, we read the substance of his filing as an application for an order of indemnification under the Nebraska Model Business Corporation Act. We have indicated that when the title of a filing does not reflect its substance, it is proper for a court to treat a pleading or motion based on its substance rather than its title. See *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014) (stating that it is proper for court to look at substance of petitioner's actual request, instead of simply title of petition); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005) (stating that determination as to how motion should be regarded depends upon substance of motion, not its title). See, also, *Dugan v. State*, 297 Neb. 444, 900 N.W.2d 528 (2017) (stating how motion should be regarded for purposes of determining whether its denial is final order depends upon substance of motion and not its title).

The relief Paul sought was not per se an award of attorney fees under Rule 2-109(F), which, when allowed, is typically granted to a prevailing party and against an adverse party. Paul and P & L differ in this appeal as to whether attorney fees may be awarded against a nonadverse party under Rule 2-109(F). However, for purposes of this appeal, we need not resolve this disagreement, because we do not read the

substance of Paul's filing as an ordinary request for an award of attorney fees.

Instead, the substance of Paul's filing shows that as a director, he is seeking indemnification from P & L for attorney fees he incurred in this appeal as authorized by the Nebraska Model Business Corporation Act. In particular, Paul cites § 21-2,114, which provides in part:

> (a) A director who is a party to a proceeding because he or she is a director may apply for indemnification or an advance for expenses to the court conducting the proceeding or to another court of competent jurisdiction. After receipt of an application and after giving any notice it considers necessary, the court shall:
>
> (1) Order indemnification if the court determines that the director is entitled to mandatory indemnification under section 21-2,112;
>
> (2) Order indemnification or advance for expenses if the court determines that the director is entitled to indemnification or advance for expenses pursuant to a provision authorized by subsection (a) of section 21-2,118; or
>
> (3) Order indemnification or advance for expenses if the court determines, in view of all the relevant circumstances, that it is fair and reasonable[.]

The statutes mentioned in § 21-2,114 set forth circumstances in which indemnification would be mandatory or permissible. Section 21-2,112 provides:

> A corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because he or she was a director of the corporation against expenses incurred by the director in connection with the proceeding.

Section 21-2,118(a) provides in part:

> A corporation may, by a provision in its articles of incorporation or bylaws or in a resolution adopted or a contract approved by its board of directors or shareholders, obligate itself in advance of the act or omission

> giving rise to a proceeding to provide indemnification in accordance with section 21-2,111 or advance funds to pay for or reimburse expenses in accordance with section 21-2,113.

Referring to such statutory authority, Paul alleged that he was made a party to this case and to this appeal based on his status as an officer, director, and shareholder of P & L and that P & L's articles of incorporation require indemnification of directors. Paul referred, inter alia, to an exhibit of P & L's articles of incorporation and attached his attorney's affidavit and billing for services related to the appeal.

Based on the substance of Paul's filing, we determine that the filing was an application under § 21-2,114 for an order of indemnification against P & L. Although the filing was fashioned as a motion for an award of attorney fees under Rule 2-109(F), the Court of Appeals should have considered Paul's request based on its substance. Having determined that the substance of Paul's filing was an application by a director for an order of indemnification under § 21-2,114, we next consider whether an application of this sort may properly be made to the appellate court in which the attorney fees were incurred.

Section 21-2,114 provides in relevant part that one "who is a party to a proceeding" based on his or her status as a director may apply for indemnification "to the court conducting the proceeding or to another court of competent jurisdiction." Section 21-2,110 sets forth definitions applicable to § 21-2,114 and related statutes, and § 21-2,110(6) provides, "Proceeding means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitrative, or investigative and whether formal or informal." Section 21-2,110 is based on § 8.50 of the Model Business Corporation Act. See 2 Model Business Corporation Act Ann. § 8.50 (3d ed. 2002). With regard to the definition of "proceeding," the official comment to the model act states as follows:

> The broad definition of "proceeding" ensures that the benefits of this subchapter will be available to directors

> in new and unexpected, as well as traditional, types of litigation or other adversarial matters, whether civil, criminal, administrative, or investigative. It also includes arbitration and other dispute resolution proceedings, *lawsuit appeals* and petitions to review administrative actions.

ABA Committee on Corporate Laws, *Changes in the Model Business Corporation Act—Amendments Pertaining to Indemnification and Advance for Expenses*, 49 Bus. Law. 741, 755-56 (1994) (emphasis supplied).

[3,4] We read "proceeding" as used in § 21-2,114 to include appeals, and therefore, the statute applies to indemnification for attorney fees incurred in an appeal. Furthermore, because § 21-2,114 provides that a director may apply for indemnification "to the court conducting the proceeding" and because "proceeding" includes an appeal, we read § 21-2,114 as providing that a director may apply to an appellate court for indemnification related to an appeal that took place in the appellate court. Based on this reading of § 21-2,114, we determine that in the present case, Paul properly sought indemnification for attorney fees incurred in the appeal to the Court of Appeals and that the Court of Appeals was a court to which he could apply for an order for indemnification.

As noted, § 21-2,114 provides that a director may apply to the "court conducting the proceeding," as well as "to another court of competent jurisdiction." Referring to this statutory provision, P & L and Langdon contend that Paul should have applied to the district court rather than the Court of Appeals for an indemnification order. We do not agree. We recognize that there are circumstances in which an appellate court might not be the best forum for deciding an application for indemnification. We are aware of cases in which, for example, an issue such as whether a director was sued in his or her capacity as a director was a fact issue that needed to be resolved by a trial court, either as a counterclaim within the action or as a separate action. See, *Witco Corp. v. Beekhuis*, 38 F.3d 682 (3d Cir. 1994); *Heffernan v. Pacific Dunlop GNB Corp.*, 965 F.2d

369 (7th Cir. 1992); *First American Corp. v. Al-Nahyan*, 17 F. Supp. 2d 10 (D.D.C. 1998); *Battenfeld of America Holding Co. v. Baird, Kurtz & Dobson*, 1999 WL 1096047 (D. Kan. Nov. 8, 1999) (unpublished memorandum and order).

But in the present case, in its order granting summary judgment, the district court found without challenge on appeal that it was "undisputed" that Paul was a director of P & L and the district court also granted Paul's claim for indemnification for fees incurred at the district court level without objection. At oral argument, the only issue that P & L identified as in need of resolution was the reasonableness of the appellate-related fee for which Paul requested indemnification. We see no need to refer this request for indemnification to the district court. Appellate courts can, and often do, decide whether fee requests for services performed in appeals before them are reasonable. Therefore, there is no apparent reason that the Court of Appeals could not determine Paul's application in this appeal consistent with § 21-2,114(a).

CONCLUSION

In this case, Paul was a party because he was a director. We conclude that Paul's request for attorney fees was, in substance, an application under § 21-2,114 for an order of indemnification from P & L. We further conclude that because the Court of Appeals was the court conducting the proceedings, such application for indemnification was properly filed in the Court of Appeals, and that the appellate court should have considered the filing as such. We reverse the order of the Court of Appeals which overruled Paul's "Motion for Attorney Fees." We remand the cause to the Court of Appeals with directions to consider Paul's filing consistent with § 21-2,114 as an application for an order of indemnification against P & L.

Reversed and remanded with directions.

State of Nebraska, appellee, v. Benjamin M. Thompson, appellant.

919 N.W.2d 122

Filed November 2, 2018. No. S-17-952.

1. **Judges: Recusal.** A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed.
2. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
3. **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. **Trial: Judges: Words and Phrases.** An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.
5. **Trial: Judges: Recusal.** A judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings when a litigant requests such recusal.
6. **Judges: Recusal.** A judge should recuse himself or herself when a litigant demonstrates 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.

7. **Criminal Law: Appeal and Error.** Harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.
8. **Convictions: Appeal and Error.** It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.
9. **Appeal and Error.** When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.
10. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

Thomas C. Riley, Douglas County Public Defender, and Zoë R. Wade for appellant.

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

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

Heavican, C.J.

INTRODUCTION

Benjamin M. Thompson was operating a motor vehicle in which his three children were passengers. Thompson's vehicle was struck by another vehicle, resulting in severe injury to two of the children. Following a jury trial, Thompson was convicted of driving under the influence, fifth offense; two counts of child abuse resulting in serious bodily injury; a single count of child abuse; and leaving the scene of an injury accident. Thompson now appeals from the district court's denial of several pretrial motions, including a motion

to recuse, a motion to suppress the results of his blood alcohol testing, and a *Franks v. Delaware*[1] motion to exclude the results of his blood testing. We affirm Thompson's convictions, but vacate the sentences imposed and remand the cause for resentencing.

BACKGROUND

On October 24, 2016, at approximately 2 p.m., police and medical personnel were dispatched to an injury accident near the intersection of Sorensen Parkway and 30th Streets in Omaha, Nebraska. One of the responding officers spoke to Randall Plugge, who reported that he had been involved in the accident. Plugge further reported that another vehicle, a white Nissan, had also been involved in the accident, but had left the scene and was heading north.

Based on this information, an officer drove his cruiser north on 30th Street, following a noticeable gouge mark in the pavement, to a local park. The officer noted a white Nissan automobile in the parking lot, heavily damaged, with a man, later identified as Thompson, running from the Nissan to a trash can. In making contact with Thompson, the officer noted that Thompson's hands were wet and that he smelled of alcohol. Thompson was ordered to the ground, and was handcuffed and arrested. An officer who later processed the scene testified at trial that there were both full and empty hard alcohol and beer containers in the car and in the trash can. There was also a bottle of lorazepam, prescribed to Thompson, in the car.

After being arrested, Thompson reported that his children were in the Nissan. The officer observed three children in the back seat: a 1-year-old, who was conscious and crying in a car seat; a 6-year old, who was slumped over and unconscious; and an 8-year-old, who was slumped over and unconscious and bleeding from her chin, mouth, and head.

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[1] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

The three children were transported to the hospital. The 1-year-old was hospitalized for 2 days for trauma caused by the collision. The 6-year-old was in intensive care for 3 days and was diagnosed with a significant and "life-threatening" head injury.

The 8-year-old's condition was worse than those of the younger children. Her injuries were life-threatening and required a breathing tube and ventilator. A monitor was implanted in her brain to monitor swelling. One of her doctors testified that on a "Glasgow Coma Score," which scores range from 3 to 15, with 3 being the worst, the child began as a 5, but later regressed to a 3. He testified that 7 months' postcrash, her eyes were open, but she was unaware of her environment and only "stare[s] off into space." The doctor testified that the child's prognosis was poor and that she would probably never fully recover, would need to be fed through a feeding tube, and would wear diapers for the rest of her life.

Law enforcement applied for and was issued a warrant to obtain a blood draw from Thompson for purposes of determining his blood alcohol content. The sample tested at .115 gram of alcohol per 100 milliliters of blood. Thompson was charged by information with driving under the influence, fifth offense; child abuse; two counts of child abuse resulting in serious bodily injury; and leaving the scene of an injury accident. Counsel filed three pretrial motions which are relevant on appeal.

Motion to Recuse.

Following his arrest, Thompson was incarcerated while awaiting trial. He sought a furlough to visit his daughter in the hospital, as her doctors testified that she was not likely to survive. The State opposed the motion, noting both the serious nature of the child's injuries—specifically, that she would not recover and that life support was the only thing keeping her alive—and the fact that those injuries were the result of Thompson's actions. After noting in the record that "in view of the seriousness of the offense, that [Thompson] is charged

with a Class IIA Felony, 'Which may, from what the prosecutor tells me, change were this person to expire,'" the district court denied the motion.

Thompson subsequently filed a motion to recuse, basing the motion on the district court's statement that it was aware that were the child to die, the State would amend the charges against Thompson. Thompson's counsel indicated that she, counsel, was not present for any such communication with the State and that the court could have discovered that intention only as a result of an ex parte communication with the State. At a hearing on the motion, the State offered into evidence an affidavit from the deputy county attorney on the case, averring that no communication on the matter alleged was had between the State and the district court.

Following the hearing, the district court denied the motion to recuse, noting that even if the evidence was clear that such a communication had taken place (and, the court implied, such was not clear), that communication would not draw into the question the court's impartiality because of the facts of this particular case: namely, that the accident was alleged to have been caused by Thompson and that it was presumed that had the child died, the State would amend the charges accordingly.

Motion to Suppress and Franks Motion.

Thompson also filed a motion to suppress on March 23, 2017, and a motion seeking a hearing under *Franks v. Delaware* on April 13, both seeking to suppress the blood draw. The bases of the motion to suppress was Thompson's assertion that the affidavit accompanying the request for the warrant did not contain sufficient information to establish probable cause and that it was so lacking in indicia of probable cause as to make the good faith exception inapplicable. The basis of the *Franks* motion was that the affidavit accompanying the request for a search warrant included false statements made knowingly or intentionally or with reckless

disregard for the truth. A hearing was held on both motions. On May 11, the district court denied both motions.

Trial.

A 7-day jury trial was held in May 2017. At trial, the State introduced evidence that Thompson had run a red light, causing the accident. The State also introduced evidence that Thompson admitted to drinking and offered further evidence indicating that after the accident, Thompson drove his car from the scene to a park. Following the trial, the jury found Thompson guilty on all counts. Thompson appeals.

ASSIGNMENTS OF ERROR

Thompson assigns that the district court erred in denying his motions to (1) recuse, (2) suppress blood test results, and (3) exclude blood test results under *Franks*.

STANDARD OF REVIEW

[1] A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed.[2]

[2] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[3]

[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.[4]

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[2] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[3] *State v. Taylor*, 300 Neb. 629, 915 N.W.2d 568 (2018).

[4] *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018).

ANALYSIS

Motion to Recuse.

In his first assignment of error, Thompson contends that the district court erred in denying his motion seeking the recusal of the district court as a result of an ex parte communication with the prosecution.

In this case, the district court concluded that it need not recuse itself, because Thompson could not show prejudice even if he could show that the alleged communication occurred. We agree that this was not the correct framework to analyze Thompson's claim.

[4,5] Thompson claimed that the district court and counsel for the State engaged in an ex parte communication. An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.[5] A judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings when a litigant requests such recusal.[6]

[6] In addition to recusal based upon an ex parte communication, a judge should also recuse himself or herself when a litigant demonstrates 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.[7]

Because Thompson alleged an ex parte communication and not bias or prejudice, the district court erred insofar as it found Thompson could not show that the court was prejudiced. But because Thompson failed to meet his burden to show that there was an ex parte communication, there was still no error in the district court's decision to deny the motion to recuse.

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[5] *State v. Thomas, supra* note 2.

[6] *Id.*

[7] *Id.*

The district court's statement that were the child to die, it "presumed that the State would amend the charges . . . accordingly," was the primary basis of Thompson's assertion of an ex parte communication. But the prosecutor offered an affidavit stating that no ex parte communication occurred, and the district court made no such finding either. While its finding could have been more clear, implicit in the court's order was that it only "presumed" that the child's death would result in an amendment of the charges. There is no merit to Thompson's first assignment of error.

Suppression of Blood Test Results.

In his second assignment of error, Thompson contends that the affidavit supporting the issuance of the search warrant allowing the blood draw did not establish probable cause. And in his third and final assignment of error, Thompson assigns that the district court erred in denying his motion to suppress the blood draw based upon *Franks v. Delaware*.[8]

We need not address the questions raised about the suppression of the blood draw under either the Fourth Amendment or *Franks*, because we conclude that any admission of the blood draw results was harmless error.

[7,8] Harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.[9] It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.[10]

[9,10] When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.[11] In other words, harmless error review

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[8] *Franks v. Delaware, supra* note 1.

[9] *State v. Kidder*, 299 Neb. 232, 908 N.W.2d 1 (2018).

[10] *Id.*

[11] *Id.*

looks to the basis on which the jury actually rested its verdict.[12] The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.[13]

In this case, there is a significant amount of evidence that Thompson was under the influence. He fled from the scene of the collision and stopped at a park, where an officer witnessed him discarding both empty and full bottles of alcohol and beer as his children sat injured in the back seat of his vehicle. In addition, open beer cans and a bottle of whiskey were found in that vehicle. Thompson admitted that he had consumed a beer and two wine coolers about 2 hours before the collision.

Also in Thompson's vehicle was a bottle containing 12 lorazepam pills. The label on the bottle indicated the prescription had been filled 6 days earlier and directed Thompson to take just one pill every 8 hours as needed. If taken as prescribed, there should have been approximately 42 pills left in the bottle. Thompson told officers at the time he was being interviewed—several hours after the collision—that he was still feeling the effects of the medications he had taken, which included lorazepam and Lyrica.

In addition, there was testimony that Thompson smelled of alcohol, had bloodshot eyes, had slurred speech, and repeatedly said that he was not "'fucked up'" at a time when officers were trying only to obtain biographical information for him and his children. Moreover, Thompson gave inconsistent explanations about where he was going at the time of the collision. Thompson also gave inconsistent details about his home address, variously indicating that he lived in Nebraska City, Nebraska, and in Fort Calhoun, Nebraska, when in fact his registered address was in Omaha.

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[12] *Id.*

[13] *Id.*

Officers also testified that Thompson showed impairment during field sobriety tests. Though these tests might not have been performed correctly by the officers, there was testimony that the tests were still valid to identify signs of impairment. Finally, officers testified that based upon their observations over a 4-hour period, Thompson was intoxicated.

There was an abundance of evidence offered that Thompson was intoxicated. On these facts, any error in the admission of the blood test results was harmless. There is no merit to Thompson's second or third assignments of error.

Plain Error in Sentencing.

The State argued in its brief that the district court erred in sentencing Thompson to license revocations for his convictions for counts 2, 3, and 5. At oral arguments, the State further noted that it believed the district court erred in failing to sentence Thompson to indeterminate sentences on counts 2 and 3.

Thompson was sentenced for his convictions to 12 to 15 years' imprisonment on count 1, driving under the influence, a Class IIA felony; 3 years' imprisonment on count 2, child abuse resulting in serious bodily injury, a Class II felony; 3 years' imprisonment on count 3, also the Class II felony of child abuse resulting in serious bodily injury; 1 year's imprisonment on count 4, child abuse, a Class IIIA felony; and 3 years' imprisonment on count 5, leaving the scene of a personal injury accident resulting in serious bodily injury, a Class III felony. The district court additionally revoked Thompson's operator's license in connection with his convictions on counts 1, 2, 3, and 5.

We turn first to the argument made by the State in its brief, that the operator's license revocations for the convictions on counts 2 and 3 were plain error. We agree.

Neb. Rev. Stat. § 60-6,197.03(9) (Cum. Supp. 2016) authorizes a 15-year license revocation for driving under the influence, fifth offense, and Neb. Rev. Stat. § 60-698(2) (Cum. Supp. 2016) authorizes the same for leaving the scene of a

personal injury accident. But there is no authorization in state law for such a revocation for child abuse convictions.[14] We therefore agree with the State that these revocations constituted plain error.

We turn next to the State's assertion at oral argument that the determinate sentences imposed for counts 2 through 5 were not authorized. The basis for this contention is Neb. Rev. Stat. §§ 29-2204 (Supp. 2017) and 29-2204.02 (Reissue 2016). Section 29-2204 provides in relevant part:

> (1) Except when a term of life imprisonment is required by law, in imposing a sentence upon an offender for any class of felony other than a Class III, IIIA, or IV felony, the court shall fix the minimum and the maximum terms of the sentence to be served within the limits provided by law. The maximum term shall not be greater than the maximum limit provided by law, and:
>
> (a) The minimum term fixed by the court shall be any term of years less than the maximum term imposed by the court; or
>
> (b) The minimum term shall be the minimum limit provided by law.

And § 29-2204.02(4) 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.

We recently explained the distinction between determinate and indeterminate sentences:

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[14] See Neb. Rev. Stat. § 28-707 (Reissue 2016).

> A determinate sentence is imposed when the defendant is sentenced to a single term of years, such as a sentence of 2 years' imprisonment. . . . 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. 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.[15]

When read together and applied to these facts, §§ 29-2204(1) and 29-2204.02(4) require Thompson to be sentenced to indeterminate sentences on all five counts. Under § 29-2204, a defendant convicted of a Class IIA felony, as Thompson was for driving under the influence, fifth offense, must be sentenced to an indeterminate sentence. Thompson was sentenced to 12 to 15 years' imprisonment for driving under the influence, and thus, this sentence was correct.

But the sentences imposed for Thompson's convictions on counts 2 and 3, both counts of child abuse resulting in serious bodily injury, a Class II felony, were not indeterminate as required under § 29-2204.02; rather, Thompson was sentenced to a determinate sentence of 3 years' imprisonment for each count. These sentences were plain error.

Moreover, § 29-2204.02(4) provides that for "any sentence of imprisonment for a Class III, IIIA, or IV felony . . . imposed consecutively or concurrently with . . . 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 count 4, Thompson was convicted of child abuse, a Class IIIA felony, and was sentenced to a determinate sentence of 1 year's imprisonment. In count 5, he was convicted of leaving the scene of a personal injury accident, a

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[15] *State v. Artis*, 296 Neb. 172, 179, 893 N.W.2d 421, 427-28 (2017), *modified on denial of rehearing* 296 Neb. 606, 894 N.W.2d 349.

Class III felony, and was sentenced to a determinate sentence of 3 years' imprisonment. But because these sentences were imposed consecutively with Thompson's Class II and Class IIA felonies, these sentences should have also been indeterminate. We therefore find plain error in these sentences.

Given this plain error, we vacate Thompson's sentences for his convictions on counts 2 through 5 in their entirety and remand those counts for resentencing.

CONCLUSION

We vacate the sentences imposed for Thompson's convictions on counts 2 through 5 in their entirety. We otherwise affirm the judgments and convictions of the district court and remand this cause to the district court for resentencing on counts 2 through 5.

Affirmed in part, and in part vacated and remanded for resentencing.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Gilbert G. Lundstrom, respondent.

919 N.W.2d 131

Filed November 2, 2018. No. S-18-872.

Original action. Judgment of disbarment.

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

Per Curiam.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Gilbert G. Lundstrom, on September 13, 2018. The court accepts respondent's voluntary surrender of his license and enters a judgment of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 16, 1969. His license is currently inactive. On September 13, 2018, respondent filed a voluntary surrender of license to practice law, in which he stated that he had been convicted in the U.S. District Court for the District of Nebraska of 12 different criminal counts of fraud-related felony charges. According to his voluntary surrender, respondent was sentenced to 132 months' imprisonment and ordered to pay restitution. Respondent indicates that the Counsel for Discipline could seek disciplinary action against his license

for this violation. In his voluntary surrender, respondent states that he freely, knowingly, and voluntarily surrenders his privilege to practice law in the State of Nebraska; waives his right to notice, appearance, or hearing prior to the entry of an order of disbarment; and consents to the entry of an immediate order of disbarment. The Counsel for Discipline, being aware of respondent's federal case, has not objected to the voluntary surrender.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations that could be made against him in connection with his fraud-related convictions. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the suggested allegations being made against him. The court accepts

respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

State of Nebraska, appellee, v. Shanna E. Golyar, appellant.

919 N.W.2d 133

Filed November 9, 2018. No. S-17-955.

1. **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.
2. **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.
3. **Homicide: Intent.** A person commits first degree murder if he or she kills another person purposely and with deliberate and premeditated malice.
4. **Criminal Law: Homicide: Proof: Words and Phrases.** In a homicide case, corpus delicti is the body or substance of the crime—the fact that a crime has been committed. It is not established until it is proved that a human being is dead and that the death occurred as a result of the criminal agency of another.
5. **Homicide: Circumstantial Evidence: Proof.** The body of a missing person is not required to prove the corpus delicti for homicide. Instead,

courts have generally held that circumstantial evidence associated with the victim's disappearance can be sufficient to establish the death.

6. **Homicide: Intent: Circumstantial Evidence: Proof.** Purposeful, deliberate, premeditated murder may be proved circumstantially.
7. **Homicide: Intent: Words and Phrases.** In the homicide context, deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.
8. ____: ____: ____. The term "premeditated" means to have formed a design to commit an act before it was done.
9. **Homicide: Intent.** One kills with premeditated malice if, before the act causing death occurs, one has formed the intent or determined to kill the victim without legal justification.
10. **Homicide: Intent: Time.** No particular length of time for premeditation is required, provided the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.
11. ____: ____: ____. The design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
12. **Criminal Law: Evidence: Intent.** The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
13. **Arson.** A person commits arson in the second degree if he or she intentionally damages a building or property contained within a building by starting a fire or causing an explosion.
14. **Arson: Circumstantial Evidence: Proof.** Circumstantial evidence is sufficient to support a conviction for arson if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt.
15. **Effectiveness of Counsel: Postconviction: 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 in a subsequent postconviction proceeding.
16. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance 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 recognize whether the claim was brought before the appellate court.
17. **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.

18. **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.
19. ____: ____. 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.
20. **Effectiveness of Counsel: Jury Trials: Waiver.** The decision to waive a jury trial is ultimately and solely the defendant's, and, therefore, the defendant must bear the responsibility for that decision.
21. ____: ____: ____. Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with the client's freedom to decide to waive a jury trial or (2) the client can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right.
22. **Trial: Joinder.** Prejudice from joinder cannot be shown if evidence of one charge would have been admissible in a separate trial of another charge.
23. **Trial: Constitutional Law: Testimony.** A defendant has a fundamental constitutional right to testify.
24. **Trial: Attorney and Client: Testimony: Waiver.** The right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone.
25. **Trial: Attorney and Client: Testimony.** Defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make.
26. **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.

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

Thomas C. Riley, Douglas County Public Defender, Lori A. Hoetger, and Scott C. Sladek for appellant.

Douglas J. Peterson, Attorney General, Sarah E. Marfisi, and Erin E. Tangeman for appellee.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ., and Moore, Chief Judge.

Stacy, J.

Cari Farver disappeared on November 13, 2012, and her body has never been found. About 4 years after Farver's disappearance, Shanna E. Golyar was charged with Farver's murder and with arson. At trial, the State introduced uncontested evidence that Golyar considered Farver a romantic rival and that Golyar posed as Farver (and others) for several years in emails, texts, and on social media. While posing as someone else, Golyar confessed in several emails to murdering Farver.

Golyar was found guilty of first degree murder and second degree arson after a bench trial. She was sentenced to life imprisonment on the murder conviction and to a consecutive sentence of 18 to 20 years' imprisonment on the arson conviction. In this direct appeal, Golyar contends the evidence was insufficient to support the convictions and claims her trial counsel was ineffective in various ways. We affirm.

I. FACTS

1. Golyar Meets David Kroupa

In late spring or early summer 2012, Golyar started dating David Kroupa after meeting him through an online dating site. Kroupa described the relationship as "[c]asual" and informed Golyar he was also dating other women. From almost the beginning, however, Golyar wanted a commitment from Kroupa. The State's general theory was that Golyar was obsessed with Kroupa and did not want him dating other women.

2. Kroupa Meets Farver

Near the end of October 2012, Kroupa met the victim in this case, Farver. Kroupa's first date with Farver was on October 29 at a restaurant in Omaha, Nebraska. During the date, Kroupa's

cell phone began "blowing up" with calls and text messages from Golyar. He initially ignored the messages, but when they continued, he contacted Golyar and told her he was on a date and could not respond. When they left the restaurant, Kroupa and Farver went to Kroupa's nearby apartment.

Almost immediately after they arrived, Golyar started ringing the bell at the security door of Kroupa's apartment building. Kroupa left Farver in his apartment and went to the security door to speak with Golyar. Golyar was crying and upset and insisted Kroupa let her in so she could retrieve some of her belongings from his apartment. Kroupa left Golyar at the security door and went back to his apartment to explain the situation to Farver. Farver decided to leave, and as she did so, she passed by Golyar, who was still standing by the security door. Farver got into her black Ford Explorer, which was parked near the security door, and drove away.

After Farver left, Kroupa let Golyar into his apartment to retrieve her belongings. She was still upset and did not stay long before he asked her to leave. Not long after Golyar left, Kroupa and Farver spoke on the telephone and Kroupa then traveled to Farver's home in Macedonia, Iowa, where he spent the night.

Kroupa and Farver continued to see a lot of each other over the next several weeks. Kroupa also continued to see Golyar during this time period. On November 9 or 10, 2012, Farver's Explorer was vandalized with spray paint while parked in Macedonia. Investigators subsequently learned that Golyar, via a Facebook account she had created under a false persona, claimed to be in Macedonia during that time period. That imposter Facebook account had also attempted to "friend" Farver.

Farver worked in Omaha at a business not far from Kroupa's apartment. Starting Monday, November 12, 2012, she was beginning a weeklong project at work that would require her to work late hours. Farver arranged for her teenage son to stay with her mother and stepfather during that week, and Kroupa agreed Farver could spend the week with him at his apartment. Farver went to work as planned on Monday, November 12,

and left work between 8 and 9 p.m. Her coworkers expected her at work the next morning. Farver spent the night with Kroupa at his apartment.

Kroupa left for work on November 13, 2012, at approximately 6:20 a.m. At that time, Farver was awake and using her laptop computer. No one has seen Farver since.

3. Farver's Cell Phone, Debit Card, and Facebook Account

Records from Farver's employer showed she called in on the work project at 6:15 a.m. on November 13, 2012. Other records showed Farver logged into her Facebook account from Kroupa's apartment at 6:39 a.m. and logged out at 6:42 a.m.

At 9:54 a.m., Farver's Facebook account "unfriended" Kroupa. At 10 a.m., Kroupa received a text from Farver's cell phone asking him if he wanted to live together. This surprised him, as he thought Farver agreed they were only involved in a casual relationship, and he responded, "No." Twenty seconds later, he received an angry text from Farver's cell phone breaking off the relationship.

Also on November 13, 2012, Farver's cell phone texted Farver's mother. The text said Farver had found a new job, which surprised her mother. Farver's mother texted back over the course of the next several days and asked questions, including when Farver was coming to pick up her son for an upcoming family wedding, but received no response. This was unusual because Farver and her mother typically had daily contact. Farver's mother reported her daughter missing on Friday, November 16.

On November 15, 2012, Farver's employer received a text from her cell phone, stating that she was resigning and was sending "Shanna Golyar" to replace her. Later that day, Golyar filled out an online application with the employer. On November 16, Farver's debit card was used to make purchases of $167.78 and $226.56 at two separate discount stores in Omaha. An item purchased at one of the stores was a shower curtain with a distinctive black-and-white floral pattern.

On November 17, 2012, Farver's mother received another text from Farver's cell phone. It included a photograph of a check for $5,000 made out to Farver and signed by Golyar, and asked Farver's mother to let Golyar into Farver's home to retrieve a bedroom set Golyar had allegedly purchased via the check. Farver's mother was suspicious about the text and contacted police. Police had Farver's service provider "ping" her cell phone to attempt to locate it, and the ping showed that in the early hours of November 18, the cell phone was at an Omaha location not far from Golyar's residence. Police searched for Farver's cell phone, but it was never found.

Farver's Facebook account continued to be active after November 13, 2012, making posts and sending messages. Trial evidence demonstrated, however, that the account making the posts and sending the messages was actually an imposter account, created using photographs and information available on Farver's actual Facebook account. The imposter account making those posts was linked via digital evidence to Golyar. This imposter account attempted to contact both Farver's mother and Farver's teenage son. Photographs from Farver's original Facebook account were also used by Golyar to make online dating profiles in Farver's name.

4. Harassment of Golyar and Kroupa

Beginning in November 2012 and continuing until approximately December 2015, both Golyar and Kroupa began receiving frequent harassing texts and emails, purportedly from Farver. The texts came from as many as 30 different telephone numbers. The emails came from as many as 30 different email accounts. Kroupa alone received 50 to 60 such emails per day, in addition to frequent texts and missed telephone calls. The texts and emails frequently referred to Golyar as a "whore."

Golyar reported vandalism to her property, allegedly by Farver, on November 23, 2012, and February 12 and April 1, 2013. Golyar also reported someone had broken into her garage prior to November 23, 2012, and stolen checks

from her. Kroupa reported vandalism to his property in July, October, and December 2013. Many of these acts of vandalism involved messages referring to Golyar as a "whore." Each time an act of vandalism occurred, Kroupa, Golyar, or both would receive a text or email from "Farver" taking responsibility for the act. The acts of vandalism tended to occur at times when Kroupa was becoming less interested in Golyar, and the two were drawn back together by their mutual fear or dislike of Farver.

In January 2013, with Kroupa's consent, the police downloaded information from his cell phone to obtain data related to the texts and emails purportedly sent by Farver. At the same time, with Golyar's consent, police also downloaded similar information from her cell phone. The downloads were "logical" downloads, which did not include data previously deleted from the devices.

5. Todd Butterbaugh

Todd Butterbaugh met Golyar in September 2010 through an online dating site, and they dated until September 2015. Butterbaugh understood the relationship was exclusive. During the course of that relationship, Butterbaugh helped Golyar with her bills, helped her buy a car, let her move into his residence with her two children, and cared for her children.

In January 2013, Butterbaugh began receiving text and email messages, purportedly from Farver. In those messages, "Farver" explained she was one of Golyar's friends and Golyar had given her Butterbaugh's contact information in case "Farver" ever needed an emergency contact for Golyar. When Butterbaugh asked Golyar about the messages, she confirmed this and said Farver was her friend. In general, the texts and emails between "Farver" and Butterbaugh discussed Butterbaugh's relationship with Golyar. Butterbaugh did not learn of Kroupa until Golyar's cell phone was downloaded by the police. At that time, Golyar told Butterbaugh she had dated Kroupa before she met Butterbaugh and that they had remained friends.

Golyar and her two children moved in with Butterbaugh in July 2013 and stayed until December 2015 or January 2016. During the time she dated and lived with Butterbaugh, Golyar did not tell him she was being harassed by Farver or anyone else. While staying with Butterbaugh, Golyar had access to his Wi-Fi network and several electronic devices, including a laptop and an iPod. Golyar and Butterbaugh broke up in October 2015.

6. August 17, 2013, Fire

Golyar and Kroupa broke off their relationship in early August 2013. Shortly thereafter, on Saturday, August 17, at 8:14 a.m., a fire was reported at a residence Golyar rented in Omaha. Golyar told investigators she and her children had left the residence at 3 p.m. the day before, and she had returned at approximately 7:30 a.m. the following day and discovered the fire. She told investigators she was in the process of moving from the residence, but they later learned she had been evicted. Firefighters found smoke in the home, but the fire had cooled and was no longer hot. Golyar's four pets died in the fire.

Investigators discovered at least six different points of origin of the fire and found accelerants. They quickly determined the fire had been set intentionally.

Golyar and Kroupa both received emails, purportedly from Farver, claiming responsibility for the fire. The email to Golyar was sent at 12:56 a.m. on August 17, 2013, and said "Farver" hoped Golyar and her children burned to death. The email to Kroupa was sent at 11:57 p.m. on August 16 and said, "I am not lying I set that nasty whores house on fire I hope the whore and her kids die in it." Golyar and Kroupa got back together after the fire.

7. Amy Flora and December 5, 2015, Shooting

Before Kroupa met Golyar and Farver, he had a long-term relationship with Amy Flora and they had two children together. Flora and Kroupa remained amicable after their breakup. Flora

and the children lived in Omaha, and Golyar met Flora briefly when she accompanied Kroupa to pick up his children for parenting time. In 2013, Flora began receiving harassing Facebook and text messages purportedly from Farver. Some of the messages indicated Flora was being watched.

Golyar and Kroupa broke up again in mid-November 2015, because Kroupa decided to have a "more serious" relationship with another woman. Shortly thereafter, on Friday, December 4, Golyar told police that Flora had been sending her harassing messages via Facebook and text. Golyar told police that she now suspected it was Flora, not Farver, who had been harassing her and Kroupa all along. Golyar consented to a download of her cell phone so police could review the harassing messages. After the download, the investigating officer told Golyar he would follow up with Flora on Monday.

On Saturday morning, Golyar sent the officer additional harassing messages she claimed were sent to her by Flora. Later that day, at 6:40 p.m., officers were dispatched to a park located in a wilderness area in Council Bluffs, Iowa. They found Golyar sitting on the ground near the driver's side of the only car in the parking lot. Golyar had been shot in the left thigh. Golyar's accounts of how the shooting occurred varied significantly over the course of the next several days and weeks, but she insisted Flora had shot her.

Based on Golyar's statements at the scene, police went to Flora's home. Flora testified that she answered her door to find "police standing at [her] door with guns pointed at [her]." Flora had been home with her 2-year-old son, and officers noticed her car was cold to the touch, indicating it had not been used recently. Police questioned Flora and found her cooperative.

Police obtained consent from both Flora and Kroupa to download their cell phones on Monday, December 7, 2015. The download from Kroupa's cell phone showed many of the emails he received from "Farver" were sent from Butterbaugh's internet protocol (IP) address while Golyar was living with

Butterbaugh. A digital forensic expert explained that an IP address is like a postal address for an electronic device and that it references a device's access to the internet from a fixed location. He testified that if a device accessed a residence's Wi-Fi, the IP address will be that residence.

In late January or early February 2016, Kroupa moved in with Flora over a weekend. The following week, Golyar contacted police, very upset that Flora had not been charged in relation to the shooting. Golyar again consented to a download of her cell phone after telling police she had received additional harassing emails from "Flora." At this time, police generally told Golyar that they suspected Flora in the shooting, but needed additional information to charge her. This was untrue, because by this time, police suspected Golyar had shot herself.

Golyar then began receiving additional emails from "Flora" about Farver's murder. These emails are dated between December 21, 2015, and February 24, 2016. Several of the emails confessed to the murder of Farver and the arson of Golyar's residence, and at least one confessed to the shooting of Golyar. The emails confessing to killing Farver gave details of how the murder occurred. The emails contained various and sometimes inconsistent details about the murder, but consistently described that Farver was stabbed in her vehicle, her body was wrapped in a tarp then later burned and put in the garbage, her vehicle was cleaned afterward, the killer posed as Farver after the killing, and the killer went to Farver's home after the killing. One email describes the interior of Farver's home with precision.

8. Farver's Explorer and Other Evidence

The January 8, 2013, download from Golyar's cell phone showed the cell phone had made six calls to Farver's landline on November 6 and 7, 2012, just days before Farver disappeared. Also discovered in the download of Golyar's cell phone was a photograph of Farver's Ford Explorer. Metadata

showed the photograph was taken December 24, 2012. This date was after Farver disappeared on November 13 and before her Explorer was found parked near Kroupa's apartment in January 2013. The download of Golyar's cell phone also included a video that was uploaded to YouTube, a video-sharing website, by "Farver." The video showed an apartment complex that looked like Kroupa's. The IP address used to access the YouTube account was Butterbaugh's. The YouTube account was created in 2014, after Farver's disappearance.

When Farver's Explorer was initially discovered in Omaha in January 2013, it was examined by a crime scene technician. At the time, the technician was primarily looking for fingerprints and noticed the vehicle was very clean. The only fingerprints found were on a mint container in the center cupholder. In September 2015, investigators learned the fingerprints were Golyar's.

On December 8, 2015, the Explorer was processed again by the same technician. This time she was looking for blood, but found none. On February 18, 2016, the technician processed the vehicle a third time. This time, she removed the cloth seat covers and found a large red stain on the passenger side seat foam. DNA testing showed it was Farver's blood.

9. Search Warrants

In February 2016, investigators obtained warrants and searched the apartment where Golyar was living, as well as the residence where she had lived with Butterbaugh. The storage unit where Farver's mother had moved Farver's belongings was searched in March 2016.

Various items were found at Golyar's apartment, including LG cell phones; a black-and-white floral shower curtain that matched the description of the one purchased at the discount store with Farver's debit card on November 16, 2012; a red Sony video camcorder; a Nikon Coolpix digital camera; and memory cards. Owners' manuals for the Nikon camera and the red Sony camcorder were found among Farver's belongings during the search of the storage unit, along with receipts from

a furniture store showing Farver had purchased both items in October 2012.

10. Evidence Linked Golyar to "Farver" and "Flora" Emails

Police also obtained search warrants for a large number of email accounts, including 31 from Google, 9 from Yahoo!, and 5 from Microsoft. A digital forensic examiner gave detailed testimony linking Golyar to all relevant messages sent by "Farver" after her disappearance from these accounts based on IP address and device usage. The forensic examiner explained that when using these "imposter" accounts, Golyar often attempted to hide her identity by using services that either disguised her IP address and/or sent messages at times other than when they were composed. The forensic examiner also gave detailed testimony linking Golyar to all relevant messages sent by "Flora" from these accounts based on IP address and device usage. At trial, Golyar did not contest the forensic evidence linking her to these imposter accounts. Similarly, on appeal, Golyar does not contest that the State proved the emails from "Farver" and "Flora" were actually authored by Golyar.

11. Evidence Relating to Farver's Body

In one of the emails confessing to the murder, "Flora" described a "yin-yang" tattoo on Farver's left hip. This tattoo had never been described to the public. Police located Farver's ex-husband and learned that when the two married in 2009, they got matching yin-yang tattoos. Farver's ex-husband's tattoo was on his calf, and Farver's was on her left hip. Police also obtained a photograph of Farver from her mother which showed a tattoo of the Chinese symbol for mother on the top of Farver's left foot.

In February 2017, investigators recovered a tablet computer from Kroupa that had been accessible to Golyar while the two were dating. The tablet had a memory card known as a micro SD card inserted into it. The forensic digital examiner found

no existing files on the SD card, but was able to recover many deleted ones. These included over 13,000 photographs and numerous text messages sent either to or from Golyar.

The tablet did not have text capabilities, so the examiner realized the SD card must have been used with another device at one time. He discovered that Golyar's "LG VS920" cell phone, the contents of which were downloaded by police on January 8, 2013, was compatible with the SD card. The login file for Golyar's cell phone showed it had used the SD card. And 458 of the 13,000 photographs on the card were also on Golyar's cell phone when it was downloaded.

Several of the photographs on the SD card were images of what appears to be a blue and grey or silver tarp, taken from various angles. Another photograph depicts a flesh-colored object with a yin-yang symbol on it. A forensic video analyst compared the yin-yang symbol in this photograph to an image of the yin-yang symbol on Farver's ex-husband's calf and concluded they were very consistent with each other. Another photograph depicts a flesh-colored object with a Chinese symbol on it. The video analyst compared the symbol in this photograph to the image of the tattoo on Farver's left foot provided by Farver's mother, and concluded the images were also very consistent with one another.

A forensic pathologist testified that the photograph depicting the Chinese symbol was a photograph of the top part of a human left foot. The pathologist opined that the foot showed signs of decomposition, but admitted she could not tell from the photograph how long the foot had been decomposing.

Golyar waived a jury trial, and she did not testify at the bench trial. After the State rested, Golyar moved for a "directed motion of acquittal," which the court overruled. The defense did not present any evidence. Golyar was convicted of one count of first degree murder and one count of second degree arson. She was sentenced to life imprisonment on the murder conviction and to 18 to 20 years' imprisonment on the arson conviction, the sentences to run consecutively. She appeals, represented by new counsel.

II. ASSIGNMENTS OF ERROR

Golyar assigns and argues that the evidence at trial was insufficient to prove the elements of first degree murder and second degree arson. She also contends her trial counsel provided ineffective assistance by (1) not adequately advising her of her right to a jury trial, (2) failing to move to sever the charges against her, (3) failing to file any pretrial motions, (4) waiving objections to the vast majority of evidence introduced by the State, (5) failing to put on any sort of defense and/or investigate potential witnesses and alibis, (6) failing to call an expert to rebut the pathologist's testimony, (7) failing to adequately advise Golyar on her right to testify at trial, and (8) being so unprepared for trial and unfamiliar with the case that he referred to Golyar and Farver by the wrong names.

III. STANDARD OF REVIEW

[1] 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.[1]

[2] 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

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[1] *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018), *disapproved on other grounds, State v. Avina-Murillo, ante* p. 185, 917 N.W.2d 865.

or was not prejudiced by a defense counsel's alleged deficient performance.[2]

IV. ANALYSIS

1. Evidence Was Sufficient to Prove First Degree Murder

[3] Golyar argues the State's evidence was insufficient to show she committed first degree murder. In Nebraska, a person commits first degree murder if he or she kills another person purposely and with deliberate and premeditated malice.[3] The State concedes the elements of murder were proved with circumstantial evidence, but contends it met its burden of proving each element beyond a reasonable doubt. We agree.

(a) Evidence of Death

[4,5] In a homicide case, corpus delicti is the body or substance of the crime—the fact that a crime has been committed.[4] It is not established until it is proved that a human being is dead and that the death occurred as a result of the criminal agency of another.[5] Here, Farver's body was never recovered. However, the body of a missing person is not required to prove the corpus delicti for homicide.[6] Instead, courts have generally held that circumstantial evidence associated with the victim's disappearance can be sufficient to establish the death.[7]

This court has specifically addressed such a situation. In *State v. Edwards*,[8] we found sufficient circumstantial evidence

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[2] *Id.*

[3] Neb. Rev. Stat. § 28-303 (Supp. 2017).

[4] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[5] *Id.*

[6] *Id.*

[7] See *id.*

[8] *Id.*

of a victim's death even though her body was never recovered. *Edwards* relied in part on evidence that the victim abruptly severed her habits and relationships without explanation, abandoned her personal effects, and did not take any money from her bank account after her disappearance. *Edwards* also found other facts were suggestive of an unlawful killing, including that the victim's blood was found and the suspect had attempted to conceal the victim's disappearance.

Similar circumstantial evidence of Farver's death appears in the record. Farver has not been seen since November 13, 2012, when she abruptly ended her contacts with her teenage son, her parents, her employer, and her current boyfriend. Her money has not been accessed, aside from the use of her debit card on November 16, and that use has been linked to Golyar. Farver's blood was found in her vehicle. Overwhelming and uncontested evidence showed that Golyar posed as Farver online and in social media in an attempt to conceal Farver's disappearance.

In addition, the record before us contains additional circumstantial evidence of Farver's death. Photographs of what appear to be body parts with tattoos identical to Farver's tattoos were discovered on an SD card used with Golyar's cell phone. And, most importantly, a forensic pathologist testified that a photograph on the same SD card of a human left foot, which had a tattoo consistent with the one on Farver's left foot, showed signs the foot was in a state of decomposition.

We conclude a rational trier of fact, viewing the evidence in the light most favorable to the State, could have concluded the State proved beyond a reasonable doubt that Farver is dead.

(b) Purposely, Deliberate, and Premeditated

Golyar argues that even if there was sufficient evidence to prove Farver's death, the "State did not introduce any evidence whatsoever to prove [Golyar] killed . . . Farver intentionally . . . and perhaps most significantly, the State's

evidence was insufficient to prove [Golyar] killed [Farver] with deliberate and premeditated malice."[9]

[6-12] Purposeful, deliberate, premeditated murder may be proved circumstantially.[10] In the homicide context, deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.[11] The term "premeditated" means to have formed a design to commit an act before it was done.[12] One kills with premeditated malice if, before the act causing death occurs, one has formed the intent or determined to kill the victim without legal justification.[13] No particular length of time for premeditation is required, provided the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.[14] The design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.[15] The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.[16]

A rational fact finder viewing the evidence in the light most favorable to the State could have found that Golyar was obsessed with Kroupa and thus had a motive to harm Farver. The record shows that just days before Farver's disappearance, Golyar made six telephone calls to Farver's landline and vandalized Farver's vehicle, suggesting a premeditated plan to harm Farver. Most significantly, however, the record contains the emails, authored by Golyar posing as Flora, confessing to

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[9] Brief for appellant at 24.

[10] See *State v. Escamilla*, 291 Neb. 191, 864 N.W.2d 376 (2015).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] See *id.*

[16] See *State v. Sing*, 275 Neb. 391, 746 N.W.2d 690 (2008).

the details of the murder. A rational trier of fact could conclude these emails are Golyar's own statements describing the manner of the murder, the motive for the murder, and her state of mind in committing the murder.

The emails authored by Golyar contain considerable evidence that Golyar killed Farver purposely and with deliberate and premediated malice. Some examples from those emails, with spelling errors corrected, include:

> "I atta[c]ked her with a kn[i]fe I stabbed her three to four times in chest and stomach area. I t[h]en took her out and burned her."
>
> . . . .
>
> "I k[i]lled [Farver] because she . . . wouldn't leave [Kroupa] alone."
>
> . . . .
>
> "I even went out to [Farver's] place got some of [Farver's] clothes and other th[i]ngs to make it look like she ran away."

One email describes driving with Farver in Farver's vehicle, and then stabbing Farver multiple times in the stomach. This email states Farver was alive after the stabbing and "begging for her life" while Golyar spent the "[w]hole t[i]me watch[i]ng the life drain fr[o]m her body." Another email described the yin-yang tattoo on Farver's left thigh in order to prove "I'm not lying about offing that crazy bitch." Two of the emails refer to covering Farver's body with a tarp.

Other evidence in the record corroborates some of the statements made in these emails, including the presence of Farver's blood in her vehicle, evidence of Golyar's obsession with Kroupa, evidence that Golyar accessed Farver's home and took some of her possessions, the existence of the yin-yang tattoo on Farver's left hip, and the photographs of tarp found on the SD card.

A rational fact finder viewing the evidence in the light most favorable to the State could conclude the State proved Golyar killed Farver purposely and with deliberate and premeditated malice. There is no merit to Golyar's claim that the

evidence was insufficient to support her conviction for first degree murder.

2. Evidence Was Sufficient to Prove Arson

[13] Golyar also argues there was insufficient evidence to support her conviction for second degree arson. As relevant here, a person commits arson in the second degree if he or she intentionally damages a building or property contained within a building by starting a fire or causing an explosion.[17]

Here, the evidence clearly established that the August 17, 2013, fire at Golyar's residence was intentionally set, as investigators discovered multiple origin sources and evidence that accelerants were used. On appeal, Golyar argues only that there was not sufficient evidence to prove she was the arsonist and that any such evidence was circumstantial.

[14] It is true the evidence linking Golyar to the arson is circumstantial, but circumstantial evidence is sufficient to support a conviction for arson if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt.[18] Viewing the evidence in the light most favorable to the State, a rational finder of fact could conclude the circumstantial evidence established Golyar was the arsonist.

There is no dispute Golyar had access to the property that was intentionally burned and had a motive to commit the arson. The arson was part of a pattern of vandalism purportedly committed by Farver but ultimately linked to Golyar via the uncontested digital forensic evidence. These acts of vandalism tended to occur at times when Kroupa was becoming less interested in Golyar and were designed to capitalize on a mutual fear of Farver and draw Kroupa back. Golyar and Kroupa had broken off their relationship just before the arson, and after the arson, they reunited. And, most significantly,

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[17] See Neb. Rev. Stat. § 28-503 (Reissue 2016).

[18] *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988).

Golyar, posing as Flora, later confessed to committing the arson in two emails.

We conclude the circumstantial evidence and reasonable inferences therefrom were sufficient to support the arson conviction. Golyar's arguments to the contrary are without merit.

3. Ineffective Assistance of Counsel

[15] Golyar claims her trial counsel provided ineffective assistance in several respects. She is represented on direct appeal by different counsel than she had during 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, otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding.[19]

[16,17] An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance 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 recognize whether the claim was brought before the appellate court.[20] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[21] The determining factor is whether the record is sufficient to adequately review the question.[22]

[18,19] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[23] In reviewing claims of ineffective assistance of counsel

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[19] See *State v. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018); *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

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.[24]

(a) Waiver of Jury Trial

Golyar claims her trial counsel was ineffective in advising her to waive her right to a jury trial. The record shows she waived this right not once, but twice.

Golyar was originally charged with only first degree murder. At her arraignment, she entered a plea of not guilty and asked, on the record, to waive her right to a jury. The court advised her of the constitutional right to a jury trial and explained the consequences of waiving such right. Golyar stated that she understood, and wanted to waive her right to a jury and proceed with a bench trial. She told the court she had discussed her desire to waive a jury with her attorney, and she confirmed that no one had promised her anything or forced or threatened her in any way to get her to waive a jury trial.

The State subsequently amended the information to add the second degree arson charge. At her arraignment on the amended information, Golyar pled not guilty and again asked to waive a jury trial. The court again advised her on the record of her right to a jury trial and the consequences of waiving such right. Golyar again stated she understood and wished to waive a jury. She affirmatively stated that she had discussed her desire to waive a jury with her attorney and that no one had promised her anything or forced or threatened her in any way to get her to waive a jury trial.

[20,21] The decision to waive a jury trial is ultimately and solely the defendant's, and, therefore, the defendant must bear the responsibility for that decision.[25] Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective

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[24] *Id.*

[25] *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

assistance only when (1) counsel interferes with the client's freedom to decide to waive a jury trial or (2) the client can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right.[26]

On appeal, Golyar does not suggest her attorney interfered with her freedom to decide whether to waive a jury, but contends only that trial counsel "did not adequately advise [her] regarding her right to a jury trial."[27] It is clear from the record that she discussed the waiver with her counsel, but beyond characterizing counsel's advice on that issue as being inadequate, she offers no specifics about the advice counsel gave or why it was unreasonable. Golyar has thus failed to allege this claim of ineffective assistance with sufficient particularity. Moreover, because she concedes the court fully advised her of the right to a jury trial and the consequences of waiving that right, the record affirmatively refutes any showing of prejudice. This claim of ineffective assistance has no merit.

(b) Motion to Sever

Golyar argues her trial counsel was ineffective for failing to move, prior to trial, to sever the arson charge from the murder charge. Pursuant to Neb. Rev. Stat. § 29-2002(1) (Reissue 2016):

> Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

And pursuant to § 29-2002(3), offenses properly joined under § 29-2002(1) may be tried separately if the court finds either the defendant or the State "would be prejudiced by a joinder."

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[26] *Id.*

[27] Brief for appellant at 33.

Golyar argues both that the murder and arson charges were not properly joinable under § 29-2002(1) and that, even if they were, the joinder resulted in prejudice to her. She suggests that if her trial counsel had asked, the trial court would have ordered separate trials. We find the record is sufficient to review and reject this claim.

[22] The State's theory was that the arson was part of Golyar's common scheme or plan to cover up Farver's murder. As such, the charges were properly joined under § 29-2002(1). Had trial counsel moved to sever, Golyar would have had the burden to show compelling, specific, and actual prejudice from the joinder.[28] Prejudice from joinder cannot be shown if evidence of one charge would have been admissible in a separate trial of another charge.[29]

The record demonstrates that if the murder had been charged separately, evidence of the arson would have been admissible at that trial. The arson was part of Golyar's scheme both to cover up Farver's murder and to frame Flora for Farver's murder. There is no merit to this claim of ineffective assistance of trial counsel.

(c) Pretrial Motions

Golyar argues her trial counsel was ineffective because he "failed to file *any* pretrial motions" and "failed to move to exclude any of the State's anticipated evidence."[30] Golyar offers no specifics about what pretrial motions should have been filed, or what evidence should have been excluded, other than to remark that counsel did not file a motion to exclude the photographs found on the memory card depicting flesh-colored objects with tattoos and the pathologist's testimony about decomposition.

But Golyar concedes, and the record confirms, that trial counsel made an oral motion to exclude the photograph

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[28] *State v. Cotton, supra* note 1.

[29] See *id.*

[30] Brief for appellant at 35 (emphasis in original).

depicting what appears to be a foot with a yin-yang tattoo and the pathologist's testimony with respect to that photograph. In response, the court indicated it would make a determination on admissibility at the time of trial, after hearing foundational evidence. At trial, Golyar objected to the pathologist's opinion, arguing the pathologist could not testify with a reasonable degree of certainty that the photograph was of a decomposing foot. That objection was overruled. The pathologist then testified the changes in the skin and the coloring in the photograph were "comparable" or "'compatible with'" a decomposing human body.

The record thus refutes Golyar's claim that there was no request to exclude the photograph and the pathologist's testimony. And to the extent Golyar is attempting to raise claims that her trial counsel should have filed other pretrial motions or sought to exclude other evidence, we conclude Golyar has failed to allege such claims with sufficient particularity.

(d) Lack of Objections

Prior to trial, the State filed a motion in limine seeking a ruling on the admissibility of evidence regarding Golyar's actions relating to property damage, threats, the shooting at the park, possession of stolen property, and harassment, claiming it was all inextricably intertwined with the charged crimes or, alternatively, was admissible rule 404 evidence.[31] Trial counsel initially resisted the motion, and the State offered evidence in support of admissibility. Before the court ruled on the motion in limine, the parties agreed that all of the evidence at issue was admissible either as evidence that was inextricably intertwined with the charged criminal acts or as evidence of consciousness of guilt. Golyar argues this was ineffective assistance.

The record on appeal is sufficient to review and reject this claim. All of the evidence referenced by Golyar was either inextricably intertwined with the charged crimes or evidence of consciousness of guilt, and thus admissible. Trial counsel

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[31] See Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016).

could not have performed deficiently by failing to object to admissible evidence.[32]

(e) Failure to Investigate

Golyar claims her trial counsel was ineffective for failing to investigate potential witnesses or alibis. She does not, however, identify any potential witnesses or alibis or specify what their testimony would have been.

An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance 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 recognize whether the claim was brought before the appellate court.[33] We find Golyar's allegations are not sufficient to raise this claim on direct appeal, because a potential postconviction court could not identify if a particular failure to call a witness claim or pursue an alibi claim was the same one raised on direct appeal.[34]

(f) No Rebuttal of Pathologist

Golyar claims trial counsel was deficient in not investigating or calling an expert to rebut the pathologist's testimony. We find this assertion is specific enough to raise the claim of ineffective assistance on direct appeal, but conclude the record on appeal is insufficient to allow us to resolve it.

(g) Advice Not to Testify

[23-25] Golyar claims her trial counsel was ineffective in advising her not to testify at the bench trial. A defendant has a fundamental constitutional right to testify.[35] The right to

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[32] See *State v. Custer*, 298 Neb. 279, 903 N.W.2d 911 (2017).

[33] *State v. Loding, supra* note 19.

[34] See *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

[35] U.S. Const. amend VI; *State v. Johnson*, 298 Neb. 491, 904 N.W.2d 714 (2017).

testify is personal to the defendant and cannot be waived by defense counsel's acting alone.[36] Defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make.[37]

[26] 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.[38] Golyar does not claim trial counsel interfered with her freedom to decide whether to testify. Instead, she claims counsel "failed to advise [her] adequately."[39] She argues she had no prior criminal record and thus there was no risk of having that used against her if she testified. She also contends that by not testifying, she was denied the opportunity to explain her multiple instances of harassing and impersonating others. But she makes no allegations as to how counsel deficiently advised her regarding these matters or how his advice not to testify was unreasonable. As such, she has failed to allege deficient performance with enough particularity and has not properly raised this claim on direct appeal.

(h) Mixing Up Names

Finally, Golyar claims her counsel was "so unprepared and unfamiliar with the issues"[40] that he often used the wrong names when referring to Golyar and Farver. A review of the record shows counsel did slip up at times, and at least twice called Farver by the wrong name. But it is also true

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[36] *State v. Johnson, supra* note 35.

[37] See *id.*

[38] *Id.*

[39] Brief for appellant at 38.

[40] *Id.*

that throughout the 10-day bench trial, a myriad of names and personas were introduced and discussed. A review of the record, in context, shows counsel's use of the wrong name was infrequent and inadvertent. Moreover, Golyar does not contend, and the record does not suggest, that the court or the issues were confused by counsel's occasional reference to the wrong name.

We conclude this claim has been sufficiently raised, and the record on appeal is adequate for us review it. We further conclude the record refutes this claim of ineffective assistance.

V. CONCLUSION

For the foregoing reasons, we affirm the convictions and sentences.

Affirmed.

Miller-Lerman, J., not participating.

State of Nebraska, appellee, v. Scott McColery, appellee, and Brett McArthur, Intervenor-appellant.

919 N.W.2d 153

Filed November 9, 2018. No. S-17-1121.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Statutes: Legislature: Intent.** The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.
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 words which are plain, direct, and unambiguous.
4. **Statutes.** A statute is ambiguous if it is susceptible of more than one reasonable interpretation, meaning that a court could reasonably interpret the statute either way.
5. ____. 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.
6. ____. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
7. **Divorce: Alimony: Child Support: Liens: Property: Legislature.** The Legislature did not provide through Neb. Rev. Stat. § 42-371 (Reissue 2016) for a lien on all personal property, tangible and intangible; instead, it expressly limited the lien to "registered personal property."
8. **Judgments: Liens: Statutes.** Judgment liens are creatures of statute.
9. **Liens: Statutes.** When a lien comes into existence by force of a statute, it must be measured by the statute, and can have no greater force than the statute gives it.

10. **Statutes.** Statutes in derogation of common law are to be strictly construed.
11. **Property.** Money is intangible property; it is not tied up in a fixed state.
12. **Bailment: Divorce: Alimony: Child Support: Property.** Under the current statutory scheme for bail, Neb. Rev. Stat. §§ 29-901 through 29-910 (Reissue 2016), money deposited as recognizance with the clerk of the court is not personal property registered with a county office under Neb. Rev. Stat. § 42-371 (Reissue 2016).
13. **Statutes.** With respect to questions about a statute, a court's role is limited to interpretation and application of statutes, irrespective of the court's personal agreement or disagreement with a particular legislative enactment, so long as a questioned statute does not violate a constitutional requirement.
14. ____. Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Reversed and remanded with directions.

Brett McArthur, pro se.

Joe Kelly, Lancaster County Attorney, and Braden W. Storer for appellee State of Nebraska.

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

Freudenberg, J.

NATURE OF CASE

This is an appeal by the debtor's former attorney from an order in garnishment enforcing a statutory lien by the State for past-due child support, against an appearance bond deposit held by the clerk of the court in a criminal case unrelated to the child support order. During the pendency of the criminal matter, the debtor had assigned to his attorney his contingent right to a return of the bond deposit, as part of the debtor's payment for the attorney's services. During the garnishment proceedings, the attorney asserted that appearance bond funds are not personal property "registered" with a "county

office," as required for a lien under Neb. Rev. Stat. § 42-371 (Reissue 2016). The district court disagreed and found that the State had a lien under § 42-371. We reverse, and remand with directions.

BACKGROUND

In 1994, the State obtained a judgment against Scott McColery for child support. By 2000, McColery was approximately $12,000 in arrears on his child support payments. In September 2015, McColery was charged in the county court for Lancaster County with strangulation. By that time, McColery was approximately $18,000 in arrears in his child support payments.

On October 5, 2015, pending trial, McColery deposited with the county court $5,000 in relation to a $50,000 appearance bond. The bond was to remain in force until the final judgment. Ninety percent of the bond deposit was to be returned to McColery upon appearance, and 10 percent would be retained by the county court clerk for bond costs.

Although McColery was originally represented by a public defender, he later obtained Brett McArthur to represent him. As part of McArthur's compensation, McColery assigned the bond funds to McArthur. The assignment was made on October 29, 2015, and was filed with the county court the next day.

Following McColery's conviction, on November 18, 2015, the State filed in the county court an affidavit of lien for child support. The State averred that McColery owed more than $18,000 in past-due child support. The State explained in its affidavit that it had reason to believe that the county court had McColery's property in its possession, in the form of a bond. The parties do not dispute that McColery appeared in court as ordered, and his bond was not forfeited.

Release of Funds Motion

On June 30, 2016, McArthur filed a motion with the district court for Lancaster County to issue an order releasing the bond funds to him. The district court overruled the

motion without making specific findings of fact. McArthur appealed.

In *State v. McColery*,[1] we held that we lacked jurisdiction over the appeal, because the court's order overruling the motion to release the bond funds was not final.[2] We explained that the order was not a final determination of the rights of the parties, because it did not indicate that McArthur was not entitled to the funds or that the State was entitled to the funds. We noted that the State had not yet initiated garnishment proceedings. We explained further that if it did so, McArthur would be able to intervene pursuant to Neb. Rev. Stat. § 25-1030.03 (Reissue 2016).

Garnishment Proceedings

On July 10, 2017, the State filed with the district court an affidavit for garnishee summons after judgment. The State set forth in the affidavit that the district court had McColery's property, which the State sought to garnish to partially satisfy past-due child support in the amount of $17,923.46. The summons and order of garnishment in aid of execution was issued the following day.

The clerk of the district court did not object and responded to the attached interrogatories, stating that it had property belonging to McColery. Specifically, the clerk of the district court described the property as "Bond Money at CR-15-1358," in the amount of $4,500. But, under "[d]ate the money or credits were due, or will be due," the clerk explained "Upon Order - Bond Assigned to Attorney 10-30-15."

McColery requested a hearing and alleged that the funds asked for were exempt from garnishment. McArthur intervened and filed a motion to quash garnishment on the ground that the $4,500 in the district court's possession had been assigned to McArthur before the garnishment action.

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

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

The court held a hearing on the motion to quash. The State argued that the child support judgment against McColery operated as an automatic lien against the funds from the moment they were deposited into the county court, because they constituted "personal property registered with [a] county office."[3] McArthur argued that depositing a bond is not "registering" it and, further, that the county court is not a "county office."

The court overruled McArthur's motion to quash and ordered that the bond funds being held by the court be remitted to the Nebraska Child Support Payment Center and credited against McColery's child support arrears. McArthur appeals.

ASSIGNMENT OF ERROR

McArthur assigns that the district court erred in overruling his motion to quash garnishment and in ordering the payment of funds held by the court toward McColery's child support payments.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.[4]

ANALYSIS

The sole issue raised by McArthur in this appeal is whether appearance bond funds held by the clerk of the court are "personal property registered with any county office," as stated in § 42-371. McArthur argues that the county court is not an "office" and that the deposit of an appearance bond is not "register[ing]" that property with the court. McArthur has not disputed that if the bond funds were personal property "registered" with a "county office," then the statutory lien was automatically perfected upon deposit and garnishment was

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[3] § 42-371(1).

[4] *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995).

proper. The clerk of the court did not claim immunity from garnishment proceedings.[5] We limit our opinion to the issues presented.[6] We conclude that money deposited in the court as recognizance is not "registered" personal property under § 42-371.

Section 42-371, contained within the statutory scheme governing divorce, alimony, and child support, establishes a lien on certain property for child support. Specifically, § 42-371 provides:

> (1) All judgments and orders for payment of money shall be liens, as in other actions, upon real property and any personal property registered with any county office and may be enforced or collected by execution and the means authorized for collection of money judgments;
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> . . . .
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> (5) Support order judgments shall cease to be liens on real or registered personal property ten years from the date (a) the youngest child becomes of age or dies or (b) the most recent execution was issued to collect the judgment, whichever is later, and such lien shall not be reinstated;
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> . . . .
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> (9) Any lien authorized by this section against personal property registered with any county consisting of a motor vehicle or mobile home shall attach upon notation of the lien against the motor vehicle or mobile home certificate of title and shall have its priority established pursuant to the terms of section 60-164 or a subordination document executed under this section.

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[5] See, Neb. Rev. Stat. § 25-1012.02 (Reissue 2016); *Fox v. Whitbeck*, 286 Neb. 134, 835 N.W.2d 638 (2013); *Anheuser-Busch Brewing Ass'n v. Hier*, 52 Neb. 424, 72 N.W. 588 (1897).

[6] See, *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016); *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998).

[2-6] The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.[7] 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.[8] A statute is ambiguous if it is susceptible of more than one reasonable interpretation, meaning that a court could reasonably interpret the statute either way.[9] Furthermore, it is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects the statute's purpose.[10] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[11] An appellate court can examine an act's legislative history if a statute is ambiguous or requires interpretation.[12]

[7] The Legislature did not provide through § 42-371 for a lien on all personal property, tangible and intangible; instead, it expressly limited the lien to "registered personal property." The terms "registered" and "registered personal property" are not specifically defined in the statutes governing divorce, alimony, and child support. Nor are these terms defined in the various statutes governing execution[13] and other means of enforcement and collection of money judgments.[14] Under dictionary definitions, to "register" is defined variously as to actively and formally enroll or record in a list, catalog, or

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

[8] *Heiden v. Norris*, 300 Neb. 171, 912 N.W.2d 758 (2018).

[9] *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

[10] *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018).

[11] *Id.*

[12] *Farmers Co-op v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017).

[13] Neb. Rev. Stat. §§ 25-1501 through 25-15,105 (Reissue 2016 & Supp. 2017).

[14] See, e.g., Neb. Rev. Stat. §§ 25-1001 through 25-1056 (Reissue 2016).

roll[15]; to enter into a public registry[16]; to record someone's name or ownership of property on an official list[17]; and to enter or record in an official list as being in a particular category, having a particular eligibility or entitlement, or in keeping with a requirement.[18] Inherent to these definitions is both a broad and a narrow understanding of "registration."

The State adopts a broad meaning and argues that appearance bonds are "registered," because the clerk of the court assigns an identification number to the funds and catalogs them into a publicly available court record by the defendant's name, date of birth, and criminal case number. McArthur adopts a narrower meaning and argues that registration under § 42-371 is cataloging property onto a formal registry with a specific purpose that includes registration of liens upon the property. We agree that the Legislature intended a narrower meaning and that an appearance bond deposit is not registered personal property under § 42-371.

The process by which the clerk of the court keeps track of appearance bonds is not specifically required by the bail statutes.[19] Instead, those statutes refer only to the "deposit" of the recognizance.[20] To "deposit" is "[t]he act of giving money or other property to another who promises to preserve it or to use it and return it in kind."[21] To preserve the money in a way that it can be returned, the clerk of the court must necessarily conduct some recordkeeping. Such acts of recordkeeping,

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[15] See, Black's Law Dictionary 1473 (10th ed. 2014); "Register," Merriam-Webster.com, https://www. merriam-webster.com/dictionary/register (last visited Oct. 26, 2018).

[16] See Black's Law Dictionary, *supra* note 15 at 1473.

[17] "Register," https://dictionary.cambridge.org/us/dictionary/english/register (last visited Oct. 26, 2018).

[18] The New Oxford American Dictionary 1434 (2001).

[19] See Neb. Rev. Stat. §§ 29-901 through 29-910 (Reissue 2016).

[20] See §§ 29-901(1)(c)(i) and 29-904.

[21] Black's Law Dictionary, *supra* note 15 at 533.

however, do not make the money "registered personal property" subject to the statutory lien.

[8-11] Judgment liens are creatures of statute.[22] When a lien comes into existence by force of a statute, it must be measured by the statute, and can have no greater force than the statute gives it.[23] And statutes in derogation of common law are to be strictly construed.[24] Early execution procedures did not extend to intangible assets.[25] Money is intangible property;[26] it is not tied up in a fixed state.[27] Thus, our execution statutes,[28] to which § 42-371 explicitly refers, describe only "goods and chattels" as personal property subject to execution.[29] Money is neither a good nor a chattel.[30] In fact, "personal property" is susceptible of more than one meaning; while personal property has a broader meaning of everything that is the subject of ownership except lands and interests in lands,[31] it was traditionally understood in the more restricted sense embracing only tangible goods and chattels.[32]

It would be unusual to conclude that the Legislature intended § 42-371 to create a lien that could not be executed

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[22] See, *Grosvenor v. Grosvenor*, 206 Neb. 395, 293 N.W.2d 96 (1980); *Freis v. Harvey*, 5 Neb. App. 679, 563 N.W.2d 363 (1997).

[23] *County Board of Platte County v. Breese*, 171 Neb. 37, 105 N.W.2d 478 (1960).

[24] See *id.*

[25] William J. Woodward, Jr., *New Judgment Liens on Personal Property: Does "Efficient" Mean "Better"?*, 27 Harv. J. on Legis. 1 (1990).

[26] *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003).

[27] See *McCulloch v. McCulloch*, 232 Ark. 413, 337 S.W.2d 870 (1960).

[28] See §§ 25-1501 through 25-15,105.

[29] See §§ 25-1503, 25-1504, 25-1516(1), 25-1518, and 25-1521 and 2018 Neb. Laws, L.B. 193, §§ 24 and 26 (effective July 19, 2018).

[30] See, Neb. Rev. Stat. § 45-335 (Supp. 2017); Neb. U.C.C § 2A-103 (Reissue 2001); Black's Law Dictionary, *supra* note 15 at 286 and 808-09.

[31] See *id.*

[32] *In re Estate of Chadwick*, 247 Iowa 1050, 78 N.W.2d 31 (1956).

upon, on an intangible that was not traditionally understood as even being "personal property." And it is clear from the legislative history that the Legislature did not in fact envision a registration system for money, appearance bond or otherwise, when it added the "registered personal property" language to the statute.

The reference to registered personal property was added in 1985 by L.B. 7[33] in response to the federal Child Support Enforcement Amendments of 1984,[34] which required states to, among other things, adopt "'[p]rocedures under which liens are imposed against real and personal property for amounts of overdue support owed by an absent parent who resides or owns property in the State.'" While much of the legislative history concerned other matters, several senators indicated that "registered personal property" was to be understood in a narrower sense. For instance, it was discussed that grain required to be documented with the local courthouse was not "registered personal property" and that Uniform Commercial Code filings would not be considered "registered" for purposes of § 42-371, because they were instead "filed."[35]

In fact, it appears that the only registered personal property specifically contemplated at the time of L.B. 7 were motor vehicles and mobile homes, which are addressed in § 42-371(9). This operates in conjunction with provisions of the Motor Vehicle Registration Act.[36] Section 60-164 of the Motor Vehicle Certificate of Title Act[37] establishes an electronic

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[33] 1985 Neb. Laws, L.B. 7, § 19.

[34] Pub. L. No. 98-378, § 3, 98 Stat. 1305.

[35] Floor Debate, L.B. 7, 89th Leg., 2d Spec. Sess. 881 (Nov. 12, 1985). See Judiciary Committee Hearing, L.B. 7, 89th Leg., 2d Spec. Sess. 32 (Oct. 24, 1985).

[36] Neb. Rev. Stat. §§ 60-301 through 60-3,222 (Reissue 2010, Cum. Supp. 2016 & Supp. 2017).

[37] Neb. Rev. Stat. §§ 60-101 through 60-197 (Reissue 2010, Cum. Supp. 2016 & Supp. 2017).

title and lien system for various vehicles, to be maintained by the county treasurer and continuously updated. Liens recorded under this system are generally given priority in accordance with the order of time in which they are noted by the county treasurer or Department of Motor Vehicles.[38] This system has little in common with the recordkeeping of the clerk of the court for appearance bond deposits.

Although providing redress for unpaid child support addresses very important public policy concerns, the attachment of a judgment lien to money deposited with the clerk of the court has other public policy implications as well. It is not the role of this court to weigh such public policy matters,[39] and these public policy questions were not weighed by the Legislature when it enacted L.B. 7. Further, we have not been asked to review whether other child support collection remedies are available to reach a child support debtor's appearance bond. Our decision is confined to the application of § 42-371 to the garnishment action here presented.

[12] Several other jurisdictions' statutory schemes that allow child support liens to attach to money, in bank accounts or elsewhere, do so explicitly.[40] Our Legislature could have similarly so provided. But, instead, it limited the lien to "registered personal property." While "registered personal property" may be susceptible to more than one meaning, viewing § 42-371 in pari materia with related statutes and looking at its Legislative history, we must understand "registered" in its narrower sense. We hold that under the current statutory scheme for bail,[41]

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[38] See § 60-164(3).

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

[40] See, e.g., Haw. Rev. Stat. § 576D-10.5 (2006); 305 Ill. Comp. Stat. Ann. 5/10-25.5 (LexisNexis 1999); Mass. Gen. Laws Ann., ch. 119A, §§ 6(b)(1) and (5) (West 2017); 23 Pa. Stat. and Cons. Stat. Ann. § 4308.1 (West 2018); Tex. Fam. Code Ann. § 157.317 (West 2014).

[41] See §§ 29-901 through 29-910.

money deposited as recognizance with the clerk of the court is not personal property registered with a county office under § 42-371.

Children's needs call for effective and efficient enforcement of child support obligations. This can easily occur where those seeking the enforcement of child support obligations diligently check bail records against child support judgments, and take prompt action. If a criminal case defendant has posted bond money which is not subject to an assignment or its equivalent to another, a routine garnishment can capture the funds upon release.

[13,14] If the Legislature believes that we have not correctly ascertained its intent, then it is free to amend § 42-371 accordingly. With respect to questions about a statute, our role is limited to interpretation and application of statutes, irrespective of our personal agreement or disagreement with a particular legislative enactment, so long as a questioned statute does not violate a constitutional requirement.[42] Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute.[43]

CONCLUSION

Because the bond deposit was not "registered personal property," we reverse the judgment of the district court and remand the cause with directions to vacate the order of garnishment.

Reversed and remanded with directions.

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[42] *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985).

[43] *Id.*

Cassel, J., concurring.

I write separately to highlight that other language of the existing statute supports this court's decision. The parties attributed no significance to the statutory phrase "as in other

actions,"[1] but basic principles of statutory construction dictate otherwise. 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.[2] The whole and every part of a statute must be considered in fixing the meaning of any of its parts.[3]

The controlling subsection states: "All judgments and orders for payment of money *shall be liens, as in other actions, upon* real property and *any personal property registered with any county office* and may be enforced or collected by execution and the means authorized for collection of money judgments."[4] In answering the question posed by this appeal, the meaning of "as in other actions" is just as significant as any other word or phrase. And this phrase directs attention both to other statutes and to preexisting case law.

Prior to a 1985 amendment made in response to a federal mandate, § 42-371(1) stated, in pertinent part: "All judgments and orders for payment of money under sections 42-347 to 42-379 *shall be liens upon property as in other actions* and may be enforced or collected by execution and the means authorized for collection of money judgments."[5] The Legislature fully comprehended the effect of these words.

The general statute governing the effect of a judgment lien has not changed since long before the 1943 recodification.[6] It was well understood that a judgment became a lien upon a debtor's lands and tenements within the county on the day the judgment was rendered.[7] This flows from the language of the general statute, which states:

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[1] Neb. Rev. Stat. § 42-371(1) (Reissue 2016).

[2] *Heiden v. Norris*, 300 Neb. 171, 912 N.W.2d 758 (2018).

[3] *Id.*

[4] § 42-371(1) (emphasis supplied).

[5] § 42-371(1) (Reissue 1984) (emphasis supplied).

[6] See Neb. Rev. Stat. § 25-1504 (Reissue 2016).

[7] See *State Bank v. Carson*, 4 Neb. 498 (1876).

> The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution; *Provided,* that a judgment shall be considered as rendered when such judgment has been entered on the judgment record.[8]

It was equally well understood that money judgments did not become a lien upon personal property until it was "seized in execution."[9] This court required only a bare statutory citation to declare that a plaintiff had no lien against funds being held by a court merely because of a money judgment against the defendant.[10]

Before the 1985 amendment to § 42-371, this court recognized that the "lien of a judgment for child support . . . constitutes a lien the same as other monetary judgments."[11] As early as 1894, the court recognized that judgments for alimony were "made liens upon property the same as judgments in actions at law, and their collection is enforceable in the same manner as other judgments."[12]

It was in the light of this history that the Legislature complied with the federal mandate to enforce child support against personal property. The legislative history this court cites articulated that understanding.

The parties have not cited nor have I found any other statute applying a judgment lien to personal property before

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[8] § 25-1504.

[9] *Credit Bureau of Broken Bow, Inc. v. Moninger*, 204 Neb. 679, 284 N.W.2d 855 (1979).

[10] See *Ceres Fertilizer, Inc. v. Beekman*, 209 Neb. 447, 308 N.W.2d 347 (1981).

[11] *Action Realty Co., Inc. v. Miller*, 191 Neb. 381, 385, 215 N.W.2d 629, 632 (1974).

[12] *Nygren v. Nygren*, 42 Neb. 408, 411, 60 N.W. 885, 886 (1894).

levy of execution or garnishment. When the Legislature added the provision for a child support judgment lien against "any personal property registered with any county office,"[13] it did so understanding that in other actions, no judgment lien attached to personal property until levy of execution or garnishment.

The 1985 amendment made perfect sense regarding motor vehicles or mobile homes, which have certificates of title. And even in those two instances, the statute does not impose a lien *automatically*, as the State asserts occurred here against the bail deposit. Instead, a child support judgment lien attaches to motor vehicles or mobile homes "upon notation of the lien against the . . . certificate of title."[14] And by reference to another statute, the child support lien statute dictates that such liens on motor vehicles or mobile homes "take priority according to the order of time in which the same are noted by the county treasurer or department."[15] This follows the first-in-time principle of judgment liens attaching to real estate.[16]

As this court's opinion recognizes, child support obligations can be collected from bail deposits under existing law. The 1985 Legislature acted carefully and deliberately in striking a balance by allowing enforcement of judgments against bail deposits by execution or garnishment having priority as of the date of levy.

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[13] § 42-371(1) (Reissue 2016).

[14] § 42-371(9).

[15] See Neb. Rev. Stat. § 60-164(3) (Supp. 2017).

[16] See *Pontiac Improvement Co. v. Leisy*, 144 Neb. 705, 14 N.W.2d 384 (1944).

Edgar Cruz, as father and next friend of Hazel N. Cruz, a minor child, appellant, v. Carlos J. Lopez et al., appellees.

919 N.W.2d 479

Filed November 9, 2018. No. S-17-1240.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
4. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
5. **Summary Judgment.** The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; only disputes over facts that under the governing law might affect the outcome of the suit will properly preclude the entry of summary judgment.
6. **Employer and Employee: Negligence: Liability.** Under the doctrine of respondeat superior, an employer is held vicariously liable to third persons for the employee's negligence in the course of the employer's business.
7. **Negligence: Liability: Contractors and Subcontractors.** One who employs an independent contractor is generally not liable for physical

harm caused to another by the acts or omissions of the contractor or its servants.

8. **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.
9. **Negligence: Liability: Contractors and Subcontractors.** An employer of an independent contractor can be liable for physical harm caused to another if (1) the employer retains control over the contractor's work, (2) the employer is in possession and control of premises where the injury occurred, (3) a statute or rule imposes a specific duty on the employer, or (4) the contractor's work involves special risks or dangers.
10. **Negligence: Liability: Contractors and Subcontractors: Words and Phrases.** A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed.
11. **Contractors and Subcontractors: Employer and Employee: Liability.** To fall within the control exception to the general rule of nonliability, the general contractor's involvement in overseeing the work must be substantial. Furthermore, that control must directly relate to the work that caused the injury.
12. ____: ____: ____. To impose liability on a property owner or general contractor for injury to an independent contractor's employee based upon the owner's retained control over the work, the owner or general contractor must have (1) supervised the work that caused the injury, (2) actual or constructive knowledge of the danger that ultimately caused the injury, and (3) the opportunity to prevent the injury.
13. **Contractors and Subcontractors: Independent Contractor.** In examining the right of control in an employment relationship with that of an independent contractor, it is important to distinguish control over the means and methods of the assignment from control over the end product of the work to be performed. Control over the work sufficient to impose liability on a general contractor or owner must manifest in an ability to dictate the way the work is performed, and not merely include powers such as a general right to start and stop work, inspect progress, or make suggestions that need not be followed.
14. **Contracts: Contractors and Subcontractors.** In examining whether an owner or a general contractor exercises control over the work, both the language of any applicable contract and the actual practice of the parties should be examined.

15. **Contracts: Liability.** As a rule, in a contract, general language requiring compliance with government regulations does not establish vicarious liability.
16. **Negligence: Words and Phrases.** A special risk is one that is different from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community.
17. **Negligence: Independent Contractor: Contractors and Subcontractors: Motor Vehicles: Presumptions.** The risks attendant to the operation of a vehicle are precisely the risks that the employer of an independent contractor is justified in presuming that the contractor will act to avoid.
18. **Employer and Employee: Contractors and Subcontractors: Motor Carriers.** Under the plain language of "employee" and "employer," a registered motor carrier that is also an employer of the drivers of its commercial motor vehicles cannot at the same time be the statutory employee of another motor carrier acting as a general contractor for a particular job.

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

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellant.

Robert S. Keith and Alexis M. Wright, of Engles, Ketcham, Olson & Keith, P.C., for appellee Werner Construction, Inc.

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

Freudenberg, J.

I. NATURE OF CASE

The employee of a registered motor carrier caused an accident while returning the motor carrier's truck after delivering the last load of the day under a contract between the motor carrier and a general contractor, also a registered motor carrier, to haul away construction debris. The injured party's representative sued the driver, the motor carrier who employed the driver, and the general contractor. The court granted summary

judgment for the general contractor. At issue is whether, viewing the evidence in a light most favorable to the plaintiff, our statutory scheme regulating intrastate motor carriers imputes an employer-employee relationship between the general contractor and the subcontracting motor carrier's employee for purposes of vicarious liability under respondeat superior. Also at issue is whether the general contractor could be held liable under one of the recognized common-law exceptions to a general contractor's nonliability for the acts or omissions of an independent contractor.

II. BACKGROUND

On June 7, 2012, Hazel N. Cruz, a minor child, was injured in an automobile accident caused by Lyle J. Carman. Carman was an employee of Lopez Trucking and, at the time of the accident, was driving a dump truck owned by Carlos J. Lopez, doing business as Lopez Trucking. Testing conducted following the accident revealed that Carman was operating his vehicle under the influence of the controlled substances amphetamine and methamphetamine.

Edgar Cruz, as father and next friend of Hazel, sued Carman for negligence, seeking recovery of medical expenses. Cruz joined Lopez, as the sole owner of Lopez Trucking, on the theory of imputed liability as Carman's employer, alleging that "[a]t all times relevant hereto, Carman was driving the . . . dump truck on June 7, 2012, in the course of his employment and with the permission of Lopez."

Cruz also joined Werner Construction, Inc. (Werner), the general contractor for a project that Lopez Trucking had been contracted to do hauling work for. On the day of the accident, Carman had been hauling debris away from the construction site pursuant to Lopez Trucking's oral agreement with Werner, but he had delivered his last load for the day and was returning the truck to where Lopez directed him to park it for the night. Cruz sued Werner on the theories that Werner was in complete and exclusive control over the vehicle Carman was driving or

that Carman was Werner's "'statutory employee'" pursuant to Neb. Rev. Stat. § 75-363 (Cum. Supp. 2012). Cruz alleged that Werner was negligent in failing to follow safety rules to determine Carman's qualifications and whether he was drug free, in compliance with Werner's drug-free workforce policy and federal regulations, as well as in failing to ensure that Lopez Trucking had Carman submit to a preemployment drug test. Cruz did not allege that the accident occurred on premises over which Werner had control.

Werner denied liability for the accident and moved for summary judgment. The evidence presented at the summary judgment hearing was largely undisputed. When the accident occurred, Carman was driving a dump truck categorized as a commercial motor vehicle owned by Lopez, doing business as Lopez Trucking. Lopez Trucking possessed and was operating under a U.S. Department of Transportation (DOT) motor carrier identification number. The Federal Motor Carrier Safety Administration found Lopez Trucking to be in violation of 49 C.F.R. § 382.305 (2011) of the Federal Motor Carrier Safety Regulations, which requires employers to implement a random controlled substances and alcohol testing program for their employees. Lopez Trucking was fined for the violation.

As alleged in Cruz' complaint and admitted by Werner, Carman was an employee of Lopez Trucking. He was paid an hourly wage by Lopez Trucking, which withheld taxes and provided Carman with workers' compensation insurance.

Lopez Trucking had been hired by Werner to haul debris from a construction site located on Interstate 80, for what was referred to as the "I-80 Air Park West Junction US-77 Project" (Air Park project). Lopez, Carman, and another driver who worked for Lopez Trucking drove Lopez Trucking dump trucks for the hauling job at the Air Park project.

Werner is also a registered commercial motor carrier with a DOT number. The Federal Motor Carrier Safety Administration did not conduct an investigation of Werner in relation to the accident.

1. Unsigned Lease Agreement

Cruz entered into evidence a lease agreement which listed Werner as lessor and Lopez as lessee, but the agreement was dated approximately 1 year before Lopez Trucking worked on the Air Park project. Further, it was signed only by Werner's president, not by Lopez. Lopez testified that he had never seen the agreement.

The agreement stated that Werner was leasing a dump truck for hauling on its construction projects. It specified the hourly rate, that Lopez would not be allowed to purchase fuel at the asphalt plant, that he would be required to fully fill out one "Lease Driver Report" per day, that Lopez must have at least $1 million in liability insurance, that Lopez would use and possess the equipment in compliance with all applicable laws, that Lopez would permit the equipment to be operated only by persons experienced in the use and operation thereof, and that he would not permit any insignia, lettering, safety warnings, or instructions on the equipment to be removed or defaced. An indemnification provision in the agreement provided that Lopez would assume the entire responsibility and liability for damages or injury to all persons and property connected with the use or care of the leased equipment.

2. Testimony of Lopez

Lopez testified that he had an oral agreement with Werner for work at the Air Park project and that it was not a lease agreement. He admitted, however, that the unsigned lease agreement accurately reflected their oral agreement with respect to the hourly rate and the requirement that Lopez Trucking obtain a liability policy of not less than $1 million. Lopez explained that this hourly rate compensated him for the maintenance and fuel for his dump trucks, which were entirely the responsibility of Lopez Trucking.

Lopez elaborated that the job at the Air Park project involved hauling millings from the construction site to a plant in Milford, Nebraska. Lopez testified that at the end of each

day, Werner's foreman for the Air Park project would let him know how many trucks to deliver to the jobsite the next day. Werner's supervisor at the milling machine would also tell Lopez each day when Lopez' trucks were no longer needed. No one directed Lopez as to the specific route he must take in driving between the construction site and the Milford plant.

Furthermore, Lopez explained that he was under no obligation to haul for Werner on any given day, or to haul a minimum number of loads, and Lopez was free to dictate his own schedule and that of his employees. Each day Lopez told Carman what to do, where to go, and when to do it. At no time was Carman, Lopez, or Lopez Trucking authorized by Werner to operate under Werner's DOT number.

3. Testimony of Werner's Project Manager, Julie Budnick

Julie Budnick, Werner's project manager, described that usually when Werner contracted with Lopez Trucking or similar contracts, it needed the trucks to supplement Werner's fleet only for short periods of time. There were no written agreements in such situations. Budnick testified that Werner would call and tell the trucking company that Werner "need[s] a couple of trucks" and that "then they are free to do whatever they want to do."

She explained that "these trucks have no obligation to work for us." Such trucks do not "want to necessarily commit"; "they want to go anywhere they want to go for the highest pay they can get." Lopez had worked for Werner in this capacity on other jobs in the past.

Budnick testified that on jobs like the Air Park project where they call in a few extra trucks, Werner does not need to tell the drivers what to do when they arrive. "They all just get in line, back up to the mill . . . get a load, drive it out, dump it, drive back, get a second load. Take a circle, drive, dump those millings, come back." She said, "They don't have to be told anything, but that, you know, when they get to the end, they're

done, go home or — or leave, we don't need you anymore for today."

At one point, Budnick was handed a copy of the unsigned lease agreement and answered in the affirmative that it was the lease agreement that Werner had with Lopez. But she later explained that she did not believe the lease agreement applied to Lopez, because it was authored for situations where drivers are using Werner's equipment. Budnick indicated that the lease agreement was used only when other truckers were pulling Werner trailers. She said that the lease agreement presented to her "doesn't even apply because we're not ren- — we're not controlling, we're not using his equipment at all, he's not using our equipment." Budnick testified that Lopez "controls his own equipment, he maintains it, he fuels it, insures it. He can just come and go as he pleases."

Under the bid proposal for the Air Park project, Werner had agreed to comply with all applicable federal, state, and local laws governing safety, health, and sanitation; provide all safeguards, safety devices, and protective equipment; and take any other needed actions that Werner or the state highway administration's contracting officer may determine to be reasonably necessary in connection with the performance of work covered by the contract to protect property, the life and health of employees on the job, and the safety of the public. Budnick testified that Werner had a drug testing policy, but that such policy would not have been applicable to Carman, because he was not Werner's employee.

4. Testimony of Carman

Carman testified that at the beginning of each day, he received instructions from Lopez regarding the work to be performed. Beginning on May 29, 2012, and continuing until the day of the accident, Carman had been directed to haul debris from the Air Park project.

Carmen would pick up Lopez Trucking's truck at a truckstop, go to the construction site, and then travel between the

construction site and the Milford plant until he was done for the day. Carman would then return the truck to the truckstop. Carman also fueled the truck at the truckstop under Lopez Trucking's account.

Carmen testified that while working on the Air Park project, he continued to receive his instructions from Lopez. He could not recall any representatives from Werner telling him what to do.

Carman kept track of the hours he worked for Lopez Trucking in a calendar that he kept in the truck. Additionally, during his final load at the end of each day, or sometimes the following morning, Carman would give a Werner employee his "unload sheet." The sheets are found in the record and are entitled "Werner Construction Lease Driver Report[s]."

The forms appear to require the date, name of the trucking company, beginning time, ending time, truck number, trailer number, load time, unload time, starting location, ending location, material hauled, load or ticket number, delays encountered, Werner fuel added, Werner oil added, other Werner-owned purchases, the driver's signature, and the signature of the foreman or plant manager. However, Carman filled out only the date, "Carlos Lopez" as the trucking company, the truck number, the beginning and ending time, the starting and ending location, and the material hauled. These were signed by Carman and Werner's plant manager.

The ending location listed in the driver reports was always the Milford plant. At the time of the accident, the truck Carman was driving had already made its last run to the Milford plant to unload the millings. Carlos was driving the empty truck back to the truckstop to park it for the evening.

5. Order of Summary Judgment

The court granted Werner's motion for summary judgment on the ground that it had not breached any duty in relation to the accident.

The court found the evidence undisputed that Lopez Trucking had an independent contractor agreement with Werner to provide trucking services but did not lease its dump truck to Werner. The court considered the 10 factors distinguishing an employment relationship from that of an independent contractor[1] and concluded that "while a couple of the factors may auger in favor of [Cruz'] claim given the standard of review, the facts overwhelming[ly] establish support [for] the finding [of] an independent contractor status in this case."

The court concluded, further, that under the Federal Motor Carrier Safety Regulations adopted by § 75-363, there was no material issue of fact that Lopez Trucking, rather than Werner, was operating as the motor carrier with respect to Carman and that Lopez Trucking, not Werner, was the employer of Carman.

Finally, viewing the evidence in a light most favorable to Cruz, the court found no evidence that would support the conclusion that Werner had exercised substantial control over Lopez Trucking's work or that the accident involved the breach of any nondelegable duty. Thus, Cruz had failed to demonstrate a genuine issue that Werner was vicariously liable for Carman's negligence under exceptions to the general rule that a general contractor is not liable for the negligence of an independent contractor.

Cruz' complaint as to Werner was dismissed. Subsequently, Cruz moved for summary judgment against Lopez and Carman, which the court granted, noting that there were no further issues remaining before the court. On appeal from the judgment, Cruz appeals the order of summary judgment in favor of Werner.

III. ASSIGNMENTS OF ERROR

Cruz assigns, consolidated and restated, that the district court erred in granting summary judgment in favor of Werner

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[1] See, e.g., *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

on the ground that there was no material issue of fact that (1) Carman was not a "common law employee" of Werner, (2) Carman was not a statutory employee of Werner pursuant to the Federal Motor Carrier Safety Regulations, and (3) Werner did not breach a nondelegable duty to Cruz.

IV. STANDARD OF REVIEW

[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, giving that party the benefit of all reasonable inferences deducible from the evidence.[2]

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

V. ANALYSIS

[3] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.[4] Cruz alleged in his complaint and asserts on appeal that Werner was negligent in failing to ensure that Carman was subjected to preemployment drug testing consistent with 49 C.F.R. § 382.301 (2011). Summary judgment was granted in favor of Werner on the ground that Werner did not have a duty to ensure that Lopez Trucking's employees were drug free.

[4,5] We agree that there was no material issue of fact preventing summary judgment in favor of Werner on the ground that Werner did not breach any duty relating to Carman's negligence that caused the accident. The question whether a legal duty exists for actionable negligence is a question

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[2] *Christensen v. Gale, ante* p. 19, 917 N.W.2d 145 (2018).

[3] *Id.*

[4] *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014).

of law dependent on the facts in a particular situation.[5] The mere existence of some alleged factual dispute between the parties, however, will not defeat an otherwise properly supported motion for summary judgment[6]; only disputes over facts that under the governing law might affect the outcome of the suit will properly preclude the entry of summary judgment.[7]

[6,7] Under the doctrine of respondeat superior, an employer is held vicariously liable to third persons for the employee's negligence in the course of the employer's business.[8] Conversely, one who employs an independent contractor is generally not liable for physical harm caused to another by the acts or omissions of the contractor or its servants.[9] This is because an employer of an independent contractor generally has no control over the manner in which the work is to be done by the contractor, so the contractor, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk and bearing and distributing it.[10]

Cruz argues, albeit somewhat vaguely, that Carman had an employee relationship with Werner rather than the relationship of an independent contractor. Cruz relies more on an argument that one of the exceptions to a general contractor's nonliability for the acts or omissions of an independent contractor applies. Alternatively, Cruz argues that our statutory scheme

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[5] *Id.*

[6] *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992).

[7] *Id.*

[8] See *Rodriguez v. Catholic Health Initiatives*, 297 Neb. 1, 899 N.W.2d 227 (2017).

[9] See, *Rodriguez v. Surgical Assocs.*, 298 Neb. 573, 905 N.W.2d 247 (2018); *Gaytan v. Wal-Mart, supra* note 4; *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007).

[10] *Rodriguez v. Surgical Assocs., supra* note 9; *Gaytan v. Wal-Mart, supra* note 4.

regulating intrastate motor carriers[11] imputes an employer-employee relationship between Werner and Carman for purposes of vicarious liability under respondeat superior.

1. Employee Versus Independent Contractor

We first address whether there was a common-law employment relationship. Cruz does not clearly argue how, under the 10 factors for determining whether one performs services for another as an employee or as an independent contractor,[12] he presented a material issue of fact that Carman was Werner's employee. Those factors are (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.[13]

[8] 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.[14] We find that under the facts presented,

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[11] See Neb. Rev. Stat. §§ 75-362 to 75-369.07 (Reissue 2009 & Cum. Supp. 2012).

[12] See *Mays v. Midnite Dreams, supra* note 1.

[13] *Id.*

[14] *Id.*

the question whether Carman was an employee of Werner was properly determined as a matter of law.

Cruz points to the district court's language that "a couple of the factors may auger in favor of [Cruz'] claim given the standard of review" and argues that the district court thus indicated it was inappropriately making a factual determination on summary judgment. Whether the court did so does not affect the outcome of this appeal, because the question whether he presented a material issue of fact is a question that we determine independently of the court below.[15] The grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.[16]

In any event, though the language used by the district court was not ideal, it was meant to convey that, viewing the evidence in a light most favorable to Cruz, he demonstrated only "a couple" of the 10 factors could possibly weigh in favor of an employer-employee relationship. Even considering those "couple" of factors, the court concluded that the clear overall inference was that Carman was not Werner's employee.

We agree. Most of the factors are simply not a good fit for an analysis of whether the negligent party, undisputedly an employee of another employer, was somehow at the same time an employee of the general contractor. For example, Carman was paid hourly, but he was paid by Lopez Trucking, not by Werner. Carman was an employee, but the relevant question is whether he was Werner's employee. Cruz did not allege that Carman was a borrowed servant.[17]

With this in mind, the factors overwhelmingly demonstrate the relationship of an independent contractor. Werner did not supply the instrumentalities for the work, the "job" was for a limited length of time, and the parties did not believe they were

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[15] See *Farmland Serv. Co-op v. Southern Hills Ranch*, 266 Neb. 382, 665 N.W.2d 641 (2003).

[16] *Olson v. Wrenshall*, 284 Neb. 445, 822 N.W.2d 336 (2012).

[17] See, e.g., *Barton v. Hobbs*, 181 Neb. 763, 151 N.W.2d 331 (1967).

creating an agency relationship. The only factor that could under these circumstances indicate an employer-employee relationship is control. As will be explained further below, even viewing the evidence in a light most favorable to Cruz, the level of control demonstrated by Cruz would be insufficient to establish vicarious liability.

2. Exceptions to Nonliability for Independent Contractor's Negligence

[9,10] Cruz argues that he presented a material issue of fact concerning the applicability of one of the exceptions to the general contractor's nonliability for the negligence of its independent contractors. Our case law has recognized four exceptions to the general rule that one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or its servants.[18] Specifically, we have held that an employer of an independent contractor can be liable for physical harm caused to another if (1) the employer retains control over the contractor's work, (2) the employer is in possession and control of premises where the injury occurred, (3) a statute or rule imposes a specific duty on the employer, or (4) the contractor's work involves special risks or dangers.[19] We often refer to the latter three exceptions as involving "nondelegable" duties.[20] A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed.[21]

(a) Control of Relevant Work

[11,12] Cruz primarily argues that the first exception applies; i.e., that Werner had control over the relevant work and is

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[18] *Gaytan v. Wal-Mart, supra* note 4.

[19] See, *id.*; *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006).

[20] *Gaytan v. Wal-Mart, supra* note 4.

[21] *Id.*

therefore liable for a failure to exercise reasonable care in the use of that control.[22] To fall within this exception to the general rule of nonliability, the general contractor's involvement in overseeing the work must be substantial.[23] Furthermore, that control must directly relate to the work that caused the injury.[24] In other words, the key element of control must exist with respect to the very thing from which the injury arose.[25] To impose liability on a property owner or general contractor for injury to an independent contractor's employee based upon the owner's retained control over the work, the owner or general contractor must have (1) supervised the work that caused the injury, (2) actual or constructive knowledge of the danger that ultimately caused the injury, and (3) the opportunity to prevent the injury.[26]

[13] In examining the right of control in an employment relationship with that of an independent contractor, it is important to distinguish control over the means and methods of the assignment from control over the end product of the work to be performed.[27] Control over the work sufficient to impose liability on a general contractor or owner must manifest in an ability to dictate the way the work is performed, and not merely include powers such as a general right to start and stop work, inspect progress, or make suggestions that need not be followed.[28]

[14] In examining whether an owner or a general contractor exercises control over the work, both the language of any applicable contract and the actual practice of the parties should

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[22] See *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997).

[23] See *Gaytan v. Wal-Mart, supra* note 4.

[24] See *id*.

[25] *Cutlip v. Lucky Stores*, 22 Md. App. 673, 325 A.2d 432 (1974).

[26] See *Gaytan v. Wal-Mart, supra* note 4.

[27] See, *Harris v. Velichkov*, 860 F. Supp. 2d 970 (D. Neb. 2012); *Gaytan v. Walmart, supra* note 4.

[28] *Gaytan v. Wal-Mart, supra* note 4.

be examined.[29] Cruz points to the provisions of the lease agreement whereby (1) Werner agreed to pay Lopez by the hour, (2) Lopez was prohibited from purchasing fuel at the asphalt plant, (3) Lopez' drivers were required to turn in one "Lease Driver Report" per day, (4) Werner agreed to use and possess the truck in compliance with all applicable laws, and (5) Werner was to return the truck to Lopez at the end of the lease. Further, Cruz relies on the acts of Werner agents in (1) determining what days Lopez' trucks were to report to work, (2) directing that the trucks were to report to work at the milling machine site, (3) directing the trucks to haul the milling to the asphalt plant, and (4) requiring a "Lease Driver Report" to be turned in for each day of hauling.

Even viewing the evidence in a light most favorable to Cruz and assuming that the lease agreement, unsigned by Lopez, evidences some of the terms of the parties' oral agreement, the control in their agreement and the parties' actual practice is insufficient as a matter of law to establish the requisite substantial control over Lopez Trucking and Carman's work. It was undisputed that Werner never had possession of Lopez Trucking's dump truck that was driven by Carman. Furthermore, the evidence was undisputed that Lopez Trucking and its employees were under no obligation to haul on any given day or to haul a specific number of loads. Lopez Trucking and Carman were not told by Werner to haul at a specific time other than to inform them when they were no longer needed for the day. The process of picking up loads and dumping them was largely self-explanatory. Werner's control concerned the end product of hauling debris from the construction site to the Milford plant. Werner did not otherwise control Lopez Trucking's drivers' means and methods. Werner did not tell Lopez Trucking or its drivers what route to take in reaching the construction site or the Milford plant.

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[29] *Id.*

[15] Furthermore, the evidence presented failed to create an issue of fact that any control by Werner extended to the very thing from which the injury arose.[30] The evidence was undisputed that Werner did not participate in the decision to hire Carman and did not control whether Lopez Trucking's drivers were tested for drugs. Cruz presented no evidence that Werner's employees should have observed Carman's impaired driving. The only indication of any control pertinent to the accident is the provision of the unsigned lease that Lopez Trucking would use and possess the equipment in compliance with all applicable laws. Leaving aside that this referred to Werner's equipment and not Lopez Trucking's, as a rule, such general language requiring compliance with government regulations does not establish vicarious liability.[31]

Viewing the evidence in the light most favorable to Cruz and giving him the benefit of all reasonable inferences deducible from the evidence, Cruz did not demonstrate substantial control over the work that caused the injury. Thus, as a matter of law, Werner was not liable for the negligence of Lopez Trucking or Carman under the control-over-the-work exception to the general rule that an employer of an independent contractor can be vicariously liable for physical harm caused to another.

(b) Nondelegable Duty

Cruz also asserts that Werner had a "nondelegable contractual duty pursuant to the awarded contract" to conduct a drug test on Carman.[32] Cruz does not argue under the nondelegable duties heretofore recognized by this court that (1) Werner

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[30] *Cutlip v. Lucky Stores, supra* note 25.

[31] See, e.g., *North American Van Lines, Inc. v. N.L.R.B.*, 869 F.2d 596 (D.C. Cir. 1989); *Howarton v. Minnesota Mining and Mfg., Inc.*, 133 S.W.3d 820 (Tex. App. 2004); *Vega v. Griffiths Const., Inc.*, 172 Ariz. 46, 833 P.2d 717 (Ariz. App. 1992).

[32] Brief for appellant at 11.

was in possession and control of premises where the injury occurred, (2) Werner breached a specific duty imposed by a statute or rule, or (3) Carman's work involved special risks or dangers.[33]

Instead, Cruz again points out that Werner agreed in its bid proposal for the Air Park project that Werner would comply with all applicable federal, state, and local laws governing safety, health, and sanitation; provide all safeguards, safety devices, and protective equipment; and take any other needed actions reasonably necessary to protect the life and health of employees on the job and the safety of the public in connection with the performance of the work covered by the project. Cruz does not cite to any law establishing that contractual obligations somehow create nondelegable duties as to all the things agreed to in the contract. We can find no support for such a proposition and find it to be without merit.

Cruz relies on *Parrish v. Omaha Pub. Power Dist*,[34] apparently as part of the contract argument. However, the facts of that case are inapposite. *Parrish* involved the death of a subcontractor's employee after a fall from the building where the construction work was being performed. We held that if the owner of the premises maintained possession and control of the construction site and the general contractor assumed a contractual duty for the safety of workers at that construction site, then both the owner and the general contractor had a nondelegable duty to use reasonable care to keep the premises in a safe condition for the subcontractor's employees or other invitees to work while the contract is in the course of performance.[35] Cruz did not allege in his complaint, nor did he present sufficient evidence to establish, an issue of fact that

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[33] See *Gaytan v. Wal-Mart, supra* note 4.

[34] *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993), *disapproved, Gaytan v. Wal-Mart, supra* note 4.

[35] See *id.* See, also, *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972).

the accident occurred on premises over which Werner maintained possession and control.

[16] Finally, Cruz suggests that the empty dump truck being driven by Carman at the time of the accident presented a special risk or danger. We find no merit to that suggestion. A special risk is one that is different from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community.[36] It must involve some special hazard resulting from the nature of the work done.[37] We have long held that operating motor vehicles is not an inherently dangerous activity.[38] And, in *Kime v. Hobbs*,[39] we held that the transportation of cattle in a tractor-livestock trailer was not an inherently dangerous activity such that it imposes a nondelegable duty on the employer of an independent contractor. In doing so, we observed that only in special circumstances have courts held that the operation of a "loaded truck" presented a peculiar risk so as to impose a nondelegable duty.[40]

[17] The dump truck Carman was driving was empty. The truck driven by Carman thus presented even less of a special hazard than the loaded trailer at issue in *Kime*. It is not distinguishable in a way that could lead this court to a different conclusion as to whether it presented a peculiar risk. Without diminishing the gravity of the underlying negligence, the risk that a driver could be impaired is, in a legal sense, an "ordinary" risk attendant to the operation of a motor vehicle. As we stated in *Kime*, the risks attendant to the operation of a vehicle are precisely the "risks that the employer of an

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[36] See *Kime v. Hobbs, supra* note 22.

[37] See *id.*

[38] See, *Bridgeford v. U-Haul Co.*, 195 Neb. 308, 238 N.W.2d 443 (1976); *Christensen v. Rogers*, 172 Neb. 31, 108 N.W.2d 389 (1961).

[39] See *Kime v. Hobbs, supra* note 22.

[40] See *id.* at 417, 562 N.W.2d at 713, citing, e.g., *Ek v. Herrington*, 939 F.2d 839 (9th Cir. 1991) (holding that transportation of logs did not generally pose peculiar risk of harm).

independent contractor is justified in presuming that the contractor will act to avoid."[41] We conclude that the evidence failed to present a material issue of fact concerning a breach of a nondelegable duty.

3. Statutory Employee Under Federal Motor Carrier Safety Regulations

Finally, we turn to Cruz' argument that Carman was a statutory employee under the regulatory scheme governing intrastate commerce. Through § 75-363, the Nebraska Legislature adopted several parts of the Federal Motor Carrier Safety Regulations as Nebraska law, making them applicable to carriers, drivers, and vehicles to which the federal regulations apply, as well as to certain vehicles of intrastate motor carriers. The purpose of extending the regulations to certain vehicles of intrastate motor carriers was to ensure that motor carriers not falling under federal jurisdiction were nonetheless subject to regulation under state law.[42] The statutory scheme governing intrastate motor carriers was designed to

> promote uniformity of regulation, to prevent motor vehicle accidents, deaths, and injuries, to protect the public safety, to reduce redundant regulation, to promote financial responsibility on the part of all motor carriers operating in and through the state, and to foster the development, coordination, and preservation of a safe, sound, adequate, and productive motor carrier system which is vital to the economy of the state.[43]

For purposes of §§ 75-362 to 75-369.07, the definition of "[e]mployee" is:

> [A]ny individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle

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[41] *Kime v. Hobbs, supra* note 22, 252 Neb. at 418, 562 N.W.2d at 713.

[42] See *Caspers Constr. Co. v. Nebraska State Patrol*, 270 Neb. 205, 700 N.W.2d 587 (2005).

[43] Neb. Rev. Stat. § 75-301(1) (Reissue 2009).

> safety. Such term includes a driver of a commercial motor vehicle, including an independent contractor while in the course of operating a commercial motor vehicle, a mechanic, and a freight handler.[44]

An "[e]mployer" is defined as "any person engaged in a business affecting commerce who owns or leases a commercial motor vehicle in connection with that business or assigns employees to operate it."[45] "Motor carrier" is defined as

> a for-hire motor carrier or a private motor carrier. The term includes a motor carrier's agents, officers, and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment or accessories. This definition includes the terms employer and exempt motor carrier.[46]

These definitions are identical to the definitions found in the Federal Motor Carrier Safety Regulations, 49 C.F.R. § 390.5 (2011).

For certain motor carriers operating in intrastate commerce, § 75-363, at the time of the accident, adopted parts 382, 385 through 387, 390 through 393, and 395 through 398 of title 49 of the Code of Federal Regulations in existence as of January 1, 2012.[47] There is no dispute that the truck involved in the accident here at issue was operated by a motor carrier governed by these sections. Both Werner and Lopez Trucking are motor carriers operating each under their own DOT numbers.

The Federal Motor Carrier Safety Regulations generally require that a commercial motor carrier operate only if registered, and such registration requires proof of financial

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[44] § 75-362(11) (now found at § 75-362(12) (Cum. Supp. 2016)).

[45] § 75-362(12) (now found at § 75-362(13) (Cum. Supp. 2016)).

[46] § 75-362(29) (now found at § 75-362(31) (Cum. Supp. 2016)).

[47] See § 75-363(1) and (3)(a) through (l).

responsibility in order to ensure collectability of a judgment against the motor carrier.[48] Several provisions of the regulations were specifically designed to prevent regulated motor carriers from evading the requirements of the regulatory scheme through lease agreements nominally designating as independent contractors owners/drivers who were underinsured and unregulated.[49] These regulations protect the public and provide financial responsibility for motor carrier accidents by creating a legal right and duty to control leased vehicles operated for the regulated motor carrier's benefit as if they were the owners of such vehicles.[50]

But most of these provisions preventing evasion of the regulatory scheme through use of independent contractors are found in 49 C.F.R. § 376 (2011), which the Legislature did not adopt. Specifically, 49 C.F.R. § 376.11 (2011) of the unadopted regulations states that "the authorized carrier may perform authorized transportation in equipment it does not own only under" several conditions, including that "[t]here shall be a written lease granting the use of the equipment and meeting the requirements contained in § 376.12."[51] And, 49 C.F.R. § 376.12(c)(1) (2011), in turn, requires that the lease shall be signed and provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment, and responsibility for its operation for the duration of the lease.

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[48] See, 49 U.S.C. §§ 13901 and 13906 (2012); *Harris v. Velichkov, supra* note 27.

[49] See, *American Trucking Assns. v. U.S.*, 344 U.S. 298, 73 S. Ct. 307, 97 L. Ed. 337 (1953); *Crocker v. Morales-Santana*, 854 N.W.2d 663 (N.D. 2014); *Illinois Bulk Carrier, Inc. v. Jackson*, 908 N.E.2d 248 (Ind. App. 2009).

[50] See, 49 U.S.C. § 14102(a)(4) (2012); *Tamez v. Southwestern Motor Transport, Inc.*, 155 S.W.3d 564 (Tex. App. 2004); *Crocker v. Morales-Santana, supra* note 49.

[51] 49 C.F.R. § 376.11(a).

Under these regulations, the holder of a highway permit is liable for the negligent operation of a motor vehicle leased from one not authorized to transport passengers or goods over the public highways, and operated under the former's permit—even though the owner of the vehicle is an independent contractor and liable for the driver's conduct.[52] Most federal courts hold that 49 C.F.R. § 376.12(c)(1) creates a rebuttable presumption of an agency relationship between the carrier-lessee and the driver.[53]

In arguing that under 49 C.F.R. §§ 350 to 399 (2011), a lessee such as Werner is vicariously liable for the driver of its "leased" vehicle, Cruz ignores the fact that these provisions are not contained in the sections adopted by § 75-363 into Nebraska law governing intrastate motor carriers. The only provisions Cruz can possibly rely upon for vicarious liability under the regulations are the definitions of employee and employer.

Before addressing those definitions, however, we note that we have never addressed the applicability of the definitions found in § 75-362 and the regulations adopted by § 75-363 to our state tort law. Neither chapter 75 of the Nebraska Revised Statutes nor the Federal Motor Carrier Safety Regulations address state tort liability. Indeed, the Interstate Commerce Commission, the predecessor to the Federal Motor Carrier Safety Administration,[54] has commented that "[t]he Commission did not intend that its leasing regulations would supersede

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[52] 8 Am. Jur. 2d *Automobiles* § 714 (2017).

[53] See, *Delaney v. Rapid Response, Inc.*, 81 F. Supp. 3d 769 (D.S.D. 2015); *UPS Ground Freight, Inc. v. Farran*, 990 F. Supp. 2d 848 (S.D. Ohio 2014); *Thomas v. Johnson Agri-Trucking*, 802 F. Supp. 2d 1242 (D. Kan. 2011); *Bays v. Summitt Trucking, LLC*, 691 F. Supp. 2d 725 (W.D. Ky. 2010). See, also, *Penn v. Virginia Intern. Terminals, Inc.*, 819 F. Supp. 514 (E.D. Va. 1993). But see, *Huggins v. FedEx Ground Package System, Inc.*, 592 F.3d 853 (8th Cir. 2010); *Zamalloa v. Hart*, 31 F.3d 911 (9th Cir. 1994).

[54] See, ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 803 (abolishing Interstate Commerce Commission); 49 U.S.C. § 113 (2012).

otherwise applicable principles of State tort, contract, and agency law and create carrier liability where none would otherwise exist. Our regulations should have no bearing on this subject. Application of State law will provide appropriate results."[55] Nevertheless, some jurisdictions hold that the regulations adopted by the state may create a statutory employee relationship between owner-lessors and authorized motor carrier lessees, which in turn may serve to establish vicarious liability under applicable state law, when the other elements of respondeat superior have been met.[56]

We need not determine in this case whether we should likewise hold that the regulatory scheme governing intrastate motor carriers is relevant to common-law concepts of respondeat superior liability in a tort action. This is because it is apparent that even if this were so there is no statutory employer-employee relationship between Werner and Carman under the definitions found in § 75-362 and the regulations adopted by § 75-363.

[18] The regulations contemplated a relationship between registered motor carriers and private truck owners/drivers who are not registered motor carriers and who lease their services to the registered motor carriers.[57] They do not impose an

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[55] *Lease and Interchange of Vehicles (Ident. Devices)*, 3 I.C.C.2d 92, 93 (1986).

[56] See, *Frederick v. Swift Transp. Co.*, 616 F.3d 1074 (10th Cir. 2010); *McHale v. Kiswani Trucking, Inc.*, 2015 IL App (1st) 132625, 39 N.E.3d 595, 396 Ill. Dec. 46 (2015); *Crocker v. Morales-Santana, supra* note 49; *Tamez v. Southwestern Motor Transport, Inc., supra* note 50. See, also, *Beavers v. Victorian*, 38 F. Supp. 3d 1260 (W.D. Okla. 2014); *Parker v. Erixon*, 123 N.C. App. 383, 473 S.E.2d 421 (1996); Patrick Phillips, Note, *Common Law Respondeat Superior Versus Federal Regulation of Motor Carrier Leases: Court Interpretation of the Interstate Commerce Commission Regulations of Motor Carrier Lease Requirements*, 24 Okla. City U.L. Rev. 383 (1999); R. Clay Porter & Elenore Cotter Klingler, *The Mythology of Logo Liability: An Analysis of Competing Paradigms of Lease Liability for Motor Carriers*, 33 Transp. L.J. 1 (2005).

[57] See Phillips, *supra* note 56.

agency relationship where the independent contractor is itself a registered motor carrier and where an employee of that motor carrier caused the accident. Under the plain language of "employee" and "employer," a registered motor carrier that is also an employer of the drivers of its commercial motor vehicles cannot at the same time be the statutory employee of another motor carrier acting as a general contractor for a particular job.[58]

Thus, in *Illinois Bulk Carrier, Inc. v. Jackson*,[59] the court held that the employee of a subcontractor that was a federally regulated motor carrier was not the statutory employee of the general contractor that was also a federally regulated motor carrier. The subcontractor in *Illinois Bulk Carrier, Inc.* operated under an oral agreement, and while the subcontractor's drivers filled out paperwork each day, they proceeded to their final destination using the route of their choice. At no time did the general contractor take possession, control, maintain, or service the subcontractor's trucks. Under these facts, the court concluded that summary judgment in favor of the subcontractor and against the injured plaintiffs seeking to impose vicarious liability was proper. The court reasoned, first, that there was no lease, because the general contractor had no right of control and never took possession of the truck involved in the accident. Second, the court concluded that under the definition in 49 C.F.R. § 390.5, an employee is an "individual," plainly meaning a human being and not a corporation or other legal person. Thus, the subcontractor, as a motor carrier, could not be an "employee" of the general contractor. Furthermore, the court observed that because the subcontractor was a motor carrier with its own DOT authorization and subject to the regulations, the circumstances were not those meant to be addressed by the statutory employee provision.[60]

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[58] *Beavers v. Victorian, supra* note 56. See, also, e.g., *Illinois Bulk Carrier, Inc. v. Jackson, supra* note 49.

[59] *Illinois Bulk Carrier, Inc. v. Jackson, supra* note 49.

[60] *Id.*

Similarly, in *Beavers v. Victorian*,[61] the court held that a motor carrier was entitled to summary judgment against the injured third party who sought to impose vicarious liability under the regulations for the negligence of the drivers of a subcontractor motor carrier operating under its own DOT registration number. A brokerage agreement between the two carriers designated the subcontractor as an independent contractor and required it to furnish all equipment needed to provide the transportation services, to maintain the equipment in good working order, employ properly licensed and trained personnel, and comply with all applicable DOT laws and regulations. While general shipment instructions were given, the subcontractor was free to determine the route to its destination. The court held that the motor carrier who brokered the agreement with the subcontractor was not an "employer," because it neither owned nor leased the motor vehicle involved in the accident, nor assigned an employee to operate it.[62] Similarly, the subcontractor could not be the broker's "employee," because it was itself an "employer" of the driver, acting under its own motor carrier authority.[63] Such legal entity did not qualify as an "individual" employee.[64]

The court in *Harris v. Velichkov*[65] also rejected a claim that a motor carrier acting in that instance as a broker was vicariously liable for the actions of the employee of a motor carrier that contracted with it to carry the goods. The court explained that it was important to "focus on the specific transaction at issue" and not whether the entity acted as a motor carrier in other situations.[66] Further, it would produce absurd results to interpret the regulations in such a way that the motor carrier acting

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[61] *Beavers v. Victorian, supra* note 56.

[62] See *id.*

[63] See *id.*

[64] See *id.*

[65] *Harris v. Velichkov, supra* note 27.

[66] *Id.* at 979.

in that instance as broker would be responsible for ensuring the maintenance of driver safety records and testing, when the driver motor carrier had no relationship with that driver other than through the independent contractor motor carrier.[67] The driver was an employee of the independent contractor motor carrier and not of the motor carrier who contracted with that independent contractor.[68]

The facts of the current case are similar to the facts held in *Illinois Bulk Carrier, Inc.*; *Beavers*; and *Harris* to be insufficient as a matter of law to establish a statutory employment relationship that could impose vicarious liability. Cruz wishes to impose liability on Werner for failing to ensure that random drug testing was conducted on Carman. But under a plain reading of the relevant terms, Lopez Trucking is not an "employee" of Werner. Leaving aside whether Lopez Trucking was even an "individual," an "employee" is defined as an individual "other than an employer."[69] And Lopez Trucking was, under the plain meaning of the applicable definitions, both an "employer" and a "motor carrier."[70]

The "motor carrier," with respect to the accident in question, was Lopez Trucking and not Werner. Carman, while an employee, was not Werner's employee. As such, Werner did not have the requisite control to ensure such that random drug testing was conducted on Carman. Werner contracted with a registered motor carrier, Lopez Trucking, which operated under its own DOT number and was subject to the regulations. Werner did not contract directly with Carman as an underinsured and unregulated individual owner/operator. We find no support for Cruz' suggestion that under the adopted regulations, Carman was Werner's statutory "employee."

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[67] See *id.*

[68] See *id.*

[69] See § 75-362(11) (now found at § 75-362(12) (Cum. Supp. 2016)).

[70] See § 75-362(12) and (29) (now found at § 75-362(13) and (31) (Cum. Supp. 2016)).

Cruz attempts to rely on interpretive guidance by the Federal Motor Carrier Safety Administration in which it stated: "The term 'employee,' as defined in § 390.5, specifically includes an independent contractor employed by a motor carrier. The existence of operating authority has no bearing upon the issue."[71] Cruz fails to note that this guidance was to clarify who is responsible for compliance with federal recordkeeping when the independent contractor is an individual owner/operator with an operating authority.[72] It does not address vicarious liability in tort, and it does not address the scenario where the contract is with a motor carrier employer and the driver in question is, under any other legal principle, an employee of that motor carrier.[73]

Viewing the evidence in a light most favorable to Cruz, we determine he cannot establish that Carman was a statutory "employee" of Werner.

VI. CONCLUSION

We find no merit to Cruz' argument that the trial court erred in granting summary judgment in favor of Werner and in dismissing Cruz' complaint as to Werner. Lopez Trucking was found liable for Carman's negligence under the doctrine of respondeat superior, and neither party disputes that result. For the foregoing reasons, we affirm the district court's order of summary judgment in favor of Werner.

Affirmed.

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[71] Regulatory Guidance for the Federal Motor Carrier Safety Regulations, 62 Fed. Reg. 16,370, 16,407 (Apr. 4, 1997).

[72] See *Beavers v. Victorian, supra* note 56.

[73] See *id.*

State of Nebraska, appellee, v. Kevin Allen, appellant.

919 N.W.2d 500

Filed November 16, 2018. No. S-17-771.

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. **Postconviction.** Postconviction relief is a very narrow category of relief.
5. **Postconviction: Proof.** In a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief
6. ____: ____. In the absence of alleged facts that would render a judgment void or voidable, the proper course is to overrule a motion for postconviction relief without an evidentiary hearing.
7. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.

8. ____: ____. Plain error cannot be asserted in a postconviction proceeding to raise claims of error by the trial court.
9. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.
10. ____: ____: ____. 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, and then the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
11. **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.
12. **Trial: Polygraph Tests.** The results of polygraph examinations are not admissible into evidence.
13. **Postconviction.** An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law without supporting facts.

Appeal from the District Court for Douglas County: W. Mark Ashford, Judge. Affirmed.

Kevin Allen, pro se.

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

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

Funke, J.

Kevin Allen appeals from the denial of postconviction relief without an evidentiary hearing. Allen asserts that he was denied a fair trial, that he was prejudiced by ineffective assistance of counsel at trial and on direct appeal, and that he was

entitled to a hearing based on newly discovered evidence. We determine that Allen's postconviction motion fails to state a claim for relief. Thus, we affirm the district court's denial of postconviction relief without an evidentiary hearing.

BACKGROUND

This appeal follows our decision on Allen's direct appeal in *State v. Allen*,[1] which affirmed Allen's jury trial convictions of first degree murder and use of a firearm to commit a felony in the shooting of an Omaha, Nebraska, police officer, James B. "Jimmy" Wilson, Jr. The district court for Douglas County sentenced Allen to life imprisonment on the murder conviction and 18 to 20 years' imprisonment on the use of a firearm to commit a felony conviction, to be served consecutively. We determined that all of Allen's assigned errors on direct appeal were without merit. As we will discuss, Allen's motion for postconviction relief raises many of the same issues addressed on direct appeal.

Shooting

On August 20, 1995, at 8 p.m., Wilson radioed for a license plate check on a brown Chevrolet van and was informed that the plate was expired and was assigned to a blue Mazda. Wilson radioed that he would stop the van and began to radio the location of the stop but never completed his communication. Police officers in the area reported hearing multiple gunshots. Officers responded to an "officer needs assistance" call and discovered Wilson's police cruiser at 40th and Blondo Streets. The cruiser had been hit by 11 rounds of gunfire. Wilson was shot four times; three times in the head. He was found deceased with his seatbelt still on and the radio microphone still in his hand.

At the time, Allen was a member of the "South Family Bloods" gang and had the street nickname "Dumb." On August

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[1] *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997), *disapproved in part, State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

20, 1995, members of the gang, including Allen, were driving around Omaha in a brown and tan Chevrolet van. Allen was driving the van earlier in the afternoon and stopped at a convenience store to purchase gasoline. Dion Harris later replaced Allen as the driver and drove for the remainder of the day.

Harris drove to his mother's house, and Tavias Minor went inside and returned with a bag containing a rifle with a banana-shaped ammunition clip. The group then headed to North Omaha and stopped for gas at another convenience store at approximately 7:35 p.m. When they left the store, Harris was sitting in the driver's seat, Ronney Perry was sitting in the passenger's seat, Minor was seated behind the driver, and Allen was seated in the back next to the sliding door.

Shortly thereafter, Wilson activated his police cruiser's overhead lights and pulled over the van. Three eyewitnesses—LaKeisha Lucas, LaTasha Lucas, and Stephanie Bean—told police that they saw one gunman exit the van through the sliding door and shoot Wilson. The murder weapon was never recovered, but police determined that the weapon that killed Wilson was a semiautomatic rifle. Witnesses provided inconsistent renditions of the facts during the postshooting investigation, which we summarize below as relevant to Allen's postconviction appeal.

Postshooting Chronology

Police tracked the van to a housing community in South Omaha and conducted door-to-door interviews and searches. Otis Simmons, Perry, Harris, Minor, and the owner of the van were contacted by the police and taken to the police station for additional questioning. Simmons initially stated that he was at the movies at the time of the shooting, but then stated that he, Perry, Harris, Minor, Allen, and Quincy Hughes all participated in the shooting and that Allen was the shooter. Perry stated that Simmons, Harris, and Minor were at the scene, that Hughes and Allen jumped out of the van, and that Allen was the shooter.

Police executed a search warrant on Hughes' home and arrested Hughes and seized some rap lyrics he had written. Hughes provided a detailed alibi. Eyewitnesses Bean, LaKeisha Lucas, and Tyran McCleton identified Hughes out of a lineup as the shooter. LaTasha Lucas stated that Hughes closely resembled the shooter. Simmons and Perry changed their stories and claimed that Hughes was the shooter, not Allen. Prosecutors outlined this evidence at a preliminary hearing to establish probable cause that Hughes was the shooter.

Two months later, Simmons and Perry both recanted their statements that Hughes was the shooter after being given polygraph examinations. The results indicated that Simmons and Perry were deceptive when they denied that Hughes was the shooter. Simmons went back to his original statement that he was at the movies. Perry reverted to his earlier statement that Allen was the shooter. The State reopened the investigation and conducted further interviews of alibi witnesses. In exchange for time served, Minor agreed to testify that Allen shot Wilson and that Simmons and Hughes were not at the scene. Minor sat for a deposition conducted by Allen's counsel.

Trial

The State dismissed charges against Hughes without prejudice and filed charges against Allen. At trial, Perry testified that Allen was the shooter. The following exchange occurred during direct examination of Perry:

> "Q. Okay. And after [Harris] pulled over, did anybody say anything?
>
> "A. [Perry]: [Allen] said he ain't going back to jail.
>
> "Q. Okay. What happened then?
>
> "A. He got out and started shooting.
>
> "Q. Who did?
>
> "A. Kevin.
>
> "Q. Kevin Allen?
>
> "A. Yeah.
>
> . . . .

"Q. Okay. So Kevin Allen, or Dumb, got out. Did he have a gun with him when he got out of the van?
"A. Yep.
"Q. What gun?
"A. The rifle.
"Q. Okay. And what door did he get out of . . . ?
"A. Sliding door."[2]

The State supported its theory that Allen was the shooter by offering Minor's deposition testimony. Security photographs were offered to show that Allen purchased gasoline at the first convenience store. The police laboratory identified nine latent fingerprints from Allen around the driver's seat and near the rear passenger seat next to the sliding door. No fingerprints from Hughes were found in the van.

Allen's theory of defense was that he was innocent and that Hughes was the shooter. The defense focused on the inconsistent accounts given by Simmons and Perry, the fact that the State initially charged Hughes, and the fact that Bean and McCleton testified that Hughes was the shooter. In rebuttal, the State provided testimony in support of Hughes' alibi. After the close of evidence, and following arguments and deliberations, the jury convicted Allen on both counts.

Direct Appeal

On direct appeal, Allen assigned, restated, that the district court erred in (1) refusing to instruct the jury that it could not speculate as to what potential alibi witnesses for Simmons and Hughes, who were identified but not called, might have said had they testified; (2) refusing to instruct the jury that the charges against Hughes had been dismissed without prejudice and that the State could have refiled charges against Hughes; (3) allowing the State to read into evidence Minor's deposition testimony after he asserted his Fifth Amendment rights part way through his live testimony; (4) excluding from evidence

[2] *Id.* at 191, 560 N.W.2d at 834-35.

four of the five offered exhibits that contained rap lyrics written by Hughes and refusing Allen's requested jury instruction that a felon (Hughes) in possession of a gun with a barrel less than 18 inches in length is guilty of a Class IV felony; (5) prohibiting inquiry into the fact that Simmons and Perry failed polygraph examinations when they denied Hughes was the shooter; (6) excluding from evidence the information filed against Hughes and the State's position at the preliminary hearing that Hughes shot Wilson; (7) denying Allen's motions that would have allowed for African-American jurors to be selected; (8) applying the rule that minorities can be preemptorially challenged as long as a race-neutral reason for the challenge can be articulated; and (9) permitting the preemptory challenge of juror No. 43, an African-American.

We found no merit to any of Allen's assigned errors. We found no merit to Allen's first assignment of error, because, contrary to Allen's assertion, the court instructed the jury to not speculate as to what the testimony of witnesses who were not called would have been. We found no merit to Allen's second assignment of error, because even though the State did not believe that Hughes shot Wilson after reexamining Hughes' alibi, the State never suggested to the jury that charges against Hughes could not be refiled, and Allen was free to argue that the charges against Hughes could be refiled if additional evidence pointed to Hughes.

Regarding Allen's third assignment of error, we found that Minor's out-of-court deposition testimony was admissible without violating the Confrontation Clause, because the testimony was properly admitted under Neb. Evid. R. 804(2)(a), Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1995), a firmly rooted hearsay exception. As an issue of first impression, we concluded that rule 804(2)(a) controlled over Neb. Rev. Stat. § 29-1917(4) (Reissue 1995) regarding the use of a deposition when the deponent is unavailable as a witness at trial. We found that the requirements of rule 804(2)(a) were met, because Minor's deposition was taken by Allen's counsel

in compliance with Nebraska law and in the course of the same criminal proceeding in which it was offered and because Allen's counsel had an opportunity to develop Minor's testimony with a similar interest or motive on matters related to Allen's defense. For example, Allen's counsel questioned Minor, knowing that Minor would testify that Allen was the shooter and that Minor would provide this testimony based on an agreement he made with the State. We therefore agreed with the district court's conclusion that Minor's deposition testimony was reliable and admissible under rule 804(2)(a).

We found no merit to Allen's fourth assignment of error, because the court did admit an exhibit that contained rap lyrics written by Hughes and excluded four other exhibits containing Hughes' lyrics as cumulative of evidence already admitted. The exhibit admitted by the court provided:

> "[**Gates Of Hell.**] My life has been hell in and out of jail so all I got is a fuck it mentality and kill tha devil when he comes for me Im gona have to hold court in the street G, Ill be dam if I go back to a cell . . . ."[3]

We also concluded that the court did not err in rejecting Allen's proposed instruction stating that a felon who possesses a firearm with a barrel less than 18 inches commits a felony offense. There was testimony at trial that a handgun was in the van on the night of the shooting, and the parties stipulated that Hughes had a prior felony conviction. Allen argued the court should have given the proposed instruction in order to allow him to demonstrate that Hughes had a motive to shoot Wilson. We determined that Allen was not prejudiced by the court's refusal to give the requested instruction, because the instruction was irrelevant to the charges against Allen and, even without the instruction, Allen had an opportunity to introduce evidence and argue to the jury that Hughes had a motive to shoot Wilson.

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[3] *Id.* at 202, 560 N.W.2d at 841.

Allen's fifth assignment of error was without merit, because the court properly concluded that evidence concerning a polygraph examination is inadmissible under Nebraska law. We found no merit to Allen's sixth assignment of error, because the court did not err in excluding from evidence the State's position at the preliminary hearing that Hughes was the shooter, the information filed against Hughes, and Hughes' docket sheet. We found the proffered evidence was not relevant, because the State's decision to charge Hughes was not probative as to whether Allen shot Wilson. Rather, the relevant evidence was the witness testimony regarding the facts and events surrounding the shooting. Moreover, the State had admitted throughout trial that it made a mistake in charging Hughes. Therefore, the excluded evidence was cumulative to evidence before the jury.

We found no merit to Allen's seventh and eighth assignments of error, because Allen's position was contrary to settled law regarding jury selection proceedings. Lastly, we found no merit to Allen's ninth assignment of error, because the State provided a race-neutral reason for excusing juror No. 43.[4]

Postconviction

In the fall of 2007, the clerk of the district court for Douglas County docketed a verified motion for postconviction relief filed by Allen, pro se. For reasons not provided in this record, the court did not rule upon Allen's pro se motion, a delay which troubles this court. The court later appointed counsel to represent Allen on his postconviction motion in district court. Through counsel, Allen filed an amended motion for postconviction relief on July 1, 2016. Allen's amended motion asserted five causes of action: (1) denial of the right to a fair trial; (2) ineffective assistance of trial counsel; (3) ineffective assistance of appellate counsel; (4) prosecutorial misconduct; and (5) newly discovered evidence. The State moved to

[4] See *Allen, supra* note 1.

dismiss Allen's amended motion, and the court granted the State's motion.

The court found Allen's first and fourth causes of action were procedurally barred, because Allen's arguments about the fairness of trial and prosecutorial misconduct could have been brought on direct appeal. The court found Allen's second cause of action was not procedurally barred, because Allen had the same counsel at trial and on direct appeal and this was Allen's first opportunity to raise ineffective assistance of counsel claims. The court, however, determined that Allen had not pointed to any defective actions taken by counsel. The court, for the same reasons, determined Allen's cause of action for ineffective assistance of appellate counsel was without merit and stated that inclusion of Allen's postconviction arguments on direct appeal would not have changed the result of the appeal.

The court found no merit to Allen's fifth cause of action regarding the discovery of new evidence. The court found the proper course would have been to file a motion for new trial under Neb. Rev. Stat. § 29-2101(5) (Reissue 2016) rather than to pursue postconviction relief. The court found Allen was not entitled to an evidentiary hearing.

Allen appealed and proceeds as a self-represented litigant. On appeal, he contends the court erred in failing to grant him an evidentiary hearing.

ASSIGNMENTS OF ERROR

Allen assigns, condensed and restated, that the district court erred in (1) prohibiting Allen from cross-examining Minor and failing to strike Minor's trial testimony after Minor invoked his Fifth Amendment rights and permitting Minor's deposition to be read into evidence, in contravention of Allen's Sixth Amendment right to confront his accuser; (2) failing to grant Allen postconviction relief based on ineffective assistance of trial counsel; (3) failing to grant Allen postconviction relief based on ineffective assistance of appellate counsel;

and (4) failing to grant Allen an evidentiary hearing based on newly discovered evidence.

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.[5]

ANALYSIS

[2-6] Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.[6] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.[7] Relief under the Nebraska Postconviction Act[8] is a very narrow category of relief.[9] 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.[10] In a few previous postconviction appeals, we have stated that in the absence of alleged facts that would render the judgment void or voidable, the proper

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[5] *State v. Foster*, 300 Neb. 883, 916 N.W.2d 562 (2018).

[6] *State v. Newman*, 300 Neb. 770, 916 N.W.2d 393 (2018).

[7] *Id.*

[8] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2016).

[9] *Foster, supra* note 5.

[10] *Newman, supra* note 6.

course is to dismiss the motion for postconviction relief for failure to state a claim.[11] This articulation is couched in terms of a rule of civil pleading,[12] and it originated prior to our opinion in *State v. Robertson*.[13] In *Robertson*, we clarified that postconviction proceedings are not governed by the Nebraska Court Rules of Pleading in Civil Cases.[14] Thus, we take this opportunity to disapprove of the former articulation. A more precise formulation is that in the absence of alleged facts that would render the judgment void or voidable, the proper course is to overrule the motion for postconviction relief without an evidentiary hearing.

Fair Trial Challenge Procedurally Barred

Allen asserts that the district court erred in failing to grant an evidentiary hearing based on allegations that the district court committed prejudicial error during Allen's trial. Allen argues that the court erred in permitting Minor to invoke his Fifth Amendment rights against self-incrimination midway through his testimony. Allen also asserts that the court erred in failing to strike Minor's in-court testimony and permitting the State to read portions of Minor's deposition into evidence.

[7,8] We conclude that the district court properly found these allegations were procedurally barred, because they could have been and actually were raised and addressed on direct appeal. Postconviction relief is available only to remedy prejudicial constitutional violations.[15] A motion for postconviction relief cannot be used to secure review of issues which were

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[11] See, *Foster, supra* note 5; *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018); *State v. Ryan*, 287 Neb. 938, 845 N.W.2d 287 (2014).

[12] See Neb. Ct. R. Pldg. § 6-1112(b)(6).

[13] *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

[14] *Id.*

[15] *State v. Ross*, 296 Neb. 923, 899 N.W.2d 209 (2017).

or could have been litigated on direct appeal.[16] Allen asserts that we should consider his arguments that the trial court erred under a plain error analysis. Plain error cannot be asserted in a postconviction proceeding to raise claims of error by the trial court.[17] We therefore affirm the denial of postconviction relief as to Allen's first assignment of error.

Trial Counsel Was Not Ineffective

[9] Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.[18] Allen's ineffective assistance of trial counsel claim is properly before us.

[10,11] To establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*,[19] 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, and then the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[20] 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.[21] A court may address

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[16] *Id.*

[17] *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009).

[18] *Id.*

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

[20] See *Foster, supra* note 5.

[21] *Id.*

the two prongs of this test, deficient performance and prejudice, in either order.[22]

Allen asserts that his trial counsel was ineffective in failing to call certain witnesses at trial to support his defense that he was innocent. The postconviction motion before the district court referred to trial counsel's alleged failure to investigate, interview, or call nine different witnesses; Allen's brief on appeal contends that three witnesses should have been called to testify: Clarence Burns, Clyde Smith, and Richard Circo.

Allen alleges that had Burns been called as a witness, he would have testified that the individual who shot Wilson matched the description of Hughes. However, the jury was already provided with testimony from multiple witnesses that Hughes was the shooter. Allen does not explain how the testimony of Burns would have changed the jury's decision, given that the jury was already presented with evidence supporting Allen's theory of the case. Allen's postconviction motion before the district court asserted that Burns' testimony would have bolstered a description of the shooter provided by McCleton. However, there is no reason why McCleton's testimony was critical to the jury's decision. While McCleton stated that Hughes was the shooter, he admitted that he never saw the individual who shot the gun, and only heard the gunshots.

Allen contends that had Smith been called to testify, he would have said that when the van stopped, he saw Minor and two other individuals who he was unable to identify exit the van. In addition, Smith was unable to identify Allen out of a lineup. Like the testimony which Burns allegedly would have provided, Smith's testimony would not have been critical and would not have proved whether Allen was or was not the shooter at the scene of the murder at 40th and Blondo Streets.

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[22] *Id.*

Allen claims that his counsel should have offered the testimony of Circo, a polygraph examiner with the Omaha Police Department who conducted polygraph tests on Simmons and Perry. Circo stated in his deposition that when Simmons and Perry denied that Hughes was the shooter, they were not truthful. However, this evidence would have been inadmissible under Nebraska law.

[12] We have consistently held that the results of polygraph examinations are not admissible into evidence in this state.[23] We have stated that "the scientific principle involved in the use of such polygraph has not yet gone beyond the experimental and reached the demonstrable stage, and that it has not yet received general scientific acceptance,"[24] and we have generally affirmed the exclusion of polygraph evidence. We have more recently stated that "[t]here is no consensus that polygraph evidence is reliable, and a fundamental principle of the justice system is that the jury is the lie detector, determining the weight and credibility of witness testimony."[25]

We have specifically prohibited the admission of the results of polygraph examinations in evidence, and we have disapproved of any reference to polygraph tests.[26] Although the results of a polygraph test are not admissible in evidence, the "mere mention of the word 'polygraph,' absent more, does not constitute prejudicial error."[27] But we have held that a mere reference to a polygraph examination is improper where the

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[23] See, *Allen, supra* note 1; *State v. Walker*, 242 Neb. 99, 493 N.W.2d 329 (1992); *State v. Steinmark*, 195 Neb. 545, 239 N.W.2d 495 (1976).

[24] *Boeche v. State*, 151 Neb. 368, 377, 37 N.W.2d 593, 597 (1949). See *Parker v. State*, 164 Neb. 614, 83 N.W.2d 347 (1957).

[25] *State v. Castaneda*, 287 Neb. 289, 303, 842 N.W.2d 740, 752 (2014), citing *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998).

[26] See *State v. Temple*, 192 Neb. 442, 222 N.W.2d 356 (1974).

[27] *State v. Anderson and Hochstein*, 207 Neb. 51, 67, 296 N.W.2d 440, 451 (1980). See *State v. Beach*, 215 Neb. 213, 337 N.W.2d 772 (1983).

credibility of a witness is impacted.[28] Our decisions in this area have recognized that it is the jury's responsibility to determine the credibility of witnesses and that polygraph evidence interferes with this process.

Circo's alleged testimony would have been introduced for the purpose of undermining the credibility of witnesses based on his reading of their polygraph examinations. This evidence would have interfered with the jury's role to determine the credibility of Simmons and Perry and would not have been admissible.

Because the alleged testimony of Burns and Smith would not have affected the outcome of the case, and because Circo's testimony would have been prohibited, Allen's claim that trial counsel was ineffective for declining to call these witnesses is without merit.

Allen asserts that he was prejudiced by trial counsel's failure to object to the admission of an assault rifle with a banana-shaped ammunition clip into evidence. Similarly, Allen asserts that a certain witness should not have been permitted to testify that police found a black gun in her apartment, but that the witness did not know how the gun got there. The issue before the jury was not whether guns were involved in the murder or whether a shooting had occurred, but whether the State proved that Allen shot Wilson beyond a reasonable doubt. As there was no dispute that someone exited the van and shot Wilson, there is no reason why the probative value of evidence of firearms would have been substantially outweighed by the danger of unfair prejudice.[29] Therefore, Allen has not shown that an objection would have led to the exclusion of the evidence. Counsel is not ineffective for failing to make an objection that has no merit.[30]

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[28] See, *Castaneda, supra* note 25; *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011).

[29] See Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016).

[30] See *State v. Stricklin*, 300 Neb. 794, 916 N.W.2d 413 (2018).

We therefore affirm the denial of postconviction relief as to Allen's second assignment of error.

Appellate Counsel Was Not Ineffective

Allen's motion for postconviction relief alleged that his appellate counsel was ineffective by failing to assign that the district court erred in permitting Minor to invoke his Fifth Amendment rights against self-incrimination midway through his testimony, failing to strike Minor's in-court testimony, and permitting the State to read portions of Minor's deposition into evidence. In addition, Allen contended that appellate counsel was ineffective for failing to raise claims of prosecutorial misconduct.

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*[31] test.[32] If trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue.[33] 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.[34]

However, in Allen's brief, he merely argues that his defense "was highly prejudiced by appella[te] counsel['s] lack of concern or interest in effectively challenging . . . constitutional concerns on direct appeal."[35] He fails to discuss how appellate counsel lacked concern or lacked interest. In addition, he

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[31] *Strickland, supra* note 19.

[32] *Foster, supra* note 5.

[33] *Id.*

[34] *Id.*

[35] Brief for appellant at 30.

fails to discuss any of the contentions raised in his motion for postconviction relief. As we have said many times, 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.[36] Because Allen's brief fails to argue the assigned error, we decline to address it. We therefore affirm the denial of postconviction relief as to Allen's third assignment of error.

Newly Discovered Evidence Claim Without Merit

[13] Allen asserts that he should have been granted an evidentiary hearing based on the claim that newly discovered evidence suggests that law enforcement officials might have tampered with forensic evidence involved in his case. Allen's claim concerns David Kofoed, the former supervisor of the Crime Scene Investigation Division for the Douglas County, Nebraska, sheriff's office. Kofoed testified in Allen's trial about diagramming the crime scene at 40th and Blondo Streets. Allen asserts, quite generically, that based on Kofoed's involvement in the investigation, any forensic evidence in the case, such as fingerprints and ballistics information, has been rendered unreliable. An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law without supporting facts.[37]

Kofoed's testimony showed that he did not play a major role in the evidence which led the jury to convict Allen. Kofoed was responsible for measuring the distance between items of physical evidence at the crime scene that were located and marked, mostly shell casings. He did not indicate that he collected any evidence, and he did not mention Allen in his testimony. He merely provided a description of the scene and laid foundation for the admission of a photograph of the

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[36] *State v. Lotter, ante* p. 125, 917 N.W.2d 850 (2018).

[37] *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015).

police cruiser. We agree with the district court that "[s]imply alleging Kofoed's involvement under these circumstances does not warrant an evidentiary hearing . . . ."[38]

Similarly, Allen's motion and brief discuss a 2012 burglary case in which a crime laboratory technician and her colleagues misidentified a fingerprint. Allen claims, in light of this new information, the evidence of fingerprint analysis used in Allen's trial was unreliable and inadmissible. Here, Allen's broad and generalized allegations do not include any factual support to suggest that his fingerprints were misidentified. In addition, Allen has failed to demonstrate that had the jury been prohibited from considering the fact that nine latent fingerprints of Allen's were found in the van, the jury would not have still convicted him based on eyewitness testimony. We determine Allen's request for an evidentiary hearing based on newly discovered evidence is without merit. We therefore affirm the denial of postconviction relief as to Allen's fourth assignment of error.

CONCLUSION

For the foregoing reasons, we affirm the order of the district court denying Allen's motion for postconviction relief without an evidentiary hearing.

Affirmed.

Freudenberg, J., not participating.

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[38] See *id.*

State of Nebraska, appellee, v. Christopher A. Edwards, appellant.

919 N.W.2d 530

Filed November 16, 2018. No. S-17-1234.

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: Evidence.** No evidentiary hearing is necessary when a postconviction motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief.
3. **Appeal and Error.** An appellate court considers only those arguments that were both adequately assigned and argued in the appellant's brief.
4. **Postconviction: Pleadings: Time.** The Nebraska Postconviction Act contains a 1-year time limit for filing a verified motion for postconviction relief, which runs from one of four triggering events or August 27, 2011, whichever is later.
5. **Postconviction: Limitations of Actions: Proof.** To satisfy the tolling provision of Neb. Rev. Stat. § 29-3001(4)(c) (Reissue 2016), a prisoner must show there was (1) an impediment created by state action, (2) which amounted to a violation of the federal or state Constitution or a state law, and (3) as a result, the prisoner was prevented from filing a verified motion. If all these factors are satisfied, the 1-year limitation period will begin to run on the date the impediment was removed.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed.

Brian Munnelly and Gerald L. Soucie for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

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

Cassel, J.

INTRODUCTION

After jurisdiction again vested in the district court following an appeal from the denial of Christopher A. Edwards' first motion for postconviction relief, he filed a second motion seeking postconviction relief. Prompted by the State, the district court denied the second motion without an evidentiary hearing. Because we agree that Edwards' second motion is barred by the limitation period set forth in Neb. Rev. Stat. § 29-3001(4) (Reissue 2016), we affirm the decision of the district court.

BACKGROUND

Crimes, Trial, and Direct Appeal

In June 2006, the State charged Edwards with second degree murder and use of a deadly weapon to commit a felony in connection with the disappearance of Jessica O'Grady. Spattered blood was found on Edwards' nightstand, headboard, clock radio, and ceiling above his bed. The underside of Edwards' mattress contained a large, damp bloodstain. Investigators discovered blood on a short sword in Edwards' closet, on the trunk gasket of Edwards' car, and on the underside of the car's trunk lid. DNA profiles from this blood were consistent with O'Grady's profile. A jury convicted Edwards of both charges.

Steven J. Lefler and two other attorneys represented Edwards at trial. Through the same counsel, Edwards appealed. We affirmed Edwards' convictions on direct appeal.[1] Our mandate issued in July 2009.

First Motion for Postconviction Relief

In July 2010, through new counsel, Edwards filed a motion for postconviction relief. He claimed that the State violated

[1] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

his due process rights by presenting fabricated evidence. More specifically, Edwards alleged that David Kofoed, a supervisor of the Douglas County Crime Scene Investigation Division, planted blood evidence to be used against Edwards.

Edwards also alleged claims of ineffective assistance of trial and appellate counsel. One of his claims was that Lefler should have known that Kofoed was suspected of planting evidence during the murder investigation and that Lefler failed to investigate this information or to effectively impeach Kofoed at trial. Edwards claimed that Lefler had a potential conflict of interest because of his friendship with Kofoed. And Edwards alleged that his appellate counsel was ineffective in failing to raise claims of trial counsel's ineffective assistance.

In October 2010, the State moved to quash Edwards' subpoenas directed to the Douglas County sheriff's office and the University of Nebraska Medical Center. The motion stated, "There has been no indication that [Edwards] alleges that the State withheld information or evidence that would entitle him the opportunity to seek out discovery in this matter." The court granted the motion.

In December 2010, Edwards moved for leave to file an amended motion for postconviction relief. The amended motion contained several additional exhibits, which were documents from the Douglas County Crime Scene Investigation Division pertaining to the criminal investigation of Edwards. Although it is not in our record, the parties agree that this motion was granted.

On August 2, 2011, the district court overruled Edwards' first motion for postconviction relief without an evidentiary hearing. Edwards appealed.

In September 2012, we determined that two of Edwards' claims required an evidentiary hearing.[2] First, we recounted Kofoed's unlawful conduct during two other murder investigations and concluded that an evidentiary hearing was needed

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[2] *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012), *disapproved in part, State v. Avina-Murillo, ante* p. 185, 917 N.W.2d 865 (2018).

on Edwards' claim that the State presented fabricated forensic evidence at trial.

Second, we concluded that an evidentiary hearing was necessary on Edwards' claim that his trial counsel had a conflict of interest because of his relationship with Kofoed. We stated:

> We cannot know from this record whether before Edwards' trial, Kofoed had asked Lefler to represent him if he was later charged with a crime. Given allegations of their friendship and Lefler's undisputed representation of Kofoed against fabrication charges in 2009, Kofoed's possible request of representation is a prospect that the court should have considered. In addition, we cannot know from this record whether before Edwards' trial, law enforcement officers conducted an internal investigation of Kofoed's conduct in which Lefler had already represented or advised Kofoed. Finally, because of their friendship, Lefler may have learned of the allegations against Kofoed even without agreeing to represent him.[3]

We determined that an evidentiary hearing was necessary to discover whether Lefler knew of the allegations against Kofoed before Edwards' trial or whether a conflict of interest prevented him from cross-examining Kofoed about any pending investigation. We thus remanded the cause to the district court for an evidentiary hearing.

Proceedings Following Remand on First Motion

On May 3, 2013, after the remand but prior to the evidentiary hearing, Edwards filed a motion for leave to file a second amended motion for postconviction relief. The proposed amended motion set forth five claims: (1) Edwards' due process rights were violated because his convictions were based on fabricated evidence, (2) his due process rights were violated because the State failed to disclose material exculpatory

[3] *Id.* at 408, 821 N.W.2d at 702.

evidence, (3) his attorney failed to provide conflict-free representation, (4) the step instruction on the lesser-included offense of manslaughter failed to distinguish between the intent to kill associated with second degree murder and the intent to kill resulting from a "sudden quarrel," and (5) cumulative error deprived him of his right to substantive due process under the 14th Amendment. In June, Edwards filed a supplemental showing regarding this motion.

The district court overruled Edwards' motion for leave to file an amended motion and the supplemental showing to the extent that they sought to expand the scope of our mandate. The court stated that our mandate specifically set out the scope of the remand and that the court was limited to those issues.

In March and April 2014, the district court conducted an evidentiary hearing on the two issues from the first motion for postconviction relief. The court heard evidence regarding whether the State knowingly used fabricated evidence and whether Lefler operated under a conflict of interest. With regard to the examination of Lefler, the court stated that the relevant timeframe was what Lefler knew from the time of voir dire to the conclusion of Edwards' trial. But the court also stated that it would "allow some leeway here to make a record." Ultimately, the court rejected Edwards' claims for postconviction relief.

On appeal, Edwards assigned that the district court erred in refusing to grant leave to amend his original postconviction motion, failing to find that his counsel had an actual conflict of interest, and failing to find that the State knowingly used fabricated evidence.

In a July 1, 2016, opinion, we rejected Edwards' claims.[4] We determined that Edwards' assignment of error concerning the denial of his motion to amend his original postconviction motion lacked merit. We reasoned:

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[4] *State v. Edwards*, 294 Neb. 1, 880 N.W.2d 642 (2016).

> *At the time of filing his motion to amend the postconviction proceeding, assuming without deciding that Edwards was not procedurally or time barred, Edwards could have filed a second postconviction proceeding alleging the claims he attempted to raise on remand*. We have held that a subsequent postconviction motion is allowed when the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion. Edwards asserts that such is the case here. Accordingly, we conclude that Edwards could have filed a second postconviction proceeding asserting the claims that he alleged he was unable to raise in the first postconviction proceeding. Therefore, the district court did not deprive Edwards of a substantial right or just result and did not abuse its discretion by denying his motion to amend his first postconviction claim.[5]

Next, we found that Edwards failed to prove by a preponderance of the evidence that his trial counsel operated under a conflict of interest. We stated, "The record simply does not support a finding that Lefler had such a loyalty to Kofoed that would have tempted him at trial to act against Edwards' interests."[6] We further determined that "[e]ven assuming that Lefler had any loyalty to Kofoed, Edwards fails to point to any situation during or prior to his trial in which Lefler acted in Kofoed's interest and against Edwards' interest."[7]

Finally, we rejected Edwards' claim that the State knowingly used fabricated evidence. We determined that the district court did not commit clear error in finding that Kofoed did not fabricate evidence in Edwards' case or in finding that Edwards failed to prove the State knowingly used fabricated evidence. Our mandate issued on October 3, 2016.

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[5] *Id.* at 21, 880 N.W.2d at 654-55 (emphasis supplied).

[6] *Id.* at 22, 880 N.W.2d at 655.

[7] *Id.* at 23, 880 N.W.2d at 655.

Second Motion for Postconviction Relief

On October 7, 2016, Edwards filed a second verified motion for postconviction relief. He alleged that he was prevented from raising the issues in his second motion for postconviction relief for reasons set forth in § 29-3001(4).

Edwards claimed that he was affirmatively denied the ability to obtain facts. He pointed to an order denying traditional discovery, the misrepresentation of facts by the Douglas County Attorney's office in its motion to quash, and the withholding of facts by agents of the State and by Lefler.

Edwards alleged that in late December 2012, attorney Jerry Soucie was retained as cocounsel to represent him. Soucie, due to his representation of individuals charged in connection with the murders of Wayne and Sharmon Stock and Brendan Gonzalez, had personal knowledge of facts that were unavailable to Edwards or his postconviction attorney through reasonable investigative efforts. Additional discovery relevant to Lefler's conflict of interest and the State's failure to disclose exculpatory information became available in connection with federal civil rights lawsuits filed in 2007 and 2008 by individuals wrongfully accused of the Stocks' murders.

A Douglas County sheriff's office internal affairs investigation report from June and July 2008 became available due to discovery in the civil rights suits. The report previously had been confidential and the subject of a federal protection order. The report enabled Edwards to learn of Lefler's direct involvement in the defense of Kofoed during the internal affairs investigation in May and June 2008—a period when Lefler was representing Edwards on direct appeal, before the reply brief was filed and before the case was argued and submitted. According to Edwards, the report showed that Kofoed admitted to the Douglas County sheriff's office and to Lefler that Kofoed had falsified a report regarding the collection of a blood sample from a vehicle related to the Stock murders, that Kofoed instructed a subordinate not to include Kofoed's

presence when photographs were taken of that vehicle, that Douglas County sheriff's office personnel told Kofoed not to file an amended report because it would look like a coverup, and that Lefler knew the Federal Bureau of Investigation told Kofoed that his story regarding how blood was found in the vehicle of an innocent man did not "'pass the smell test.'"

Edwards alleged that on May 14, 2013, Soucie was able to obtain a complete set of the crime scene investigation reports related to the Stock murder investigation. Also, he alleged that only then did he learn that a former Nebraska State Patrol investigator was suspicious of Kofoed's conduct in the Stock and Gonzalez cases and also wondered about the blood supposedly found on the sword in the O'Grady case.

Edwards' second motion for postconviction relief set forth three grounds for relief. The first ground alleged a violation of due process based on the failure to disclose materially exculpatory impeachment evidence to Edwards related to Kofoed's "propensity to fabricate evidence and falsify reports." Edwards alleged that law enforcement officials involved in Edwards' prosecution team were aware of information that Kofoed falsified reports. Specifically, he alleged that the Douglas County Attorney, the Douglas County sheriff, and a crime scene investigator were aware of circumstantial evidence that Kofoed had fabricated evidence in the Stock murder investigation and that such evidence was exculpatory impeachment evidence with respect to Kofoed's involvement in the collection of the forensic evidence in Edwards' prosecution. Edwards claimed that the failure of the State and its agents to disclose such information to Edwards violated due process and the decisions in *Brady v. Maryland*[8] and *Kyles v. Whitley*.[9]

Edwards alleged that Lefler's examination and cross-examination of all Douglas County sheriff's office crime scene

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[8] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[9] *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

investigation personnel at trial was significantly restricted if he did not have the details regarding how Kofoed fabricated evidence in the Stock and Gonzalez investigations. Edwards asserted that because agents for the State withheld Kofoed's misconduct, Lefler focused his closing argument on the lack of a body and did not mention possible contamination of the evidence discussed by Kofoed. On the other hand, the State relied specifically on the validity and reliability of the DNA evidence showing O'Grady's DNA on various items.

The second ground raised in the motion was that Lefler had an actual conflict of interest in his representation of Edwards on appeal. Edwards alleged that between May 2008 and July 28, 2009, Lefler concurrently represented Edwards and Kofoed. According to Edwards, Lefler represented him from June 2006 until July 28, 2009. Edwards claimed that Lefler acted under an actual conflict of interest because he could not use the information he obtained during his representation of Kofoed regarding Kofoed's propensity to falsify reports and fabricate evidence. Further, Edwards alleged that if he received a new trial, Lefler's representation of Kofoed would be problematic, thus presenting a significant financial reason for Lefler to not want Edwards' convictions reversed.

Edwards claimed that Lefler failed to take a number of actions due to his conflict of interest. He alleged that Lefler failed to file a timely motion for new trial based on newly discovered evidence when Lefler became aware of the facts regarding the Stock murder investigation. Edwards claimed that Lefler should have assigned error in a replacement or supplemental brief that the State failed to comply with *Brady* by disclosing the "'cross-contamination'" theory of Kofoed in the Stock investigation or the "'evidence planting'" theory of other attorneys in the criminal prosecutions. He alleged that Lefler should have requested leave to withdraw the previous brief after criminal charges were filed against Kofoed in April 2009, requested a remand to investigate the allegations from the Stock investigation as they related to Edwards' prosecution, or filed a supplemental brief asserting

errors based on the factual allegations in the criminal prosecutions against Kofoed.

Edwards took issue with a number of Lefler's actions while Lefler represented Edwards on direct appeal. During that time, Lefler became aware of the Federal Bureau of Investigation's allegations against Kofoed, accepted a retainer from Kofoed, represented Kofoed in the internal affairs investigation, appeared as Kofoed's private attorney in the civil rights cases, accompanied Kofoed to a federal grand jury, and defended Kofoed against criminal charges. According to Edwards, Lefler did not disclose information that he learned during his representation of Kofoed, such as Kofoed's admission of falsification of reports, a coverup by the sheriff's office in not amending one of Kofoed's reports, and the falsification of evidence by Kofoed during the Stock and Gonzalez investigations.

The third ground raised by Edwards concerned the step instruction on the lesser-included offense of manslaughter. Edwards alleged that the instruction given failed to distinguish between the intent to kill associated with second degree murder and intent to kill resulting from a "sudden quarrel." According to Edwards, the court's instruction failed to properly advise the jury through a negative element instruction that any intent to kill associated with second degree murder could not be the result of a sudden quarrel. Edwards asserted that he could not have earlier raised this issue, because it was not until after the appeal of the denial of an evidentiary hearing on August 25, 2011, that this court decided the cases relevant to his claim.[10]

The State moved to dismiss Edwards' motion for postconviction relief. The State alleged that the motion should be denied because it was filed outside of the time limits contained

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[10] See, *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013); *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012); *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

in § 29-3001(4) and that it should be denied as a successive motion.

The district court denied Edwards' request for an evidentiary hearing and sustained the State's motion to dismiss. The court focused on when the facts alleged in the motion could have been discovered, not when Edwards realized they were significant. The court noted that the proposed amended motion, which Edwards sought to file in May 2013, raised the same issues as those set forth in the second motion for postconviction relief. Thus, the court stated that "these issues clearly were discoverable and in fact, were discovered, years before the filing of the 2nd Motion."

The court also stated that the operative motion was a successive attempt at postconviction relief. It determined that the issues asserted in the second motion were known or knowable at the time the first motion was filed.

Finally, the court rejected the jury instruction issue. It stated that because *State v. Smith*,[11] a 2011 decision, was released after Edwards' direct appeal was affirmed, the court did not err by providing jury instructions that complied with the law at the time of Edwards' trial. The court determined that Edwards was not entitled to retroactive application of the rule in *Smith*, because Edwards' direct appeal was not still pending when *Smith* was decided.

Edwards filed a timely appeal.

ASSIGNMENT OF ERROR

Edwards assigns that the district court erred in denying an evidentiary hearing on his second motion for postconviction relief.

STANDARD OF REVIEW

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

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[11] *State v. Smith, supra* note 10, 282 Neb. 720, 806 N.W.2d 383 (2011).

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.[12]

ANALYSIS

[2,3] Before considering whether the claims raised in Edwards' second motion for postconviction relief are barred, we recall governing principles in two areas. First, an evidentiary hearing must be granted when the facts alleged, if proved, would justify relief, or when a factual dispute arises as to whether a constitutional right is being denied.[13] But no evidentiary hearing is necessary when "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."[14] Second, we consider only those arguments that were both adequately assigned and argued in the appellant's brief.[15] Because the argument section of Edwards' appellate brief addresses only his ineffective assistance of counsel/conflict of interest claim, we limit our analysis accordingly.

[4] The Nebraska Postconviction Act contains a 1-year time limit for filing a verified motion for postconviction relief, which runs from one of four triggering events or August 27, 2011, whichever is later.[16] Edwards refers to "§ 29-3001(4)" a number of times throughout his brief. However, it is unclear which, if any, subsection he believes extended the date to file his motion. Edwards had until August 27, 2012, to file his motion for postconviction relief, unless one of the triggering events extended the date beyond August 27, 2012.

Section 29-3001(4) sets forth four triggering events. They are:

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[12] *State v. Torres*, 300 Neb. 694, 915 N.W.2d 596 (2018).

[13] *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018).

[14] § 29-3001(2).

[15] See *State v. Haynes, supra* note 13.

[16] *State v. Lotter, ante* p. 125, 917 N.W.2d 850 (2018).

> (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[.]

Despite Edwards' failure to argue a particular triggering event that he believes makes his October 2016 motion timely, we consider each possibility.

Two of the triggering events clearly do not assist Edwards. His convictions became final in 2009, so § 29-3001(4)(a) does not extend the period beyond August 27, 2012. And § 29-3001(4)(d) has no application, because Edwards does not assert a newly recognized right in connection with his ineffective assistance of counsel claim.

Under § 29-3001(4)(b), Edwards had 1 year from the date on which the factual predicate of his claim of ineffective assistance of counsel could have been discovered through the exercise of due diligence. He could have discovered that Lefler concurrently represented Kofoed when discovery in one of the federal civil rights suits became publicly available on August 30, 2010. Edwards does not contend that he or his counsel were unaware of those cases. They were based on allegations that Kofoed falsified evidence. Similarly, a focus of Edwards' first motion for postconviction relief—initially filed in July 2010—was the investigation and conviction of Kofoed for

fabricating evidence and falsifying official reports. It is reasonable to think that Edwards' postconviction counsel would be keenly interested in the federal civil rights suits. Thus, once the discovery became publicly available in August 2010, "the factual predicate of the constitutional claim . . . could have been discovered through the exercise of due diligence."[17] We conclude that § 29-3001(4)(b) does not extend the time for filing beyond August 27, 2012.

[5] To satisfy the tolling provision of § 29-3001(4)(c), a prisoner must show there was (1) an impediment created by state action, (2) which amounted to a violation of the federal or state Constitution or a state law, and (3) as a result, the prisoner was prevented from filing a verified motion. If all these factors are satisfied, the 1-year limitation period will begin to run on the date the impediment was removed.[18]

Edwards' argument fails at the first step. In *State v. Amaya*,[19] we stated that the prisoner had not shown how the alleged ineffective assistance of his postconviction counsel was "'created by state action.'" Similarly, Edwards has not shown how Lefler's conflict of interest was "created by state action." We recognize that in July 2009, Douglas County retained Lefler to represent Kofoed in the federal civil rights suits. But prior to that time—in June 2008—Kofoed hired Lefler to represent him in connection with the internal affairs investigation. Thus, the conflict of interest present in June 2008 was not created by state action. Because Edwards cannot meet all of the factors, the tolling provision of § 29-3001(4)(c) does not apply.

To the extent that Edwards alleges facts purporting to show that state action prevented him from learning about Lefler's conflict of interest, his own motion shows that he obtained such information in May 2013. Any impediment was removed at that time. Still, Edwards did not file his motion until 2016.

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[17] § 29-3001(4)(b).

[18] *State v. Amaya*, 298 Neb. 70, 902 N.W.2d 675 (2017).

[19] *Id.* at 79, 902 N.W.2d at 682.

Edwards attempted to avoid this result in two ways. Both have no merit.

Before the district court, Edwards argued that the period under § 29-3001(4) should be tolled while the appeal concerning his first motion was pending. We recognize that the scope of our mandate precluded the district court from enlarging the issues presented on his first motion. The district court properly refrained from acting outside the scope of our remand; thus, refusal to allow the amendment was not "in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state."[20]

In arguing Edwards' second motion for postconviction relief, he asserted that "the clerk of the district court will refuse to accept anything, in terms of a second post-conviction motion or anything of that nature, until the mandate and jurisdiction's been returned to the court." But nowhere in his second motion did he allege that he actually tried to file a second motion—as opposed to his attempt to file a second amendment to his first motion—and was prevented from doing so. Once again, this allegation was not sufficient to plead that he was prevented from filing his motion due to a state-created impediment.

Edwards waited until October 2016 to file his second motion for postconviction relief. The motion is barred by the time limitation of § 29-3001(4).

CONCLUSION

We agree with the district court that Edwards' second motion for postconviction relief is barred by the limitation period set forth in § 29-3001(4). Accordingly, we affirm the court's decision.

Affirmed.

Freudenberg, J., not participating.

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[20] See § 29-3001(4)(c).

In re Estate of Hilda M. Graham, deceased. Merle Gallagher and Linda Clarke, appellants, v. Gregory G. Graham, appellee.

919 N.W.2d 714

Filed November 16, 2018. No. S-17-1296.

1. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Attorney Fees.** Ordinarily, the fixing of reasonable compensation, fees, and expenses, pursuant to Neb. Rev. Stat. § 30-2480 (Reissue 2016), governing compensation of personal representatives; Neb. Rev. Stat. § 30-2481 (Reissue 2016), governing expenses in estate litigation; and Neb. Rev. Stat. § 30-2482 (Reissue 2016), governing compensation of personal representatives and employees of the estate, is within the sound discretion of the county court.
4. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.
5. **Pretrial Procedure: Appeal and Error.** Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings on appropriate sanctions will not be disturbed on appeal absent a showing of an abuse of that discretion.
6. **Rules of the Supreme Court: Appeal and Error.** The cross-appeal section of an appellate brief must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of the facts.

7. ____: ____. When a brief of an appellee fails to present a proper cross-appeal pursuant to Neb. Ct. R. App. P. § 2-109 (rev. 2014), an appellate court declines to consider its merits.
8. **Appeal and Error.** Absent plain error, an appellate court considers only an appellant's claimed errors that the appellant specifically assigns in a separate "assignment of error" section of the brief and correspondingly argues in the argument section.
9. **Decedents' Estates: Executors and Administrators: Courts: Jurisdiction.** A probate court's jurisdiction and authority continue until an executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of whom it devolves.
10. **Decedents' Estates: Courts: Jurisdiction.** Pursuant to Neb. Rev. Stat. § 30-2473 (Reissue 2016), county courts in ongoing probate proceedings have jurisdiction over surcharge motions brought against former personal representatives to recover losses to the decedent's estate arising from an alleged breach of fiduciary duty.
11. **Decedents' Estates: Executors and Administrators: Damages: Proof.** A beneficiary or designee seeking a surcharge against the personal representative for conversion, damage, or loss of estate property has the burden of proving that (1) a fiduciary duty was breached, (2) the breach of the fiduciary duty caused the losses alleged, and (3) the extent of those damages.

Appeal from the County Court for Douglas County: Thomas K. Harmon, Judge. Affirmed.

Howard Kaiman and Edward W. Hasenjager for appellants.

Norman Denenberg for appellee.

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

Freudenberg, J.

NATURE OF CASE

The designees of the decedent's estate appeal the county court's determination that the evidence was insufficient to prove damages for the conversion of estate property purportedly caused by the personal representative who was removed

for breaches of fiduciary duties. They also assert that the personal representative should have been surcharged for the attorney fees and successor personal representative fees because of his breaches of fiduciary duties and alleged frivolous defense to his removal. We affirm.

FACTS

Removal of Personal Representative and Personal Property Damages

Gregory G. Graham (Graham) was the designated personal representative of the estate of Hilda M. Graham, who died on September 5, 2013. In accordance with the decedent's last will and testament, Graham's appointment as the personal representative followed.

A dispute developed between Graham and two interested parties in the estate, Merle Gallagher and Linda Clarke. Both Gallagher and Clarke were to inherit from the decedent's will. Specifically, Clarke was to receive a "Peanuts collection" of figurines and Gallagher was to inherit full ownership of the decedent's home, as well as the residual estate. After Graham distributed the personal property pursuant to the decedent's will, Gallagher and Clarke alleged that they did not receive the entirety of what was bequeathed to them. As a result, they sought to have Graham removed as personal representative.

After a hearing, Graham was removed as personal representative of the estate and a successor personal representative, Edward Kasl, was appointed by the county court. Graham subsequently appealed that decision, and in case No. S-14-804, an unpublished memorandum opinion dated May 21, 2015, we reversed. We held that the county court erred in removing Graham as personal representative without having heard his evidence and testimony. We also held that the court erred in awarding damages when such relief was not requested. We remanded the matter, ordering a new hearing and directing that the case be reassigned to a new judge.

At the hearing on remand, exhibit 101 was offered, but the county court sustained Graham's relevancy objection to exhibit 101 and did not receive it into evidence. Exhibit 101 consists of the entire bill of exceptions for the proceedings leading up to the order that we reversed in our memorandum opinion.

Gallagher and Clarke again presented evidence in support of Graham's removal. They also moved for the court to assess damages against Graham for the alleged conversion, damage, or loss of estate property. Gallagher and Clarke testified that Graham maintained exclusive control over the real estate, as well as its contents, for a period in excess of 90 days after the decedent's death and failed to properly inventory the contents of the residence or provide an accounting of how the nonprobate estate assets were disposed of during that time.[1]

In support of their claims that certain items were stolen, damaged, or lost, Gallagher and Clarke offered testimony from various witnesses that the decedent, at some point before she died, had at least three jewelry boxes full of "expensive" jewelry. Gallagher and Clarke testified that the decedent had several items of "nice" clothing, various tools, and a number of documents in her home before her death. All of these items were absent from the decedent's home at the time the keys to her home were finally transferred to Gallagher.

The court also received into evidence pictures of the decedent wearing certain pieces of jewelry from her collection. Additional testimony was received that, while attending the decedent's funeral, Gallagher observed Graham's wife wearing a pendant and a locket allegedly owned by the decedent.

Clarke testified that she had seen the decedent's figurine collection in the past. She stated that it filled an entire hallway closet. When she arrived at Graham's attorney's office to retrieve the figurines she was to inherit, some were broken while others were completely missing.

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[1] See Neb. Rev. Stat. § 30-2467 (Reissue 2016).

Graham testified that he was out of town for work during the months following the decedent's death. As a result, Graham was unable to transfer the keys to the home to Gallagher. But he claimed that he had told Gallagher to contact Graham's attorney for further information about obtaining the keys.

Graham attested that he emptied the entire contents of the decedent's home and transferred the property to his home for safekeeping. He then transferred some of the property to his attorney's office for distribution, but donated many articles of the decedent's clothing. Graham testified that he delivered all property that was to be distributed to interested parties to his attorney's office.

An inventory document was prepared by Graham's attorney which set forth the items of personal property retrieved by Gallagher and Clarke at his office. Both Gallagher and Clarke signed this inventory document to indicate that they had received the items that were bequeathed to them. However, Gallagher and Clarke took exception to the contents of that inventory document, claiming Graham failed to list several items owned by the decedent that were in her home at the time of her death.

Graham maintained that the property he distributed was all that remained in the decedent's home after her death. It was undisputed that Graham and Gallagher were both at the home near the time of the decedent's death, but neither made a list of what was in the home. Both testified that hospice workers were also in and out of the home during the decedent's final days.

On April 25, 2016, the court removed Graham as personal representative with an additional order that his status was terminated rather than discharged so he would remain responsible for any misdeeds he may have committed while acting as personal representative. The county court found that Graham had acted negligently and improvidently in denying access and then in failing to either protect or inventory the contents of the residence which he maintained under his exclusive control.

Thus, the court found that he had breached his fiduciary duty as a personal representative as it related to the filing of an inventory concerning personal property when he took control of nonprobate assets. Graham did not appeal within 30 days of the April 25 order.

In a subsequent order on September 26, 2017, the court denied Gallagher and Clarke's motion to assess damages against Graham for his conversion, damage, or loss of estate property. The court reasoned that, based on the evidence presented, it could not determine beyond mere speculation whether or not Graham had converted, damaged, or lost assets of the estate.

Attorney Fees and Personal Representative Fees

In addition to damages, Gallagher and Clarke sought attorney fees and personal representative fees for Kasl. Kasl had obtained counsel and performed services for the benefit of the estate, such as obtaining records from banks and attending meetings with his counsel while the first appeal was pending.

In its September 26, 2017, order, the county court awarded personal representative fees to Kasl to be paid from the estate. The court also awarded attorney fees to the attorney representing Gallagher, Clarke, and Kasl for services rendered on behalf of Kasl as successor personal representative. These fees were also to be paid from the estate.

In an order on April 26, 2016, the court appointed a second successor personal representative to close the estate. Graham was ordered to provide a full and complete inventory of all the decedent's personal property as well as an account of his actions as personal representative. Graham failed to comply with this court order. As a result of his noncompliance and his prior-held breaches of his fiduciary duty, the court ordered as a form of sanction that Graham pay the second successor personal representative's fees personally.

Sanctions for Destruction of Document After Ordered to Compel

Gallagher and Clarke asserted that sanctions should be imposed on either Graham or his attorney for the spoliation of a document that they asserted could be relevant to the estate. Prior to her death, the decedent met with the attorney for Graham in this case to prepare a will and draft a deed to convey her home to Gallagher while she was still living. Gallagher was present at this meeting. Graham's attorney drafted both the will and the deed shortly after their meeting. According to the attorney, although the decedent requested that a deed be prepared, she later decided that the real property would be conveyed to Gallagher by will instead.

After the commencement of the probate proceedings, Gallagher's attorneys sought to compel the production of the deed three times. In September 2015, the county court ordered Graham to produce the deed. However, Graham's attorney testified that he purposefully "trashed" the document approximately 4 months after the decedent's death, stating he believed that it was attorney work product and not relevant because it was never delivered.

After an evidentiary hearing related to attorney fees in April 2017, Gallagher and Clarke submitted a written closing argument requesting that the court levy $3,000 in attorney fees as a sanction against Graham for the destruction of this deed. The county court rejected this request for sanctions in its September 26 order.

ASSIGNMENTS OF ERROR

On appeal, Gallagher and Clarke assign, reordered and rephrased, that the county court erred by not (1) awarding damages for Graham's conversion, damage, or loss of property; (2) awarding fees to the successor personal representative, Kasl, personally against Graham by way of surcharge; (3) awarding

attorney fees and costs personally against Graham by way of surcharge; (4) imposing sanctions against Graham or his attorney for the destruction of a deed of conveyance of real estate executed by the deceased in favor of Gallagher; and (5) receiving into evidence exhibit 101.

Although Graham attempts to cross-appeal, the format and substance of his brief on cross-appeal fail to adhere to the briefing requirements found in Neb. Ct. R. App. P. § 2-109 (rev. 2014). As such, we decline to address his assignments of error on cross-appeal.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record.[2] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3] When reviewing a decision of the probate court, the appellate court does not reweigh the evidence and must consider the evidence in the light most favorable to the successful party, who is entitled to every reasonable inference available from the evidence.[4]

[3] Ordinarily, the fixing of reasonable compensation, fees, and expenses, pursuant to Neb. Rev. Stat. § 30-2480 (Reissue 2016), governing compensation of personal representatives; Neb. Rev. Stat. § 30-2481 (Reissue 2016), governing expenses in estate litigation; and Neb. Rev. Stat. § 30-2482 (Reissue 2016), governing compensation of personal representatives and employees of the estate, is within the sound discretion of the county court.[5]

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[2] *In re Estate of Gsantner*, 288 Neb. 222, 846 N.W.2d 646 (2014).

[3] *Id.*

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

[5] See *In re Estate of Odineal*, 220 Neb. 168, 368 N.W.2d 800 (1985).

[4] When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.[6]

[5] Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings on appropriate sanctions will not be disturbed on appeal absent a showing of an abuse of that discretion.[7]

ANALYSIS

Issues Not Properly Raised on Appeal and Cross-Appeal

As a threshold matter, we must determine what assignments of error were properly raised and argued on appeal.

[6] As stated above, Graham did not properly cross-appeal. Section 2-109(D)(4) of our court rules of appellate practice provides:

> Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

Thus, the cross-appeal section of an appellate brief must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of the facts.[8]

[7] Graham's cross-appeal section fails to set forth a separate title page, a table of contents, a statement of the case, assigned errors, or propositions of law. When a brief of an appellee fails to present a proper cross-appeal pursuant to § 2-109, we

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[6] *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

[7] *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

[8] See *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015).

decline to consider its merits.[9] As such, we do not consider the merits of Graham's purported cross-appeal.

[8] Gallagher and Clarke, in their appellate brief, assign as error that the county court erred in not receiving exhibit 101 into evidence, but they fail to argue this assignment of error substantively in their brief. Absent plain error, an appellate court considers only an appellant's claimed errors that the appellant specifically assigns in a separate "assignment of error" section of the brief and correspondingly argues in the argument section.[10] Because Gallagher and Clarke failed to argue this assignment of error in the argument section of their brief, and we do not find plain error in the county court's ruling, we will not consider it.

We turn now to the issues on appeal that were properly presented. Those are whether the county court erred in failing to (1) award damages against Graham for conversion, damage, or loss of property; (2) assess successor personal representative fees on Graham personally by way of surcharge; and (3) award attorney fees for the motions to remove and surcharge Graham.

Conversion, Damage, or Loss of Estate Property

[9] Gallagher and Clarke argue that the court erred in failing to find that Graham converted, damaged, or lost property bequeathed to them, and in failing to order Graham to pay damages to the estate accordingly. Generally, the county court has exclusive original jurisdiction over all matters relating to decedents' estates.[11] The relevant portion of the Nebraska Probate Code, Neb. Rev. Stat. § 30-2473 (Reissue 2016),

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[9] See *id.*

[10] *C.E. v. Prairie Fields Family Medicine*, 287 Neb. 667, 844 N.W.2d 56 (2014).

[11] See Neb. Rev. Stat. § 24-517 (Supp. 2017). See, also, *Line v. Rouse*, 241 Neb. 779, 491 N.W.2d 316 (1992).

provides that "the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty." It has been held that county courts have plenary powers for the exercise of that jurisdiction.[12] A probate court's jurisdiction and authority continue until an executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of whom it devolves.[13]

[10] Pursuant to § 30-2473, county courts in ongoing probate proceedings have jurisdiction over surcharge motions brought against former personal representatives to recover losses to the decedent's estate arising from an alleged breach of fiduciary duty.[14] Our courts have thus reviewed the merits of surcharge motions that have claimed damages to the estate sustained from the personal representative's breach of fiduciary duty by wrongfully loaning funds of the estate,[15] attempting to sell real estate within the residuary estate to the general public as opposed to the decedent's family,[16] and failing to file federal estate tax returns.[17] Though we have never addressed a motion to surcharge the personal representative for his or her direct conversion, damage, or loss of the decedent's former personal property, we conclude that such a motion is properly brought within the probate proceeding, because the facts underlying such motions ultimately concern the probate of the decedent's will and the distribution of the decedent's property.

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[12] *Klug v. Seegabarth*, 98 Neb. 272, 152 N.W. 385 (1915).

[13] *In re Estate of Statz*, 144 Neb. 154, 12 N.W.2d 829 (1944).

[14] See, *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292 (1993); *In re Estate of Statz, supra* note 13; *In re Estate of Snover*, 4 Neb. App. 533, 546 N.W.2d 341 (1996). Compare *Line v. Rouse, supra* note 11. See, also, 31 Am. Jur. 2d *Executors and Administrators* § 847 (2012) (stating generally that court may surcharge personal representative for breach of duty).

[15] *In re Estate of Statz, supra* note 13.

[16] *In re Estate of Watkins, supra* note 14.

[17] *In re Estate of Snover, supra* note 14.

Gallagher and Clarke's motion seeking damages for conversion, damage, or loss of estate property, while not using the word "surcharge," was in substance a motion to surcharge the personal representative for his breach of fiduciary duty. The county court had jurisdiction to determine whether Graham should restore to the estate the property improperly converted, damaged, or lost as a result of Graham's alleged breach of duty in his capacity as personal representative for the estate. We next determine whether the court erred in denying the motion.

We have never specifically addressed the burden of proof for motions to surcharge. In other jurisdictions, parties seeking surcharge have the burden of proving that the representative failed to meet his or her duty of care.[18] Placing the burden on the movant is also consistent with other claims of breach of fiduciary duty in which the plaintiff is required to prove that the defendant's breach of fiduciary duty caused the plaintiff damages and the extent of those damages.[19] And this burden is consistent with the general principle of trust law that "[w]hen a plaintiff brings suit against a trustee for breach of trust, the plaintiff generally bears the burden of proof."[20] Under Nebraska's trust law related to fraud, a beneficiary establishes a prima facie case of fraud by showing that a trustee's transaction benefited the trustee at the beneficiary's expense.[21]

[11] Consistent with these principles, we hold that the party seeking a surcharge carries the burden to show that the representative failed to meet his or her duty of care.[22] A

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[18] 31 Am. Jur. 2d, *supra* note 14, § 848; 34 C.J.S. *Executors and Administrators* § 1024 (2009).

[19] *McFadden Ranch v. McFadden*, 19 Neb. App. 366, 807 N.W.2d 785 (2011).

[20] Restatement (Third) of Trusts § 100, comment *f.* at 68 (2012).

[21] *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009).

[22] See, e.g., 31 Am. Jur. 2d, *supra* note 14, § 848; 34 C.J.S., *supra* note 18.

beneficiary or designee seeking a surcharge against the personal representative for conversion, damage, or loss of estate property has the burden of proving that (1) a fiduciary duty was breached, (2) the breach of the fiduciary duty caused the losses alleged, and (3) the extent of those damages.[23]

In this case, the county court found that while Graham breached his fiduciary duty as personal representative by failing to properly inventory the estate's property, Gallagher and Clarke had failed to prove that Graham's breach involved or resulted in the conversion, damage, or loss of the decedent's personal property that allegedly was in her home when Graham took possession. We conclude that the county court's decision in this regard conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

The record indicates that Graham and Gallagher were not the only people visiting the decedent's home before her death. Gallagher and Graham testified that hospice workers frequented the home during the decedent's final weeks. Further, there was no evidence presented to prove that the decedent did not simply dispose of the property herself. Graham testified that he delivered all property that was to be distributed to interested parties to his attorney's office.

The county court was not unreasonable in concluding, based upon the evidence presented, that it could not be assumed that there was malfeasance by Graham nor could it be presumed that he acted honestly. In other words, the county court did not err in concluding that Gallagher and Clarke had failed to meet their burden to show that Graham had breached a fiduciary duty, causing the losses alleged, and the extent of those damages.

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[23] See, *Lefkowitz v. Bank of New York*, 676 F. Supp. 2d 229 (S.D.N.Y. 2009); *In re Estate of Hedke, supra* note 21; *McFadden Ranch v. McFadden, supra* note 19.

Successor Personal Representative Fees

Gallagher and Clarke next assert that the court erred in ordering Kasl's fees to be paid out of the estate rather than by Graham personally. Gallagher and Clarke rely on the language of § 30-2473 that "[i]f the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust." They assert that Graham's breach was the proximate cause of Kasl's fees and that therefore, Graham should be required to pay Kasl's fees.

Under § 30-2480, a personal representative is entitled to reasonable compensation; under § 30-2481, a personal representative who defends or prosecutes any proceeding in good faith is entitled to receive from the estate his or her necessary expenses and disbursements; and under § 30-2482, the reasonableness of the compensation determined by the personal representative for his or her own services may be reviewed by the court. We have held that the fixing of reasonable compensation is within the sound discretion of the county court.[24]

We have permitted any person beneficially interested in the estate embraced in an administration account to cite the executor or administrator to file an account, object, or file objections to the terms or matters contained in the account, and the personal representative in a proper proceeding may be surcharged with losses occurring because of a breach of trust.[25] An action to surcharge a personal representative may be brought to recover losses to the estate for an alleged breach of fiduciary duty by the personal representative.[26] The measure of damages is the monetary damage to the

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[24] *In re Estate of Odineal, supra* note 5.

[25] *In re Estate of Statz, supra* note 13.

[26] *Line v. Rouse, supra* note 11.

estate caused by the personal representative's breach of fiduciary duties.[27]

However, Gallagher and Clarke fail to present any statutory authority or case law which mandates that a county court must assess against the removed personal representative the successor personal representative's fees and expenses. In the instant matter, it is unclear from the record exactly how or to what extent Graham's breach of fiduciary duty caused the estate to incur additional personal representative fees. The record indicates that at the time of Kasl's appointment, further actions were necessary to close the estate either by the original personal representative or by the successor personal representative, such as preparing inventories and accountings and determining an inheritance tax. Further, the record indicates that a portion of Kasl's actions as successor personal representative were in line with the actions Graham would have needed to complete had he continued as personal representative, including dealing with the ongoing litigation.

We note that the county court's order requiring Graham to personally pay the second successor personal representative's fees is distinguishable from its denial of Gallagher and Clarke's request to surcharge Graham for Kasl's fees. According to the county court's September 26, 2017, order, Graham was required to pay the second successor personal representative's fees as a form of sanction as a result of his noncompliance to prior court orders and in contemplation of his prior-held breaches of his fiduciary duty.

When reviewing a decision of the probate court, the appellate court does not reweigh the evidence and must consider the evidence in the light most favorable to the successful party, who is entitled to every reasonable inference deducible from the evidence.[28] We conclude that the probate court

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[27] *Id.*

[28] *In re Estate of Lamplaugh, supra* note 4.

did not abuse its discretion by refusing to order Graham be personally responsible for Kasl's successor personal representative fees.

Attorney Fees for Claims of Removal and Damage to Estate Property

Gallagher and Clarke also assign as error that the county court erred in declining to award them, either from the estate or against Graham, the attorney fees they incurred while litigating their motion to remove Graham as personal representative and their motion to surcharge Graham for conversion, damage, or loss of estate property. As a general rule, attorney fees and expenses are recoverable only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.[29]

In Gallagher and Clarke's argument to the probate court for attorney fees incurred in litigating their motions to remove and to surcharge, they failed to point to any statute or uniform course of procedure for such an award. They merely argued that because of Graham's breach of his fiduciary duty, they were required to act in the protection of their interests by bringing the removal action and, therefore, were entitled to recover the entirety of their attorney fees. Based on the arguments presented below, the county court did not abuse its discretion in refusing to award additional attorney fees beyond those incurred for Kasl's representation.

On appeal, Gallagher and Clarke raise for the first time that attorney fees were proper under Neb. Rev. Stat. § 25-824(4) (Reissue 2016), which governs frivolous claims or defenses in civil proceedings. We have never held that § 25-824 applies to probate proceedings, and appellate courts do not

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[29] *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004). See, also, *In re Estate of Snover, supra* note 14 (applying this principal in probate case).

generally consider arguments and theories raised for the first time on appeal.[30] Applying that principle, we decline to address Gallagher and Clarke's frivolous defense theory for attorney fees.

Attorney Fees as Discovery Sanction

Gallagher and Clarke also argue that Graham's attorney's destruction of a deed of conveyance, after Graham had been compelled and ordered to turn over the document, warranted discovery sanctions in the form of attorney fees. The county court declined to impose sanctions on Graham or Graham's attorney with regard to the destruction, but, as discussed, did sanction Graham for his failure to provide the second successor personal representative an account of his actions as personal representative. The determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings on appropriate sanctions will not be disturbed on appeal absent a showing of an abuse of that discretion.[31]

Sanctions for failing to comply with court-ordered discovery are governed under Neb. Ct. R. Disc. § 6-337, commonly referred to as "Rule 37." Rule 37 sanctions serve several purposes. First, they punish a litigant or counsel who might be inclined to frustrate the discovery process.[32] Second, they deter those who are tempted to break the rules.[33] Finally, they prevent parties who have failed to meet their discovery obligations from profiting from their misconduct.[34] Relevant factors that are reviewed when determining whether a sanction is

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[30] *Maroulakos v. Walmart Associates*, 300 Neb. 589, 915 N.W.2d 432 (2018).

[31] *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994).

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

[33] *Id.*

[34] *Id.*

appropriate include the prejudice or unfair surprise suffered by the party seeking sanctions, the importance of the evidence which is the root of the misconduct, whether the court warned the sanctioned party about the consequences of its misconduct, whether the court considered less drastic sanctions, the sanctioned party's history of discovery abuse, and whether the sanctioned party acted willfully or in bad faith.[35]

We conclude that the court did not abuse its discretion by refusing to impose sanctions on Graham or his counsel for destruction of the deed of conveyance. In considering the above factors, this deed of conveyance would not have and did not prejudice or unfairly surprise Gallagher and Clarke. In fact, the residence was already conveyed by will to Gallagher when the probate proceedings commenced,[36] and Gallagher and Clarke do not explain on appeal how they were prejudiced by any possible delay between the time of the alleged deed and the conveyance by will. We cannot find that the county court's decision to decline sanctions in the form of attorney fees resulted in an outcome that was untenable and unfairly deprived the litigants of a substantial right or a just result.

CONCLUSION

For the reasons stated above, we affirm the county court's judgment in this matter.

Affirmed.

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[35] *Id.*

[36] See *Hagn v. Verret*, 143 Neb. 820, 11 N.W.2d 551 (1943).

Danielle Krause and Laurie Hoyt, as coguardians and coconservators for Linda Carlson, appellees, v. Five Star Quality Care, Inc., also known as Crestview Healthcare Center, and New Hampshire Insurance Company, its workers' compensation insurance carrier, appellants.

919 N.W.2d 514

Filed November 16, 2018. No. S-18-009.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. In workers' compensation cases, an appellate court is obligated to make its own determinations regarding questions of law.
4. **Workers' Compensation: Words and Phrases.** In Nebraska, a workers' compensation claimant may receive permanent or temporary benefits for either partial or total disability. "Temporary" and "permanent" refer to the duration of the disability, while "total" and "partial" refer to the degree or extent of the diminished employability or loss of earning capacity.
5. **Workers' Compensation.** Temporary disability benefits under the Nebraska Workers' Compensation Act are discontinued at the point of maximum medical improvement, because a disability cannot be both temporary and permanent at the same time.

6. **Workers' Compensation: Time.** The date of maximum medical improvement for purposes of ending a workers' compensation claimant's temporary disability is the date upon which the claimant has attained maximum medical recovery from all of the injuries sustained in a particular compensable accident.
7. **Workers' Compensation.** When an injured employee has reached maximum medical improvement, any remaining disability is, as a matter of law, "permanent," within the meaning of the Nebraska Workers' Compensation Act.
8. ____. Whether a workers' compensation claimant has reached maximum medical improvement is a question of fact.
9. **Workers' Compensation: Judgments: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the appellate court gives the successful party the benefit of every inference reasonably deducible from the evidence.
10. **Workers' Compensation: Witnesses.** The single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even where the issue is not one of live testimonial credibility.
11. **Workers' Compensation: Time.** Maximum medical improvement occurs only at the date a worker reaches maximum medical improvement for all injuries suffered as a result of the work-related injury, including psychological injuries.
12. **Workers' Compensation: Mental Health: Proof.** In workers' compensation cases involving allegations of psychological injuries, the burden is on the claimant to prove by a preponderance of the evidence that his or her disability is the result of an accident arising out of the claimant's employment.
13. **Workers' Compensation.** Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employees' mentality and attainments could perform.
14. ____. Whether a worker is totally and permanently disabled is a question of fact.
15. **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.

16. **Workers' Compensation: Proof.** An injured employee seeking permanent disability benefits has the burden of proving that his or her injury caused permanent impairment and that this impairment resulted in a loss of earning capacity.
17. **Workers' Compensation: Expert Witnesses.** While expert witness testimony may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability.
18. **Workers' Compensation: Testimony.** In assessing a claimant's disability, physical restrictions and impairment ratings are important; but once a claimant establishes the cause of disability, the trial judge is not limited to this evidence and may also rely on the claimant's testimony to determine the extent of disability.
19. **Workers' Compensation: Words and Phrases.** Disability, in contrast to impairment, is an economic inquiry.
20. ____: ____. Total disability does not mean a state of absolute helplessness. Rather, it means that because of an injury, (1) a worker cannot earn wages in the same or a similar kind of work for which he or she was trained or was accustomed to performing or (2) the worker cannot earn wages for any other kind of work which a person of his or her mentality and attainments could do.
21. **Workers' Compensation.** A worker's earning power after a physical injury is often constricted by mental capacity and education, and it is a matter of common observation that a worker whose sole stock in trade has been the capacity to perform physical movements, and whose ability to make those movements has been impaired by injury, is under a severe disadvantage in acquiring a dependable new means of livelihood.
22. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
23. **Workers' Compensation.** Whether an employee who has a compensable permanent total disability can, consistent with the Nebraska Workers' Compensation Act, be deprived of ongoing total disability benefits because of a subsequent noncompensable injury that independently causes permanent disability presents a question of law.
24. ____. The Nebraska Workers' Compensation Act should be construed liberally to carry out its spirit and beneficent purposes.
25. ____. Where it is shown that a worker has a condition attributable to his or her employment that alone would totally disable him or her, it is

immaterial for the purposes of the workers' compensation statutes that he or she may suffer from other independent and concurrent ailments which would by themselves be sufficient to disable him or her.

Appeal from the Workers' Compensation Court: John R. Hoffert, Judge. Affirmed.

Patrick J. Mack, of Hennessy & Roach, P.C., for appellants.

Daniel A. Fix, of Fix Law Office, P.C., L.L.O., for appellees.

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

Stacy, J.

Linda Carlson was injured during the course and scope of her employment and filed a petition in Workers' Compensation Court seeking temporary and permanent disability benefits. Approximately 3 weeks after the petition was filed, Carlson suffered a catastrophic stroke which left her largely incapacitated. The stroke was unrelated to the work injury or treatment. The compensation court found Carlson had reached maximum medical improvement prior to her stroke and awarded permanent total disability benefits. The employer and its workers' compensation insurance carrier appeal, challenging the date of maximum medical improvement and the award of permanent total disability. The employer also argues that after Carlson's stroke, she was no longer entitled to permanent total disability benefits. We affirm.

I. FACTS

1. Background

The parties stipulated to many of the relevant facts. Carlson was injured on February 17, 2013, during the course and scope of her employment with Five Star Quality Care, Inc., also known as Crestview Healthcare Center. Carlson was working as a housekeeper when she slipped and fell, fracturing her right femur.

Carlson filed a petition in the compensation court in September 2015. On October 14, 2015, she suffered a catastrophic stroke that was wholly unrelated to the work-related injury and its subsequent treatment. The compensation court granted the parties' joint motion to substitute Carlson's coguardians and coconservators as plaintiffs.

2. Trial Evidence

Trial was held on November 7, 2017. Carlson appeared, but did not testify, because her stroke left her unable to communicate verbally. The only witness to testify was one of Carlson's coconservators, who had known Carlson for many years. Medical evidence was submitted, and the parties offered a comprehensive joint stipulation addressing most of the relevant facts concerning Carlson's work accident and subsequent treatment.

(a) Work Injury and Treatment

The evidence showed that the day after Carlson's fall, three pins were surgically inserted in her hip. Carlson underwent subsequent physical therapy and treatment and, in April 2013, was authorized to return to work in a "[s]edentary/[l]ight" capacity. Carlson continued to struggle with significant pain, and on June 14, Dr. Matthew Reckmeyer recommended a total hip arthroplasty and opined Carlson could not return to work in any capacity. Reckmeyer performed the hip arthroplasty on June 25. Carlson did not return to work after June 14, and she continued to report significant pain and limitations up to the date of her stroke. She last sought treatment for her work injury on September 15, 2015. Five Star Quality Care and New Hampshire Insurance Company, Five Star's workers' compensation insurance carrier (collectively Five Star), have paid all of Carlson's medical bills related to the work accident and injury and paid temporary partial disability benefits for a period of time.

(b) Medical Evidence

Medical examinations were performed on Carlson in September 2014, April 2015, and October 2015. The September 2014 examination was performed by Dr. David Diamant, who was retained by Five Star. Diamant opined Carlson had not reached maximum medical improvement at that time, because she could possibly benefit from additional treatment to her right sacroiliac joint. Diamant also performed a second medical examination of Carlson in April 2015. At that time, he did not make an express finding of maximum medical improvement. He did, however, determine Carlson had suffered a 30-percent body-as-a-whole impairment. He also opined that Carlson would likely need "continuing maintenance care" and recommended she could work at "sedentary duty capacity."

Dr. Morgan LaHolt, also retained by Five Star, conducted the October 8, 2015, medical examination. LaHolt found Carlson had reached maximum medical improvement as of that date for "any and all conditions" "related to [the] work accident injury of February of 2013." Notes from LaHolt's physical examination indicate Carlson was able to rise from a seating position using a cane. She reported pain with hip flexion, hip abduction, hip adduction, knee extension, and knee flexion. Carlson's pain limited her from engaging in range-of-motion testing. Carlson told LaHolt that she could walk for only 50 to 75 feet and that her pain increased with turns and activities that required bending.

LaHolt found Carlson had a 37-percent lower extremity impairment and opined it was "likely that . . . Carlson will have significant permanent physical restrictions as a result of her injury." LaHolt's report rejected a suggestion from one of Carlson's treating physicians regarding placement of a spinal cord stimulator to manage her pain, opining that the "likelihood of any type of functional or symptomatic improvement" from such treatment was "extremely low."

As noted, Reckmeyer was one of Carlson's treating physicians. He first examined Carlson in June 2013 and performed

the hip arthroplasty on June 25, 2013. He then saw Carlson for several followup appointments. Reckmeyer's last examination of Carlson occurred on October 24, 2014. His report of the same date stated Carlson had a "smoldering dysfunction" with her right hip and ambulated with a cane. He opined the hip replacement appeared stable and well aligned and recommended Carlson pursue treatment for sacroiliac joint problems.

Pursuant to a request from Carlson's counsel, Reckmeyer authored a subsequent report on July 17, 2017, which opined:

> Carlson has been under my care for treatment of a work related left hip fracture that she sustained on or about February 17, 2013. She required a repair of her fracture and subsequently a total hip replacement. As of her last office visit October 24, 2014, she had reached a point of medical stability. She required the use of an ambulatory assistive device and would likely continue to require that. At that time, it was felt that she would be able to perform restricted activity work which would include capacity in the sedentary[-]light category. She would be limited from climbing stairs and restricted from no ladders, no kneeling or no squatting. Very limited walking and only light (10 #) lifting. Some reaching would be tolerated. These would be lifelong restrictions.

Counsel for Five Star then obtained a further report from LaHolt, who examined Reckmeyer's reports of October 24, 2014, and July 17, 2017, and opined:

> After a review of the medical record, it does not appear that . . . Carlson reached MMI as of her final visit with Dr. Reckmeyer. Additional work up and treatment would not be expected to be necessary for an individual who has reached maximum medical improvement. . . . Instead, I would place . . . Carlson's date of maximum medical improvement as of October 8, 2015, the date of my independent medical examination. At the time of this encounter, . . . Carlson had undergone all

reasonable medical treatment and work up of her work related condition.

(c) Testimony of Coguardian and Coconservator

Carlson's coguardian and coconservator, Laurie Hoyt, testified she had known Carlson for 25 years and regularly spent time with her both before and after the work accident. Hoyt observed a significant decline in Carlson's physical ability after the work accident; she became sedentary, required a cane to walk, no longer participated in her prior activities or hobbies, and complained "a lot" about pain. Hoyt also testified about Carlson's educational background and her prior work experience. Carlson had completed high school and had worked (1) in a road construction crew, performing duties such as driving a blacktop roller and flagging traffic; (2) in the food industry, loading, hauling, and unloading large containers of food; and (3) in hotel housekeeping. This vocational history was also supported by the medical reports. Additional evidence in the record showed that before her stroke, Carlson had some "[u]nderlying elevated symptoms of depression," was "mildly impaired" intellectually/cognitively, and had a full-scale IQ of 69.

3. Compensation Court Findings

The Workers' Compensation Court found Carlson reached maximum medical improvement on October 8, 2015 (the date of her medical examination by LaHolt) and awarded temporary disability benefits up to that date. The court went on to find that from and after the date of maximum medical improvement, Carlson was permanently and totally disabled as a result of her work injury. In making this finding, the court acknowledged that no vocational rehabilitation counselor had offered an opinion on Carlson's loss of earning capacity. However, the court concluded it could find a loss of earning capacity based on evidence of permanent impairment and/or

restrictions. Thus, the court relied on Reckmeyer's 2017 report, Diamant's impairment rating, and LaHolt's observations of Carlson's restrictions on October 8, 2015. It also noted the evidence of Carlson's education, work history, and cognitive abilities. Ultimately, the compensation court concluded: "Giving due consideration to . . . Carlson's educational background, vocational/employment history, self-described physical limitations as well as the restrictions imposed upon her by medical providers . . . , the Court finds that . . . Carlson has been rendered permanently and totally disabled as a result of her work accident of February 17, 2013."

The compensation court awarded Carlson permanent total disability benefits "for so long as she remains permanently and totally disabled." The court rejected Five Star's contention that the occurrence of the stroke relieved Five Star of the ongoing responsibility to pay total disability benefits. Five Star appeals. We moved this case to our docket on our own motion.[1]

II. ASSIGNMENTS OF ERROR

Five Star assigns, restated and consolidated, that the compensation court erred in (1) finding Carlson reached maximum medical improvement on October 8, 2015; (2) finding Carlson was permanently and totally disabled; and (3) finding the stroke had no impact on Carlson's entitlement to ongoing permanent total disability benefits.

III. STANDARD OF REVIEW

[1] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or

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

award; or (4) the findings of fact by the compensation court do not support the order or award.[2]

[2] On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[3]

[3] In workers' compensation cases, an appellate court is obligated to make its own determinations regarding questions of law.[4]

IV. ANALYSIS

1. Date of Maximum Medical Improvement

[4] The parties dispute the date on which Carlson attained maximum medical improvement from her work injury. This date is important because it marks the point at which temporary disability benefits end and entitlement to permanent disability benefits can be ascertained.[5] In Nebraska, a workers' compensation claimant may receive permanent or temporary benefits for either partial or total disability.[6] "Temporary" and "permanent" refer to the duration of the disability, while "total" and "partial" refer to the degree or extent of the diminished employability or loss of earning capacity.[7]

[5-7] Temporary disability benefits under the Nebraska Workers' Compensation Act are discontinued at the point of

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[2] *Wynne v. Menard, Inc.*, 299 Neb. 710, 910 N.W.2d 96 (2018); Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016).

[3] *Id.*

[4] *Kohout v. Bennett Constr.*, 296 Neb. 608, 894 N.W.2d 821 (2017); *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[5] See *Gardner v. International Paper Destr. & Recycl.*, 291 Neb. 415, 865 N.W.2d 371 (2015). See, also, Neb. Rev. Stat. § 48-121(3) (Reissue 2010) ("compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertainable").

[6] See *id.*

[7] *Gardner, supra* note 5.

maximum medical improvement, because a disability cannot be both temporary and permanent at the same time.[8] The date of maximum medical improvement for purposes of ending a workers' compensation claimant's temporary disability is the date upon which the claimant has attained maximum medical recovery from all of the injuries sustained in a particular compensable accident.[9] When an injured employee has reached maximum medical improvement, any remaining disability is, as a matter of law, "permanent," within the meaning of the Nebraska Workers' Compensation Act.[10]

[8,9] Generally, whether a workers' compensation claimant has reached maximum medical improvement is a question of fact.[11] In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and we give the successful party the benefit of every inference reasonably deducible from the evidence.[12]

In her petition, Carlson alleged that the "nature and extent of the injury sustained is right femur fracture, post total hip arthroplasty, chronic pain syndrome, gait disturbance and depressive disorder." The parties stipulated that she sustained a compensable injury arising out of the February 17, 2013, accident and that she underwent a "percutaneous screw fixation and subsequent total hip arthroplasty as a result of the femur fracture sustained" in the work accident. The stipulation is silent regarding her chronic pain syndrome, gait disturbance,

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[8] *Id*. See, also, § 48-121(3).

[9] *Stacy v. Great Lakes Agri Mktg*., 276 Neb. 236, 753 N.W.2d 785 (2008).

[10] *Gardner, supra* note 5; § 48-121.

[11] *Stacy, supra* note 9; *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005).

[12] See, *Gardner, supra* note 5; *Money, supra* note 4.

and depressive disorder. There is no other evidence of causation in the record.

[10] Five Star argues the compensation court erred in relying on the opinions of Reckmeyer and LaHolt in finding Carlson reached maximum medical improvement on October 8, 2015. With respect to the medical opinions of Reckmeyer, Five Star presents several arguments, all of which amount to attacks on the weight and credibility of Reckmeyer's July 2017 report. The single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even where the issue is not one of live testimonial credibility.[13] Here, the compensation judge expressly found the opinions offered by Reckmeyer to be persuasive, and Five Star's appellate arguments to the contrary are without merit.

With respect to LaHolt's opinion, Five Star concedes his report is "sufficient to support a finding of maximum medical improvement from a physical medicine prospective."[14] Indeed, LaHolt's October 8, 2015, report expressly stated Carlson had reached maximum medical improvement as of that date for "any and all conditions" "related to [the] work accident injury of February of 2013." But Five Star argues there was a psychological aspect of Carlson's injury that was not addressed by LaHolt. Some additional background is helpful to understand this argument.

Dr. Robert Arias, a neuropsychologist, examined Carlson in August 2015 on a referral from her treating physician to determine whether she was a good candidate for a spinal cord stimulator to help with her pain management. After his examination, Arias diagnosed Carlson with "Unspecified Neurocognitive Disorder," "Unspecified Depressive Disorder,"

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[13] *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013); *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

[14] Brief for appellants at 18.

and "Intellectual Disability, Mild." His report made no attempt to relate any of these diagnoses to Carlson's work accident injury or related treatment.

[11] Now, Five Star relies on Arias' diagnoses to suggest that its own retained expert, LaHolt, failed to adequately consider Carlson's "psychological injuries" when he concluded on October 8, 2015, that she had reached maximum medical improvement for any and all conditions related to the work injury. Five Star's argument is based on the proposition that maximum medical improvement occurs only at the date a worker reaches maximum medical improvement for all injuries suffered as a result of the work-related injury, including psychological injuries.[15]

[12] In workers' compensation cases involving allegations of psychological injuries, the burden is on the claimant to prove by a preponderance of the evidence that his or her disability is the result of an accident arising out of the claimant's employment.[16] Here, the burden was on Carlson to prove any psychological injuries were caused by the work-related accident.

Although Carlson's complaint alleged depression as one of the accident-related injuries, she never attempted to prove a causal relationship between her depression and the work accident. And although Arias' report noted Carlson suffered from unspecified neurocognitive disorder and unspecified depressive disorder, he did not opine that either disorder was caused by the February 17, 2013, accident or related treatment. The parties' stipulation did not reference either disorder, and there is no other evidence in the record suggesting that either disorder, or any other psychological condition, was caused by the February 17 accident and resulting treatment.

On this record, evidence of psychological injury was simply not a factor in the compensation court's finding of maximum

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[15] See *Rodriguez, supra* note 11.

[16] *Worline v. ABB/Alstom Power Int. CE Servs.*, 272 Neb. 797, 725 N.W.2d 148 (2006).

medical improvement. Consequently, Five Star's concern that LaHolt's report did not "attempt to comment on the psychological or neuropsychological aspects"[17] of Carlson's treatment with Arias is of no moment. The trial court did not clearly err in finding Carlson had reached maximum medical improvement on October 8, 2015, for all injuries suffered as a result of the work accident.

2. Permanent Total Disability

[13,14] After determining the date of maximum medical improvement, the compensation court found that as of that date, Carlson was permanently and totally disabled as a result of the work accident and injury. Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employees' mentality and attainments could perform.[18] Whether a worker is totally and permanently disabled is a question of fact.[19]

[15] Five Star argues there was insufficient evidence in the record to support the court's factual finding that Carlson was permanently and totally disabled. 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.[20]

[16,17] An injured employee seeking permanent disability benefits has the burden of proving that his or her injury caused

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[17] Brief for appellants at 18.

[18] *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016); *Money, supra* note 4.

[19] See *id*.

[20] *Nichols v. Fairway Bldg. Prod.*, 294 Neb. 657, 884 N.W.2d 124 (2016); *Tchikobava, supra* note 18.

permanent impairment and that this impairment resulted in a loss of earning capacity.[21] While expert witness testimony may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability.[22] Here, the court based its finding of permanent and total disability on the uncontroverted medical evidence of permanent impairment and lifelong restrictions, as well as testimony regarding Carlson's self-described physical limitations and evidence of her educational background, vocational history, and mental ability before the stroke.

Before addressing this evidence, we note Five Star makes much of the fact that presumably due to the timing of Carlson's stroke, no expert performed additional medical assessments of Carlson's impairment or restrictions after the chronological date of maximum medical improvement—October 8, 2015. Five Star argues that because permanent impairment and permanent restrictions cannot be ascertained until after maximum medical improvement is reached,[23] the lack of such assessments after October 8 resulted in insufficient evidence upon which the trial court could make a determination of permanent disability.

This argument, however, is based only on the chronological dates of the relevant assessments and ignores their content. In finding Carlson totally and permanently disabled, the trial court specifically relied on the medical opinions of both Reckmeyer and LaHolt. Temporally, Reckmeyer's opinion was rendered after maximum medical improvement was reached, because his report was authored in July 2017. But what is more important, in that report, Reckmeyer opined that as of October 24, 2014, Carlson would have "lifelong restrictions" requiring the use of an ambulatory assistive device and limiting her to

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[21] *Gardner, supra* note 5.

[22] See *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

[23] See *Yost v. Davita, Inc.*, 23 Neb. App. 482, 873 N.W.2d 435 (2015).

sedentary-light work. Reckmeyer specified that Carlson would also have "lifelong" limitations on her ability to climb stairs, walk, climb ladders, kneel, squat, and lift. Similarly, LaHolt found in October 2015, days before her stroke, that Carlson would have "significant permanent physical restrictions." In addition, Diamant assessed Carlson with a 30-percent body-as-a-whole impairment, also before her stroke. No evidence was offered to the contrary. The evidence in the record was sufficient to support the compensation court's finding that prior to her stroke, Carlson suffered significant and severe permanent impairment and restrictions as a result of her work-related accident.

Five Star does not specifically contest the compensation court's finding that based on her permanent impairments and restrictions, Carlson was permanently and totally disabled as a result of the work accident of February 17, 2013. But for the sake of completeness, we note the record supports this factual finding. In addition to the medical assessments of permanent, lifelong restrictions and physical impairment, the record also contains evidence of Carlson's prior work history, education, and cognitive ability.

[18-20] In assessing a claimant's disability, physical restrictions and impairment ratings are important; but once the claimant establishes the cause of disability, the trial judge is not limited to this evidence and may also rely on the claimant's testimony to determine the extent of disability.[24] Disability, in contrast to impairment, is an economic inquiry.[25] And total disability does not mean a state of absolute helplessness.[26] Rather, it means that because of an injury, (1) a worker cannot earn wages in the same or a similar kind of work for which he

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[24] *Money, supra* note 4.

[25] *Id.*

[26] *Gardner, supra* note 5; *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015); *Money, supra* note 4.

or she was trained or was accustomed to performing or (2) the worker cannot earn wages for any other kind of work which a person of his or her mentality and attainments could do.[27]

Carlson had a high school education, and her prior work experience was in vocations which required significant mobility and which were incompatible with the lifelong restrictions imposed upon her as a result of her work-related injury. She was approximately 62 years old at the time of her stroke. Carlson had a mild intellectual disability and her full-scale IQ was 69.

[21] We have observed that a worker's earning power after a physical injury is often constricted by mental capacity and education, and "'"it is a matter of common observation that a [worker] whose sole stock in trade has been the capacity to perform physical movements, and whose ability to make those movements has been impaired by injury, is under a severe disadvantage in acquiring a dependable new means of livelihood."'"[28] Here, the record contains medical evidence detailing permanent and significant restrictions that resulted from Carlson's work injury, as well as information about her work history, education, and mental and physical abilities.

[22] If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.[29] Considering the evidence in the light most favorable to Carlson, we find the record supports the compensation court's determination that as of October 8, 2015, she was permanently and totally disabled as a result of her work accident of February 17, 2013.

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[27] See *id.* See, also, *Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013).

[28] *Money, supra* note 4, 275 Neb. at 621, 748 N.W.2d at 65.

[29] *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015).

3. Effect of Stroke on Benefits

Finally, Five Star argues that even if Carlson reached maximum medical improvement before the date of her stroke and was permanently and totally disabled at that time, the subsequent stroke left her completely incapacitated and unable to care for herself. Five Star therefore asks us to conclude the stroke "cut off"[30] Carlson's entitlement to permanent total disability benefits.

[23] We have not previously considered whether an employee who has a compensable permanent total disability can, consistent with the Nebraska Workers' Compensation Act, be deprived of ongoing total disability benefits because of a subsequent noncompensable injury that independently causes permanent disability. We conclude this presents a question of law.

The only legal support Five Star offers for its position that Carlson's permanent total disability benefits should end after her stroke is a single sentence in § 48-121(1). Section 48-121(1) sets out the schedule of compensation for total disability, and provides: "Nothing in this subdivision shall require payment of compensation after disability shall cease." Five Star's theory is that the permanent total disability caused by Carlson's work injury "ceased" on the date of her stroke, apparently reasoning that if she had not already been permanently and totally disabled from the work accident, the stroke would have rendered her so. Five Star suggests Carlson's permanent total disability was either subsumed, or canceled out, by the effects of her subsequent stroke. It analogizes the situation to the nonwork-related death of an employee receiving permanent total disability payments and suggests that if "Carlson had passed away from complications to her stroke, her entitlement to . . . permanent and total disability benefits would be cut off on the date of her unfortunate passing."[31]

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[30] Brief for appellants at 27.

[31] *Id.*

We do not find this death analogy to be factually or legally supported. Carlson survived her stroke, and we see nothing in the record to support Five Star's contention that her work-related disability ceased once she had the stroke. To the contrary, the evidence supports that she was permanently and totally disabled from a work accident injury at the time she had her stroke, and she remained so afterward. Because Carlson's permanent total disability did not cease as a result of the stroke, Five Star's reliance on § 48-121(1) is misplaced.

Although Five Star has not framed its argument as one seeking to modify an award, Five Star basically seeks to terminate Carlson's award of permanent total disability benefits due solely to her subsequent stroke. Nebraska's workers' compensation statutes allow an award to be modified "on the ground of increase or decrease of incapacity *due solely to the injury*."[32] But Five Star is claiming the change in disability was due to the stroke, not the work injury, so the modification statute does not support Five Star's requested relief either.

[24] The Nebraska Workers' Compensation Act should be construed liberally to carry out its spirit and beneficent purposes.[33] Five Star's position is contrary to the beneficent purpose of the act, because it would result in Carlson's entitlement to permanent total disability benefits for a work-related injury being cut off by a completely unrelated event.

Five Star directs us to no cases from this jurisdiction or elsewhere that support its position. There is very little precedent on this issue, but a few other courts have considered and rejected the suggestion that an employee's permanent total disability benefits can be canceled out if the employee suffers a subsequent independent injury that also causes disability.

Kentucky addressed a factual situation similar to the instant case in *Beth-Elkhorn Corporation v. Dotson*.[34] In

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[32] Neb. Rev. Stat. § 48-141 (Reissue 2010) (emphasis supplied).

[33] *Anderson v. EMCOR Group*, 298 Neb. 174, 903 N.W.2d 29 (2017).

[34] *Beth-Elkhorn Corporation v. Dotson*, 428 S.W.2d 32 (Ky. App. 1968).

that case, the worker had been a coal miner for more than 40 years when he suffered a heart attack after finishing his workday. Medical evidence established that the worker suffered from pneumoconiosis as a result of his employment and that the pneumoconiosis left him permanently and totally disabled. Medical evidence also established that the non-work-related heart attack left the worker totally disabled. The court affirmed an award of total disability benefits, reasoning that "'any disability an employe[e] sustains in the course of and arising out of his employment shall [not] be cancelled out, for compensation purposes, by disability from another cause.'"[35] This rationale was based on *Daugherty v. Watts*,[36] an earlier case decided by the Kentucky Court of Appeals. *Daugherty* expressly held that "if a workman has suffered a compensable injury he will not be deprived of compensation merely because of the existence of an independent, concurrent cause of disability."[37]

[25] One legal commentator has cited to *Daugherty* for the following general proposition:

> Where it is shown that a worker has a condition attributable to his or her employment that alone would totally disable him or her, it is immaterial for the purposes of the workers' compensation statute[s] that he or she may suffer from other independent and concurrent ailments which would by themselves be sufficient to disable him or her.[38]

This proposition is consistent with the beneficent purpose of the Nebraska Workers' Compensation Act.

Carlson was permanently and totally disabled as a result of a work accident and injury. The fact that she subsequently suffered a stroke that was neither medically nor causally related,

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[35] *Id.* at 34.

[36] *Daugherty v. Watts*, 419 S.W.2d 137 (Ky. App. 1967).

[37] *Id.* at 138.

[38] 82 Am. Jur. 2d *Workers' Compensation* § 353 at 383-84 (2013).

does not relieve Five Star of its obligation to pay Carlson permanent total disability benefits under the Nebraska Workers' Compensation Act.

V. CONCLUSION

For the foregoing reasons, the compensation court did not err in finding Carlson (1) reached maximum medical improvement on October 8, 2015; (2) was permanently and totally disabled as of that date as a result of her work-related accident; and (3) remained permanently and totally disabled as a result of her work-related accident after her stroke. We affirm the judgment of the compensation court.

Affirmed.

State of Nebraska, appellee, v. Tillman T. Henderson, appellant.

920 N.W.2d 246

Filed November 30, 2018. No. S-17-535.

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.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.
3. **Postconviction: Appeal and Error.** On appeal from the denial of postconviction relief without an evidentiary hearing, the question is not whether the movant was entitled to relief by having made the requisite showing. Instead, it must be determined whether the allegations were sufficient to grant an evidentiary hearing.
4. **Postconviction: Pleadings.** The allegations in a motion for postconviction relief must be sufficiently specific for the district court to make a preliminary determination as to whether an evidentiary hearing is justified.
5. **Postconviction: Pleadings: Proof: Constitutional Law.** In a proceeding under the Nebraska Postconviction Act, the application is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights, and the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing.
6. **Postconviction: Proof: Constitutional Law.** A postconviction evidentiary hearing must be granted when the facts alleged, if proved, would justify relief, or when a factual dispute arises as to whether a constitutional right is being denied.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by the same

counsel, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.

8. **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. A court may address the two prongs of this test, deficient performance and prejudice, in either order.
9. **Postconviction: Effectiveness of Counsel: Proof.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
10. **Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness.
11. **Trial: Effectiveness of Counsel: Appeal and Error.** An appellate court will not judge an ineffectiveness of counsel claim in hindsight.
12. ____: ____: ____. An appellate court must assess trial counsel's performance from counsel's perspective when counsel provided the assistance.
13. ____: ____: ____. When reviewing claims of ineffective assistance, an appellate court will not second-guess trial counsel's reasonable strategic decisions.
14. **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. 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. **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.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed.

Gregory A. Pivovar for appellant.

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

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

Papik, J.

Tillman T. Henderson was convicted of first degree murder, attempted first degree murder, and related firearms offenses. We affirmed his convictions on direct appeal. See *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014). Henderson now appeals the order of the district court for Douglas County that denied his motion for postconviction relief without an evidentiary hearing. He alleges various claims of ineffective assistance of trial and appellate counsel. Finding that the district court did not err by denying Henderson's postconviction claims without an evidentiary hearing, we affirm.

I. BACKGROUND

1. Trial

A detailed recitation of the evidence at trial can be found in our opinion on direct appeal. See *State v. Henderson, supra*.

In summary, Henderson was charged in connection with the shooting death of Matthew Voss and the nonfatal shooting of Antonio Washington. Evidence at Henderson's jury trial showed that in the early morning hours of February 18, 2012, Voss and Antonio Washington both sustained gunshot wounds after a fight broke out at an after-hours party in downtown Omaha, Nebraska. Witnesses reported seeing two men firing guns. After a person at the scene identified Henderson to a police officer as one of the shooters, police apprehended Henderson as he was running from the scene of the incident. Henderson was in possession of one gun when he was arrested, and a police officer saw him throw another gun under a vehicle as the officer was chasing him. Forensic evidence presented at trial tied bullets and casings found at the scene of the shootings to those guns. DNA testing indicated that blood found on clothing worn by Henderson had come from Voss.

The jury found Henderson guilty of first degree murder, attempted first degree murder, two counts of use of a deadly

weapon to commit a felony, and possession of a deadly weapon by a prohibited person.

2. Direct Appeal

Represented by the same counsel that represented him at trial, Henderson appealed his convictions. See *State v. Henderson, supra*. He made numerous assignments of error pertaining to pretrial and trial rulings. This court affirmed Henderson's convictions and sentences. The U.S. Supreme Court denied Henderson's petition for certiorari. See *Henderson v. Nebraska*, 576 U.S. 1025, 135 S. Ct. 2845, 192 L. Ed. 2d 881 (2015).

3. Postconviction Proceedings

Following direct appeal, Henderson filed an application for postconviction relief. He alleged various instances of ineffective assistance of trial and appellate counsel. In response, the State filed a motion to dismiss. The district court denied postconviction relief without an evidentiary hearing. It determined that Henderson had failed to show either that he had received deficient representation or that he had suffered prejudice. Henderson now appeals that order.

II. ASSIGNMENTS OF ERROR

Henderson assigns, rephrased and summarized, that the district court erred in denying him an evidentiary hearing on his application for postconviction relief, which alleged various instances of ineffective assistance of counsel at trial and on appeal.

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. *State v. Torres*, 300 Neb. 694, 915 N.W.2d 596 (2018).

IV. ANALYSIS

[2,3] Before turning to Henderson's specific arguments on appeal, we review the general principles governing postconviction actions asserting claims of ineffective assistance of counsel. Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable. *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018). On appeal from the denial of postconviction relief without an evidentiary hearing, the question is not whether the movant was entitled to relief by having made the requisite showing. Instead, it must be determined whether the allegations were sufficient to grant an evidentiary hearing. *Id.*

[4-6] The allegations in a motion for postconviction relief must be sufficiently specific for the district court to make a preliminary determination as to whether an evidentiary hearing is justified. *Id.* In a proceeding under the Nebraska Postconviction Act, the application is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights, and the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing. *Id.* An evidentiary hearing must be granted when the facts alleged, if proved, would justify relief, or when a factual dispute arises as to whether a constitutional right is being denied. *Id.*

[7,8] Here, Henderson bases his claim to postconviction relief on ineffective assistance of trial and appellate counsel. When, as here, a defendant was represented both at trial and on direct appeal by the same counsel, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief. *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017). 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. Newman*, 300 Neb. 770, 916 N.W.2d 393 (2018). A court may address the two prongs of this test, deficient performance and prejudice, in either order. *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017).

[9-13] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Haynes, supra*. In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness. *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014). An appellate court will not judge an ineffectiveness of counsel claim in hindsight. *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). We must assess trial counsel's performance from counsel's perspective when counsel provided the assistance. *Id.* When reviewing claims of ineffective assistance, we will not second-guess trial counsel's reasonable strategic decisions. *Id.*

[14] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Haynes, supra*. 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. See *State v. Schwaderer, supra.* A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *State v. Custer*, 298 Neb. 279, 903 N.W.2d 911 (2017).

With these principles in mind, we turn to Henderson's arguments.

1. Alleged Failure to Call Other Witnesses

In his motion for postconviction relief, Henderson asserted that trial counsel was ineffective in failing to interview, depose, and call three additional witnesses to testify. He now contends that the district court erred in denying him an evidentiary hearing concerning these claims. For reasons explained below, we disagree.

(a) Timothy Washington

First, Henderson claims his trial counsel should have called Timothy Washington. Henderson argues that had Timothy Washington been called to testify, he would have rebutted the testimony of a witness called by the State, Vasili Petrihos. At trial, Petrihos testified that a young black man, who was later apprehended and identified as Henderson, was "tensed up and all hyped up," "huffing and puffing," and "getting aggravated" and appeared "ready to fight" near the shooting site immediately prior to the shooting.

In his motion for postconviction relief, however, Henderson did not reference Petrihos or his testimony. Henderson asserted only that Timothy Washington was willing to testify about Henderson's "demeanor and the direction . . . Henderson had been headed . . . minutes before the shooting" and that such testimony could have impeached the testimony of other unspecified witnesses as to Henderson's whereabouts, demeanor, and actions in the minutes before the shooting. The motion did not explain what Timothy Washington would have testified regarding Henderson's location, demeanor, or direction.

The lack of explanation as to what Timothy Washington would have testified is relevant because 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. See *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014). Absent specific allegations, a motion for postconviction relief is subject to dismissal

without an evidentiary hearing. See *id*. Because Henderson's motion did not describe Timothy Washington's alleged testimony with sufficient specificity, an evidentiary hearing was not warranted.

(b) Deonta Marion

Next, Henderson asserts that he is entitled to postconviction relief because his trial counsel failed to call Deonta Marion. Henderson alleged in his motion for postconviction relief that Marion gave a statement to police regarding the shooting. Henderson attached a document to his motion that appears to be a police report documenting that statement. The report stated that Marion described one shooter as wearing a "'white or a light-colored short-sleeve shirt'" and the other as wearing "'dark clothing.'" Later in the report, the author noted that Marion had initially provided a false name to law enforcement. Henderson argues that had Marion been called, his testimony regarding the shooters' clothing would have undercut the State's theory that Henderson was one of the shooters because Henderson was wearing a tan "Carhartt" jacket when he was apprehended. Brief for appellant at 24.

We recently addressed two related cases in which defendants contended that trial counsel failed to call witnesses who would have identified the perpetrators of crimes as having different characteristics than the defendants charged with those crimes. In *State v. Newman*, 300 Neb. 770, 916 N.W.2d 393 (2018), and *State v. Stricklin*, 300 Neb. 794, 916 N.W.2d 413 (2018), the codefendants, who were both African American, contended that their counsel deficiently failed to call witnesses. They claimed the witnesses would have testified that the perpetrators were unnamed "'Mexicans'" or "'Latino's.'" *State v. Newman*, 300 Neb. at 782, 916 N.W.2d at 406. Accord *State v. Stricklin, supra*. We concluded that these allegations did not show a reasonable likelihood that, absent the alleged deficiency, the outcome at trial would have been different.

In so finding, we applied the approach that the U.S. Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to analyze prejudice:

> "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."

State v. Newman, 300 Neb. at 782-83, 916 N.W.2d at 407, quoting *Strickland v. Washington, supra*. See, also, *State v. Stricklin, supra*. In both cases, we concluded that in the context of all the evidence adduced at trial, the omitted testimony "would not have altered the evidentiary picture and would, at best, have had an isolated or trivial effect on the jury's findings." See *State v. Newman*, 300 Neb. at 783, 916 N.W.2d at 407. Accord *State v. Stricklin, supra.*

Similarly, here, there is overwhelming evidentiary support for the jury's verdict, which we summarized on direct appeal:

> Henderson was apprehended by police as he was running from the scene of the incident. A person who was at the scene had identified Henderson to a police officer as one of the shooters. The other suspect was not apprehended. One gun was found on Henderson's person

> when he was arrested, and a police officer saw Henderson throw another gun under a vehicle as the officer was chasing him.
>
> Forensic evidence presented at trial indicated that bullets and casings found at the scene of the shootings had been fired from the gun found on Henderson and from the gun he was seen throwing under a vehicle. A fingerprint on the gun found under the vehicle matched Henderson's. In addition, DNA testing of blood found on the clothing worn by Henderson at the time of his arrest indicated that the blood had come from Voss.
>
> The State maintained at trial that Henderson shot Voss and [Antonio] Washington to retaliate for an assault on Henderson's friend, Jimmy Levering. Levering and Voss had both been inmates at a prison in Florida, and Voss had allegedly stabbed and punched Levering.

State v. Henderson, 289 Neb. 271, 274-75, 854 N.W.2d 616, 624 (2014). In addition to the evidence quoted above, text messages obtained from a cell phone found on Henderson's person indicated that the two people exchanging the messages around the time of the shooting were attempting to meet one another outside the party where the shooting occurred and that the individual who stabbed "'Jb'" was there. *Id*. at 277, 854 N.W.2d at 625. The background of the cell phone's screen was a picture of Jimmy Levering.

When we weigh the effect of counsel's allegedly deficient failure to call Marion against the remaining evidence, we conclude that there is not a reasonable likelihood the outcome would have been different had Marion testified. Henderson's presence at the scene, his possession of the weapons used in the shooting, the blood matching the DNA profile of one of the victims on his clothing, and the evidence of his premeditative intent to retaliate against someone he believed to be present at the scene are highly suggestive of his guilt. To reach a different conclusion, the jury would have to find that just after Henderson had received a text message that someone

who had stabbed his acquaintance was at a party in downtown Omaha, Henderson went to such a party where someone else shot a person who had assaulted Henderson's friend Levering in prison when Henderson happened to be sufficiently nearby to get blood matching the DNA profile of the victim on his clothes, and that Henderson somehow took possession of both guns used in the crime and fled the scene with them. We find the likelihood of the jury's reaching such a conclusion to be exceedingly low.

Our prejudice analysis is also informed by the fact that Henderson relied on another account of the shooters' attire at trial but was unable to convince the jury of his innocence. The evidence showed that Henderson was apprehended wearing a tan Carhartt jacket that had a hood. However, an eyewitness, Charles Bird, testified that one shooter wore a light-colored or gray "hoodie" and the other wore a dark-colored hoodie. Henderson's counsel highlighted Bird's testimony during closing arguments, noting that the witness did not describe a tan jacket like Henderson wore that night. Even so, the jury found Henderson guilty.

The State points to Henderson's reliance on Bird's testimony and contends that it shows that Marion's testimony would not have made a difference. In this case, we agree. We can envision a circumstance in which testimony of a purported eyewitness that the perpetrator of a crime lacked certain characteristics of the defendant might corroborate similar testimony of another purported eyewitness and thus meaningfully assist the defense. However, for multiple reasons, we do not believe Marion's testimony would have had that effect here. First, it is not clear that Marion's testimony would have corroborated Bird's: Bird identified the shooters as wearing hoodies, and Marion identified one of the shooters as wearing a short-sleeved shirt. And even if the chance that Marion's testimony would undercut rather than corroborate Bird's is set to the side, the testimony would not necessarily have been exculpatory, because there was evidence that Henderson was wearing a white short-sleeved

shirt under his jacket. Finally, there is still the overwhelming evidence of Henderson's guilt set forth above. Given the nature of this evidence, we are convinced that the jury would have reacted to the testimony Henderson claims Marion would have given the same way it did to the testimony of Bird, which Henderson relied on at trial.

Because Marion's testimony would not have meaningfully altered the evidentiary picture and any impact on the jury's findings would have been isolated and trivial, we hold that the district court did not err in denying this claim of ineffective assistance of counsel without an evidentiary hearing.

(c) Jermaine Westbrook

Finally, Henderson contends he should have received an evidentiary hearing on his claim that his counsel was ineffective for failing to call Jermaine Westbrook to testify. In his motion for postconviction relief, Henderson alleged that Westbrook called the 911 emergency dispatch service regarding a sport utility vehicle (SUV) following the shooting. The record does not contain a recording or transcript of Westbrook's 911 call, but Henderson attached a police report to his application for postconviction relief that summarized the call:

> WESTBROOK . . . stated to [the] 911 operator that he is following the car that the shooter was in. . . . WESTBROOK stated the party inside this white SUV is the "accessory to the shooting". . . . WESTBROOK stated [that] after he saw the guys do the shooting, they went right on 16th and Harney. He stated that one of the shooters (masculine) shot the guy in broad (unaudible). 911 asked WESTBROOK if he knew who the shooters or the people in the vehicle were, to which the caller responded no. WESTBROOK further described one of the shooters as having a brown Carhart [sic] jacket on. He further stated that this suspect in the brown Carhart [sic] jacket was a black male, approximately five foot five, and short, and approximately 20-21 years old. . . . WESTBROOK

stated he lost sight of the taillights of the white SUV which the possible suspects were in.

Henderson contends that if Westbrook had been called to relay the substance of his 911 call, the testimony would have absolved Henderson because he fled the scene not in an SUV, but on foot. Henderson's motion alleges that Westbrook could have provided information about the departure from the scene of "at least one of the shooters." But the police report indicates that Westbrook claimed to be following the car that the "shooter," singular, was in. Henderson's motion and the attached exhibit do not explain how Westbrook could have provided information about the departure of more than one shooter. The lack of any such explanation is significant. Testimony by Westbrook that one unidentified shooter fled in an SUV would not have benefited Henderson. Evidence at trial established that there were two shooters. Evidence that the other suspect fled in an SUV would not have disproved the claim that Henderson shot Voss and Antonio Washington and then fled on foot.

As we have already stated, 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. See *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017). 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. See, *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015); *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015). And we have held that without such specific allegations, an application for postconviction relief has not alleged sufficient facts to establish a reasonable probability that the outcome of trial would have been different if trial counsel had called those witnesses. See *State v. Marks*, 286 Neb. 166, 835

N.W.2d 656 (2013). Here, Henderson's motion for postconviction relief does not contain the level of specificity needed to demonstrate that the outcome would have been different had Westbrook testified.

Even if it is assumed Westbrook would have testified to a belief that he was following an SUV in which both shooters were riding, we do not believe there is a reasonable probability that such testimony would have affected the outcome. In addition to the overwhelming evidence of Henderson's guilt recounted above, had Westbrook been called to testify, the State would assuredly have elicited from Westbrook another item contained in the police report summarizing Westbrook's 911 call—that Westbrook identified one shooter as a "black male" wearing a "brown Carhart [sic] jacket" and matching Henderson's physical description. We are confident that the jury would not have concluded that both shooters were in an SUV driving away from the scene when Westbrook's description of one of the shooters matched the clothing and physical characteristics of Henderson, who was running away from the scene of the shooting carrying both guns used and who was identified to police as the shooter. We find no error in the district court's denial of this claim without an evidentiary hearing.

2. Alleged Failure to Move for Gunshot Residue Testing

Henderson also claims that his trial counsel provided ineffective assistance by failing to move for gunshot residue testing of other individuals at the scene of the shooting, including the victims. Henderson argues the district court's rejection of this claim without granting an evidentiary hearing was erroneous. Again, we disagree.

Henderson contends that gunshot residue swabs were taken from Voss, Antonio Washington, and two other individuals who were present at the scene. Henderson asserts that these swabs were never submitted for testing and that such testing

"could have implicated other suspects in the shooting" or provided him with "alternative theories of defense." Evidence introduced at trial, however, demonstrated that gunshot residue testing would not have made a difference. An officer involved in the investigation testified that a finding of gunshot residue on a person does not definitively show that the person had fired a gun, because a person can also come into contact with gunshot residue by being in the vicinity of gunfire. Because the individuals from whom gunshot residue swabs were obtained either were victims or were known to be at the scene, a finding of gunshot residue on them would not have implicated them or exculpated Henderson. In light of this testimony, the correctness of which Henderson does not dispute, Henderson's counsel could not have acted deficiently by not seeking gunshot residue testing and Henderson suffered no prejudice.

3. Alleged Failure to Move for and Compel DNA Testing

Henderson argues that he received ineffective assistance when his trial counsel failed to move for DNA testing on a sample taken from Jeremy Terrell.

As previously mentioned, shortly before the shooting, text messages were sent from the cell phone found on Henderson's person. Those messages were responses to text messages from a telephone number assigned to Terrell, also referred to as "Jay Town." The correspondence indicated that "Jay Town" and the recipient were attempting to meet one another outside the after-hours party where the shooting occurred and that the individual who stabbed "Jb" was there. Terrell was not apprehended at the scene of the shootings. Police later attempted to interview him, but he refused to provide any information. Police obtained a DNA sample from Terrell, but the sample was not tested.

Law enforcement conducted DNA testing on samples taken only from Henderson and Voss. That testing led to the conclusion that blood found on Henderson's shirt and shoes had

come from Voss. It also showed a mixture of DNA from at least three people on the grip of one of the guns recovered upon Henderson's arrest, but testing could not show the identities of those sources with any degree of certainty. A DNA analyst explained that because of the mixture, many people could be indicated and the probability that a random individual matched a DNA profile found in the mixture was 1 in 3 for Caucasians, 1 in 2 for African Americans, and 1 in 4 for Hispanic Americans. The DNA analyst testified that consequently, test results comparing the mixture to Henderson's and Voss' DNA were inconclusive, meaning that she could not be certain whether either man's DNA was present or not present on the gun grip.

In his application for postconviction relief, Henderson referenced the mixture of DNA from at least three people and alleged that testing Terrell's sample "may have" exculpated Henderson on its own or led to a more thorough investigation that "could have" revealed more evidence pointing to "the actual shooters." Even if we were to consider Henderson's allegation sufficiently specific, he has failed to show ineffective assistance of counsel. The DNA analyst's testimony suggests that even if Terrell's DNA sample had been tested and compared to the DNA mixture on the gun grip, the result would have been inconclusive, and Henderson makes no allegation that the DNA analyst's testimony was incorrect. Therefore, Henderson's motion failed to show a reasonable probability that DNA testing would have resulted in a different outcome at trial. In the absence of any prejudice to Henderson, then, the district court did not err in denying Henderson an evidentiary hearing concerning DNA testing.

4. Allegedly Ineffective Response to Evidence of Gang Affiliation

Henderson also asserts that his trial counsel ineffectively responded to evidence at trial concerning gang affiliation. Henderson contends that his trial counsel (1) should have taken

various measures after a police officer testified that Levering was "kind of an infamous gang member" and (2) should have objected to the admission of pictures of Levering in which Henderson claims Levering is making gang-related hand gestures as unfairly prejudicial. Again, we find no error with the district court's disposition of this claim.

(a) Statement Regarding Levering

The reference to Levering's being "kind of an infamous gang member" came about when Det. Nick Herfordt was testifying regarding the contents of the cell phone found on Henderson when he was arrested. Herfordt identified a background picture on the cell phone as a photograph of Levering, and when asked how he knew that, he answered, "I worked Northeast Omaha when I was in uniform, and . . . Levering, I guess, was kind of an infamous gang member . . . ."

Henderson immediately moved for a mistrial, noting that the State had agreed in connection with Henderson's pretrial motion in limine that it would not introduce evidence regarding gang affiliations. The trial court denied the motion. The trial court later asked Henderson's counsel whether he was moving to strike Herfordt's answer, and Henderson's counsel stated he was not.

Henderson now argues his trial counsel should have done more to respond to Herfordt's statement. Henderson details various measures he contends trial counsel should have employed, including further pressing the motion for a mistrial, asking that the testimony be stricken, or requesting an admonition or limiting instruction.

On direct appeal, however, we rejected Henderson's contention that he was prejudiced by the trial court's denial of his motion for a mistrial. In doing so, we observed that Herfordt's gang reference "was an isolated comment" and that the State did not present any other evidence of gang affiliation on the part of Henderson or anyone else. *State v. Henderson*, 289 Neb. 271, 299, 854 N.W.2d 616, 639 (2014). These same facts

lead us to conclude that Henderson could not show that he was prejudiced by his counsel's failure to take additional steps concerning the comment.

(b) Pictures of Levering

Henderson also contends his trial counsel was deficient for not objecting to the admission of pictures of Levering as unfairly prejudicial. According to Henderson, Levering is making gang-related hand gestures in the pictures. However, there was no testimony that Levering's hand gestures were gang related. Furthermore, on direct appeal, we did not consider the photograph itself to be evidence of gang affiliation; we determined that other than the "'infamous gang member'" reference, "the State did not present . . . evidence of gang affiliations." *Id.* at 298, 299, 854 N.W.2d at 638, 639. Having already decided that the photograph of Levering does not constitute evidence of gang affiliation, we will not revisit the issue on postconviction review. See *State v. Thorpe*, 290 Neb. 149, 156, 858 N.W.2d 880, 887 (2015) ("[a] motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased").

5. Allegedly Ineffective Response to Text Message Evidence

Henderson alleges several instances of ineffective assistance of counsel relating to a series of text messages admitted at trial. The text messages were from a cell phone found on Henderson at the time of his arrest. Henderson's counsel moved unsuccessfully to suppress the messages and also attempted to exclude evidence from the cell phone via a motion in limine and objections at trial.

On direct appeal, Henderson assigned that the trial court erred in overruling his second motion to suppress evidence obtained from his cell phone and admitting that evidence, including text messages and pictures. This court concluded that the district court had not erred when it overruled the motion

to suppress or when it admitted evidence obtained from the search over Henderson's Fourth Amendment objections. We also concluded that the district court did not err in admitting the cell phone evidence over Henderson's objections based on hearsay and lack of foundation establishing a chain of custody. Henderson now claims his counsel was ineffective for not taking various other steps in response to the text messages. We disagree as we explain in the sections below.

(a) Authentication of Text Messages

First, Henderson contends his counsel was ineffective for not objecting to a lack of "authentication that . . . Henderson was the one receiving or sending those text messages." According to Henderson, the State would have been unable to oppose an authentication objection by proving that Henderson was involved in the text messages.

The State's burden of authentication for text messages is relatively low. The proponent of text messages is not required to conclusively prove who authored the messages and can establish foundation through the context of the messages and testimony that the number belonged to or was regularly utilized by the alleged sender. See *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016). Although Henderson asserts that the State would not have been able to do so had he objected, he alleges no facts to support this assertion. As pleadings of mere conclusions of fact or law are not sufficient to require the court to grant an evidentiary hearing, we find that the district court did not err in denying this claim without an evidentiary hearing. See *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018).

(b) Limiting Instruction

At trial, Henderson's counsel proposed the following instruction regarding the text messages:

> During this trial the Court admitted some evidence that was received for a specific limited purpose. Specifically, the incoming text messages received into evidence from

> the cell phone of [Henderson were] offered to show [Henderson's] state of mind. The content of the text messages was not received for the purpose of showing the truth of the matter asserted in the incoming text messages. You may consider the evidence only for the limited purpose for which it was received and for no other purpose.

The trial court declined to give this instruction. On direct appeal, we determined that the text messages were admitted not for the truth of the statements contained therein but instead for the purpose of showing their effect on Henderson and were thus not hearsay. We did not address the limiting instruction because Henderson's appellate counsel did not properly raise the issue on direct appeal. Henderson alleged in his postconviction motion that his appellate counsel was deficient in failing to do so and now alleges on appeal that the district court erred in denying him an evidentiary hearing to address the issue.

We conclude that Henderson was not entitled to an evidentiary hearing on this matter. Even if Henderson's appellate counsel had raised the limiting instruction on appeal, it would not have been grounds for a reversal of his convictions. We perceive little danger that the jury improperly deliberated by considering the text messages for the truth of the matter asserted. The facts asserted in the messages were that an individual had stabbed "Jb" and that the individual was in the same area as the author of the text messages. Whether those facts were true was immaterial. Regardless of whether "Jb" had actually been stabbed, whether the suspected individual had done it, or whether that person was in the area described, the text messages would have suggested that Henderson went to the area of the shootings with the intent of retaliating against the individual who he believed stabbed his acquaintance. And this was the nonhearsay purpose for which they were admitted. No limiting instruction was necessary to prevent the jury from considering the truth of the statements in the text messages.

(c) Brief Supporting Second Motion to Suppress

In his application for postconviction relief, Henderson asserted that his trial counsel was ineffective in failing to properly brief the trial court concerning the text messages before a suppression hearing on the second search warrant. Based on a few words uttered by his trial counsel at a hearing on the matter, he contended that his trial counsel's brief only addressed the second search warrant's validity, not the suppression of evidence. But the record affirmatively refutes this claim. Both the second motion to suppress and the brief supporting it sought to suppress evidence obtained as a result of the second search warrant, and Henderson's counsel affirmed this objective later at the same hearing. In addition, we considered Henderson's motions to suppress on direct appeal and ultimately determined that the trial court did not err in overruling them. This allegation is refuted by the record.

(d) Timing of Search

Henderson asserts that the district court should have granted him an evidentiary hearing concerning contents from the cell phone that he believes police may have accessed before obtaining a search warrant. He refers to two allegations of ineffective assistance of counsel from his motion for postconviction relief: (1) that his trial counsel failed to mount a Fourth Amendment challenge to the Omaha Police Department's search to obtain the telephone number from the cell phone before securing a search warrant and (2) that his trial and appellate counsel failed to pursue Fourth Amendment objections to the download of data from the cell phone that "potentially could have occurred" before police obtained a search warrant. But Henderson did not show ineffective assistance of counsel in either regard.

As to obtaining the telephone number from the cell phone, Henderson can show no prejudice. The record shows that police obtained the telephone number prior to applying for

any search warrant and that the telephone number was not necessary for that application. But no evidence at trial utilized the telephone number to demonstrate that the cell phone belonged to Henderson; nor was the telephone number used to obtain other evidence through telephone records. The key evidence from the cell phone—photographs of Levering and the "J Town" text messages—was downloaded from the cell phone itself. Based on the record, we cannot discern how Henderson could have suffered prejudice when his counsel did not argue that the telephone number was prematurely obtained.

Henderson's claim that data was downloaded from the cell phone before police obtained the search warrant also fails, because the record refutes it. Henderson relies on testimony by the officer who applied for the search warrant that he was uncertain whether information was downloaded on the day the search warrant was obtained. According to Henderson, this suggests the possibility that the download occurred before police secured the search warrant and that his counsel was ineffective in not pursuing the issue. However, the record demonstrates no such possibility. The same officer testified that police waited until after obtaining the first search warrant to download data and that the second search warrant was executed in the same manner. Because the record refutes this claim, Henderson cannot demonstrate ineffective assistance of trial or appellate counsel.

6. Allegedly Ineffective Response to Testimony of Ramone Narvaez

Next, Henderson asserts that he received ineffective assistance both at trial and on appeal concerning his counsel's response to testimony of Ramone Narvaez. Narvaez, a correctional officer from a federal penitentiary in Florida, testified that in 2009, he witnessed an altercation between Levering and an inmate named "Voss." As noted above, the State contended that Henderson shot Voss and Antonio Washington to retaliate for an assault on Henderson's friend, Levering. Henderson

argues his trial counsel provided ineffective assistance by failing to object to the Narvaez testimony on relevance grounds until after it was complete and that his appellate counsel provided ineffective assistance by failing to contend the testimony was irrelevant on appeal.

Henderson cannot establish that he received ineffective assistance of counsel regarding the Narvaez testimony. Contrary to Henderson's assertion, the relevance and allegedly prejudicial nature of the Narvaez testimony was addressed on direct appeal. We specifically stated that the testimony was "relevant to the State's case and was not unfairly prejudicial." *State v. Henderson*, 289 Neb. 271, 301, 854 N.W.2d 616, 640 (2014). Because we have already rejected the evidentiary objections that Henderson contends his counsel should have raised, the record refutes Henderson's claim that his appellate counsel failed to raise the issue of relevance on appeal, and we need not revisit whether his trial counsel was ineffective in not objecting on relevance grounds during Narvaez' testimony. See *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

7. Alleged Failure to Request Lesser-Included Offense Instruction

Henderson was charged and convicted of the attempted first degree murder of Antonio Washington. He claims his trial counsel was ineffective in not requesting lesser-included offense instructions on that charge. But, in fact, the trial court *did* instruct the jury on the elements of second degree murder and informed the jury that it could find Henderson guilty of first degree murder or second degree murder or find him not guilty. Furthermore, Henderson did not identify any other lesser-included offenses in his postconviction motion or explain why the result of the proceeding would have been different had the jury been instructed on those offenses. Because Henderson's allegations were not sufficiently specific for the district court to make a determination as to whether an

evidentiary hearing was required, the district court did not err in denying Henderson's claim without an evidentiary hearing. See *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018).

8. Alleged Failure to Object to Pictures of Coat

Photographs of a coat were received at trial without objection. Testimony at trial established that the coat in the photographs was the Carhartt jacket worn by Henderson when police apprehended him. The detective who identified the photographs testified without objection that the coat had blood on it. DNA testing was not performed on this blood, but as noted above, DNA testing showed that Voss' blood was on Henderson's shirt and shoes.

Henderson asserts his counsel was deficient in failing to make authentication or prejudice objections to the admission of photographs of the coat. He noted that no evidence was presented that the blood on the coat was ever tested and matched to either victim. Henderson claimed that allowing the jury to see photographs of "an untested and supposedly blood-stained article of clothing" denied him a fair trial.

We fail to see how testimony that there was blood on Henderson's jacket prejudiced Henderson's defense. Henderson conceded that he was at the scene of the shootings. In addition, Voss' blood was found on Henderson's shirt and shoes. Given evidence that Henderson was not only present at the scene but also sufficiently close to Voss to get Voss' blood on his clothing, we do not believe additional testimony suggesting there was blood on his coat "altered the evidentiary picture." See *State v. Newman*, 300 Neb. 770, 783, 916 N.W.2d 393, 407 (2018). Accordingly, the district court did not err by denying this claim without an evidentiary hearing.

9. Alleged Failure to Investigate Witness Tampering

Henderson also claims that he received ineffective assistance because his trial counsel did not pursue claims of witness

tampering. In his postconviction motion, Henderson states that although Antonio Washington testified that he did not know Matthew Voss, their "families were close friends" and Voss' mother asked Antonio Washington to do what he could to keep Henderson in prison. Henderson says that this motivated Antonio Washington to lie in his testimony at trial, but that Henderson's counsel did not investigate or pursue the matter when Henderson reported it.

We find that Henderson has not sufficiently alleged how an investigation on the part of Henderson's counsel would have made a difference. Henderson has not described what would have been discovered during any additional investigation or explained what testimony of Antonio Washington was untrue or how it made a difference to the result. Without such allegations, he has failed to allege facts that would entitle him to an evidentiary hearing. See *State v. Haynes, supra*.

10. Alleged Misstatement of Testimony

Henderson also claims his trial counsel misstated testimony in a way that prejudiced his defense during his cross-examination of Petrihos. Petrihos testified during his direct examination that before the shooting, he saw an individual pass something "metallic [and] black" to "a younger black male," later identified as Henderson. The following colloquy between Petrihos and Henderson's counsel then took place during cross-examination:

> Q [by Henderson's counsel]: And you're that close to that and you — you couldn't tell it was a gun?
>
> A [by Petrihos]: No, sir.
>
> Q: I think, in fact, you didn't — you thought it might have been brass knuckles?
>
> A: It looked — something metal. I didn't know. It [sic] didn't — didn't really think it was a gun. Didn't really think — I don't know — didn't really think it was a gun.

Q: And you can't tell us what this black male was wearing that was handed the gun?

A: From a year ago? No, sir, I can't.

[15] Henderson argues that his counsel's reference to the object's being a gun constituted ineffective assistance. The record, however, affirmatively refutes Henderson's claim. It is apparent from the record that counsel was trying to create doubt the object was a gun and doubt regarding Petrihos' general credibility and that the reference to the object as a gun was a momentary and inconsequential slip of the tongue. Moments before, Henderson's counsel asked Petrihos a leading question about whether he thought the object was a set of brass knuckles and Petrihos responded that he did not think it was a gun. Later, counsel again referred to the object as a gun but immediately corrected himself. Moreover, the jury was instructed that "[s]tatements, arguments, and questions of the lawyers for the State and [Henderson]" are not evidence. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016). Consequently, we conclude that the district court did not err in denying an evidentiary hearing concerning trial counsel's misstatement.

11. Failure to Argue *State v. Tompkins* on Appeal

Finally, Henderson alleges that his appellate counsel was ineffective for not arguing that our opinion in *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006), *modified on denial of rehearing* 272 Neb. 865, 727 N.W.2d 423 (2007), precluded us from finding, as argued by the State on direct appeal, that text messages from the cell phone found on Henderson were admissible under the good faith exception to the exclusionary rule. Henderson contends that the State did not raise the good faith exception at trial and that as a result, *Tompkins* precluded the State from raising it on appeal.

It is not entirely clear that the State did not raise the good faith exception to the trial court in some fashion. Although the State cannot point to any indication in the record that it did, we note that the record does show that Henderson's counsel argued at trial that the good faith exception did not apply. At the very least, then, Henderson's counsel was aware of the potential applicability of the exception and took the opportunity to argue against it.

In any event, we do not need to determine whether the State actually raised the good faith exception in the trial court in order to resolve this assignment of error. In *State v. Tompkins, supra*, the sole issue on appeal was whether an appellate court may consider the good faith exception sua sponte. We concluded that it may not, reasoning that if the court finds the exception applies on the court's own initiative, the defendant is given no chance to make arguments to the contrary. *Tompkins* thus does not answer the question of whether the State may raise the good faith exception for the first time on appeal.

In *Tompkins*, we did cite *U.S. v. Hahn*, 922 F.2d 243 (5th Cir. 1991), a case in which a federal appellate court declined to apply the exception because the prosecution had not raised the issue before the trial court. Henderson seems to contend that if his appellate counsel had cited *Tompkins*, we would have, in reliance on *Hahn*, extended *Tompkins* to say that we could not consider the good faith exception because it was not raised at trial. But in fact, *Hahn* itself did not categorically hold that the prosecution could never raise the good faith exception for the first time on appeal. Rather, the court pointed out that the defendant had "not had a fair opportunity to factually respond" to the assertion of the good faith exception, and because of that and other reasons unique to that case, "considerations of fairness and the orderly administration of justice tip[ped] the scales in favor" of not considering the good faith exception. *U.S. v. Hahn*, 922 F.2d at 248.

In this case, Henderson cannot claim that he did not have an opportunity to factually address the potential applicability

of the good faith exception. As noted above, his counsel expressly argued at trial that the exception did not apply. Thus, even assuming for the sake of argument that we could have been convinced to follow *Hahn*, it would not have precluded our consideration of the good faith exception in Henderson's direct appeal. Because the result of Henderson's direct appeal would have been no different had his counsel cited *Tompkins*, we find no merit to this assignment of error.

V. CONCLUSION

For the foregoing reasons, we affirm the order of the district court denying Henderson's motion for postconviction relief without an evidentiary hearing.

Affirmed.

Freudenberg, J., not participating.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Kent E. Person, respondent.

919 N.W.2d 856

Filed November 30, 2018. No. S-17-556.

1. **Disciplinary Proceedings.** Attorney discipline cases are original proceedings before the Nebraska Supreme Court, and the court reviews a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
2. ____. The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.
3. ____. The goal in disciplining attorneys in attorney discipline proceedings is not as much punishment as it is a determination of whether it is in the public interest to allow an attorney to keep practicing law.
4. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any aggravating or mitigating factors.
5. ____. The Nebraska Supreme Court considers the following factors in determining whether and to what extent discipline should be imposed: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present and future fitness to continue in the practice of law.

Original action. Judgment of suspension.

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

Kent E. Person, pro se.

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

Per Curiam.

INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against Kent E. Person, alleging ethical violations. At the hearing before the referee, Person, a Nebraska licensed attorney, admitted to violating his oath of office as an attorney, as well as Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), 3-503.3 (candor toward tribunal), and 3-508.4 (misconduct). We order an indefinite suspension from the practice of law for a minimum of 2 years, followed by a 2-year period of probation.

BACKGROUND

Person was admitted to the practice of law in the State of Nebraska on June 24, 1968. Person began practicing as an attorney in 1970, working with his father in Holdrege, Nebraska.

Person was retained by complainant to administer the estate of complainant's mother following her passing on November 16, 2007. The following timeline is placed against the backdrop of repeated, and rarely answered, communications by complainant over the 8 years that Person was purporting to administer the estate of complainant's mother.

On January 22, 2008, Person opened the estate informally in Phelps County Court, at which time, complainant was appointed as the estate's personal representative. After no further action had taken place with regard to the estate, on June 3, the clerk magistrate sent Person a notification reminding him that the estate inventory had been due on April 22. Person filed the initial inventory on December 1, over 7 months after the statutorily mandated filing date.

In connection with meeting federal tax reporting requirements, Person contacted complainant on November 25, 2008,

to request that he come to Person's office to sign the "Federal Estate Tax Return, Form 706." After complainant signed the form, Person told complainant that he, Person, would file the form. Person ultimately failed to do so. Person withheld from complainant that the form should have been filed within 9 months of complainant's mother's death, a deadline that had passed over 3 months earlier. Person further withheld information regarding penalties and interest that would result from the missed deadline.

As a result of the case's being open in excess of 18 months, the clerk magistrate sent a notification to Person requesting that a "'status letter'" be filed with the court by August 15, 2009. After Person failed to file the ordered status letter, the clerk magistrate issued a show cause order to Person, setting the matter for hearing on October 19. The result of the hearing is not clear from the record. On April 6, 2010, the clerk magistrate sent another communication to Person, seeking a report on the status of the estate. Receiving no reply or status letter, the clerk magistrate issued a second show cause order on May 19 to determine the reason for the lack of movement with regard to the estate and set the matter for hearing.

On June 7, 2010, Person filed a status letter with the Phelps County Court, advising that a determination of the estate's assets had been difficult due to title discrepancies. Person indicated that "[w]e have prepared and filed a Federal Estate Tax Return in this estate." Person went on to state that "[w]e will be filing an Inventory with this estate within thirty (30) days and will proceed to file the Inventory within thirty (30) days with the Internal Revenue Service on *the 706 that has been filed* and the remaining papers within thirty (30) days." (Emphasis supplied.) The federal estate tax form had not been filed at the time Person made this statement.

Having again not heard from Person or any representative of the estate, the clerk magistrate sent a letter on January 13, 2011, indicating that a status update on the case was required. Person again failed to respond or file a status update. On May

13, the clerk magistrate issued a third order to show cause, setting the matter for hearing on June 6. The result of the scheduled June 6 hearing is not clear from the record; however, on June 7, Person filed an amended inventory.

With the estate still open and no further action occurring following the June 7, 2011, filing, on January 10, 2012, the clerk magistrate issued a fourth order to show cause and set the matter for a hearing on February 8. Person failed to appear at that hearing. With no further action occurring in regard to the estate, on September 17, the clerk magistrate issued a fifth order to show cause, setting the matter for hearing on October 1. The record is unclear as to the result of the September 17 order; however, the clerk magistrate sent a sixth order to show cause on November 30, setting a hearing for December 17.

On December 14, 2012, complainant signed a petition for determination of inheritance tax and maintained that until that date, he was not aware he was required to pay an inheritance tax. At the hearing on December 17, Person reportedly indicated that he would be closing the estate by the end of the year.

On April 25, 2013, Person filed an amended inventory, a petition for determination of inheritance tax, and an inheritance tax worksheet. The petition for determination of inheritance tax contains the following: "The Inheritance Tax Worksheet states the clear market value of all assets of the Decedent, the *proper deductions* and the correct computation of the Nebraska Inheritance Tax, which should be determined and assessed as stated therein, and the Worksheet is incorporated by this reference." (Emphasis supplied.) The inheritance tax worksheet referenced shows a deduction of $55,415 for attorney fees. During the hearing regarding discipline, the referee questioned Person about the attorney fees, to which Person responded that he had not received any payment. In response to further questioning, Person indicated that the amount listed on the worksheet was the agreed-upon fee for Person's services; however, Person further indicated that he

had never charged complainant and that he felt he had not earned the fees.

In addition to the misrepresentations that Person had made to the probate judge stating that he had filed the tax form, the referee concluded that Person made a false statement in the petition for determination of inheritance tax and on the inheritance tax worksheet he filed with the court, because a deduction for attorney fees had been claimed but never paid by the estate.

On April 25, 2013, an order assessing the inheritance tax was filed. However, Person had not informed complainant that the state inheritance tax was past due and was accruing interest and penalties according to Neb. Rev. Stat. § 77-2010 (Reissue 2009). Under § 77-2010, interest will accrue at a rate set by the Legislature under Neb. Rev. Stat. § 45-104.01 (Reissue 2010), which was 14 percent. Additionally, according to § 77-2010, a consequence for not filing the appropriate proceeding to determine estate taxes within 12 months carries between "five percent per month or fraction thereof, up to a maximum penalty of twenty-five percent of the unpaid taxes due." As a result of Person's failing to adequately administer the estate or communicate with complainant, state taxes, including accumulated interest and penalties, totaled $36,052.48. The record demonstrates that complainant paid the tax, including interest and penalties. However, it is unclear from the record whether Person has fully reimbursed complainant.

Three additional show cause orders requiring Person's appearance in court were issued on November 20, 2013; July 11, 2014; and January 6, 2015. The January 6 order compelled Person to appear on February 11. Upon Person's failure to appear at the scheduled hearing, the probate court appointed a separate attorney as special administrator for the estate.

The special administrator worked with complainant to wrap up the affairs of the estate. During the course of its work, the special administrator learned that the required tax form

had been completed but not filed. The special administrator also retained a tax attorney to resolve issues with the Internal Revenue Service (IRS). Despite the efforts of the tax attorney, who sought to abate the IRS penalties and interest in excess of the $800,000 owed, the IRS refused to accommodate any abatement. As a result, the total amount due to the IRS totaled $1,090,077.58 in interest and penalties.

The complaint made by complainant was forwarded to the Committee on Inquiry of the Sixth Judicial District on May 13, 2017, and a disciplinary hearing was held on November 8. After the hearing, the referee found that Person had violated §§ 3-501.1; 3-501.3; 3-501.4(a)(1) through (4) and (b); 3-503.3(a); and 3-508.4(a), (c), and (d) of the Nebraska Rules of Professional Conduct. The referee weighed a number of considerations and determined that the appropriate discipline was to consist of a 30-day suspension, with reinstatement after the 30 days conditioned upon proof that Person had fully reimbursed the estate all interest and penalties paid by the estate to state and federal taxing authorities. The 30-day suspension was to be followed by a 1-year period of probation, during which Person would be required to engage an attorney, licensed to practice law in the State of Nebraska and approved by the Counsel for Discipline, to act as a practice monitor during Person's probationary period.

In addition to the suspension and probationary period, the referee recommended that upon Person's application for reinstatement, such reinstatement was to be conditioned upon his producing evidence that he is fit to practice law and has not had any additional disciplinary matters arise during his suspension. Further, the referee recommended that Person be required to comply with Neb. Ct. R. § 3-316 (rev. 2014), and be required to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323(B), within 60 days after any order imposing costs and expenses ordered by the court.

STANDARD OF REVIEW

[1] Attorney discipline cases are original proceedings before this court, and we review a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[1]

ANALYSIS

[2-4] The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.[2] The goal in disciplining attorneys in attorney discipline proceedings is not as much punishment as it is a determination of whether it is in the public interest to allow an attorney to keep practicing law.[3] With that in mind, the determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any aggravating or mitigating factors.[4]

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

Person admits that in this case, he violated the following Nebraska Rules of Professional Conduct: §§ 3-501.1 (competence); 3-501.3 (diligence); 3-501.4(a)(1) through (4) and

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[1] See *State ex rel. Counsel for Dis. v. Trembly*, 300 Neb. 195, 912 N.W.2d 764 (2018).

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

[3] *Trembly, supra* note 1.

[4] *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005).

[5] See *Trembly, supra* note 1.

(b) (communication); 3-503.3(a) (candor toward tribunal); and 3-508.4(a), (c), and (d) (misconduct). Person argues on appeal that because the violations affected only one client and were mitigated by other factors, at most a brief suspension was appropriate. Relator agreed with the referee that a 30-day suspension, followed by reinstatement conditioned on proof that Person had fully reimbursed the estate and a 1-year period of probation following that reinstatement, was appropriate.

In *State ex rel. Counsel for Dis. v. Fraizer*,[6] the formal charges consisted of one count against Theodore Fraizer, alleging that he failed to make a timely distribution of the assets remaining in the trust. In that case, the decedent died on May 3, 2006, and Fraizer filed the estate proceeding on May 12. In May 2009, the estate was closed, with the remaining assets being transferred to a trust for which Fraizer became trustee in 2013. The beneficiaries subsequently filed a complaint with the Counsel for Discipline alleging that Fraizer failed to make timely distribution of the assets remaining in the trust. Fraizer ultimately completed all matters related to the estate and trust, further agreeing to be responsible for any interest or penalties. Fraizer filed a conditional admission admitting that he violated his oath of office as an attorney and professional conduct rules §§ 3-501.3 and 3-508.4(a). Fraizer's violations and voluntary admission resulted in a public reprimand.

In *State ex rel. Counsel for Dis. v. Holthaus*,[7] the formal charges alleged that Roger Holthaus had neglected his responsibilities while acting as the attorney for the personal representative of a probate estate. It was alleged that Holthaus neglected his responsibilities by not timely filing pleadings in the probate case, not filing tax returns, not communicating

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[6] *State ex rel. Counsel for Dis. v. Fraizer*, 297 Neb. 496, 899 N.W.2d 912 (2017).

[7] *State ex rel. Counsel for Dis. v. Holthaus*, 268 Neb. 313, 686 N.W.2d 570 (2004).

with the residual beneficiary, and mishandling estate assets. The residual beneficiary filed a petition to surcharge the personal representative and Holthaus, which resulted in a judgment against Holthaus. Subsequently, Holthaus filed a conditional admission in which he did not contest the truth of the allegations and further waived all proceedings against him in favor of a 6-month suspension of his license.

In *State ex rel. Counsel for Dis. v. Ubbinga*,[8] we suspended Lori Anne Ubbinga for 1 year upon finding that she failed to complete the work for which she was retained, failed to communicate with her client regarding the status of her work, failed to provide an accounting when asked, and failed to cooperate with relator's investigation. In that case, Ubbinga agreed to represent a client regarding child visitation. During the course of the representation, she failed to file motions with the court and did not adequately communicate with the client. Upon the client's filing a complaint, Ubbinga failed to fully cooperate with relator and made false statements to relator. In that case, we noted that Ubbinga did not take responsibility for her actions and that her dishonest conduct raised questions as to her fitness to practice law.

The record shows that during the course of Person's representation of the estate, he repeatedly failed to see that the estate was properly administered. The clerk magistrate sent numerous letters requesting a status update, which were largely ignored by Person. Following Person's disregard of requests for status updates, the clerk magistrate issued multiple orders to show cause, which were also largely ignored by Person. Complainant made several attempts to communicate with Person, which he either ignored the attempts or provided little information in the way of legal counsel.

Moreover, Person misled the court by stating that he had filed the required tax form, when in fact he had taken no

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[8] *State ex rel. Counsel for Dis. v. Ubbinga*, 295 Neb. 995, 893 N.W.2d 694 (2017).

such action. He later made a false statement in the petition for determination of inheritance tax and on the inheritance tax worksheet that he subsequently filed with the court. As a result of Person's failure to competently administer the estate, it accumulated $1,090,077.58 in interest and penalties alone to the IRS, and $36,052.48 in interest and penalties to the state and county, a loss totaling $1,126,130.06.

We note that Person had been practicing law for approximately 48 years when he took on representation of complainant and that he had been subject to only one prior complaint, for which he was reprimanded. The length of Person's career and the lack of substantial prior disciplinary history should be considered as a mitigating factor in this case, as it demonstrates that this is not a pattern of behavior throughout Person's career. Person also maintains a good reputation in the community, and complainant has commented, without solicitation, that Person is "an honest individual. He is civic-minded and has made several contributions to better our life in Holdrege."

Person has indicated that he suffers from depression. Person indicated that due to a severe motor vehicle accident, the loss of his father in 2007, and his brother's retiring from the practice of law, he was left without a support system. Person claims this resulted in his becoming overburdened, though he did not recognize it at the time. However, the record contains no medical evidence that the injuries Person received in his accident were direct and substantial contributing factors for his conduct. As such, the referee discounted those claims.

Moreover, Person's lack of a support system in which to seek professional assistance and counsel with regard to decisionmaking is a cause for concern. This need for support, and accompanying lack of support, lead to the unavoidable concern for the protection of the public.

Person has not only been cooperative with the Counsel for Discipline, but has demonstrated remorse and admitted that he mishandled his representation in this case. Further, Person has

indicated that he intends to reimburse his client for the loss he caused. These factors weigh in favor of Person. However, as the referee correctly noted, we cannot allow members of the bar to buy their way out of disciplinary sanctions or give the public the impression that we would permit such actions.

CONCLUSION

Based on the repeated acts of indifference to the clerk magistrate's communications and orders, as well as Person's indifference to his responsibility to communicate with his client and his duty as an officer of the court to communicate honestly with the tribunal, we find that the appropriate sanction is an indefinite suspension from the practice of law for a minimum of 2 years, followed by a 2-year period of probation. At the completion of Person's suspension, he must apply for reinstatement. Such reinstatement should be conditioned on Person's producing evidence that he has fully reimbursed the estate, in addition to showing that he is fit to practice law and has not had any additional disciplinary matters arise during his suspension.

Upon reinstatement, Person shall comply with the following terms of monitored probation. The monitoring shall be by an attorney licensed to practice law in the State of Nebraska and approved by the Counsel for Discipline. Person shall submit a monitoring plan with his application for reinstatement, which shall include but not be limited to the following: During the first 6 months of probation, Person shall meet with and provide the monitor a weekly list of cases for which Person is responsible. The list shall include the date the attorney-client relationship began; the general type of case; the date of last contact with the client; the last type and date of work completed on the file (pleading, correspondence, document preparation, discovery, or court hearing); the next type of work and date that work should be completed on the case; any applicable statutes of limitations and their dates; and the financial terms of the relationship (hourly, contingency, et cetera).

After the first 6 months through the end of his probation, Person shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information as set forth above. Person shall work with the monitor to develop and implement appropriate office procedures to ensure protection of the clients' interests. Person shall reconcile his trust account within 10 working days of receipt of the monthly bank statement and provide the monitor with a copy within 5 working days.

Person shall submit a quarterly compliance report to the Counsel for Discipline, demonstrating adherence to the foregoing terms of probation. The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that Person continues to abide by the terms of probation. If at any time the monitor believes Person has violated the rules of professional conduct or has failed to comply with the terms of probation, the monitor shall report the same to the Counsel for Discipline. Person shall pay all of the costs in this case, including the fees and expenses of the monitor, if any.

Judgment of suspension.

Maria A. on behalf of Leslie G., appellant, v. Oscar G., Appellee.

919 N.W.2d 841

Filed November 30, 2018. No. S-17-1133.

1. **Protection Orders: Injunction: Appeal and Error.** A protection order pursuant to Neb. Rev. Stat. § 42-924 (Reissue 2016) is analogous to an injunction. Thus, the grant or denial of a protection order is reviewed de novo on the record. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Protection Orders.** Whether domestic abuse occurred is a threshold issue in determining whether an ex parte protection order should be affirmed; absent abuse as defined by Neb. Rev. Stat. § 42-903 (Reissue 2016), a protection order may not remain in effect.
3. ____. In considering whether to continue an ex parte domestic abuse protection order following a finding that domestic abuse has occurred, a court is not limited to considering only whether the ex parte order was proper, but may also consider a number of factors pertinent to the likelihood of future harm.
4. **Injunction: Proof.** A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief.
5. **Protection Orders: Proof.** The petitioner at a show cause hearing following an ex parte order has the burden to prove by a preponderance of the evidence the truth of the facts supporting a protection order. Once that burden is met, the burden shifts to the respondent to show cause as to why the protection order should not remain in effect.

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

Sara K. Houston, of Nebraska Coalition, for appellant.

Carlos A. Monzón and David V. Chipman, of Monzón, Guerra & Associates, for appellee.

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

Hall, District Judge.

On behalf of her minor daughter, Leslie G., Maria A. appeals the order of the district court for Saline County that rescinded an ex parte domestic abuse protection order against Leslie's father, Oscar G. Upon our de novo review of the specific facts of this case, we cannot say that the district court, which heard and observed the witnesses as the trier of fact, erred in finding that the evidence as a whole was sufficient to show cause why the protection order should not remain in effect. We affirm.

BACKGROUND

Maria and Oscar are the biological parents of two minor children involved in this case, Emily G. and Leslie. Maria and Oscar are not married and do not reside in the same household. Maria has "[f]ull [c]ustody" of Emily and Leslie, with Oscar exercising regular parenting time every other weekend. This appeal arises from an incident that occurred at Oscar's residence on June 4, 2017, during his parenting time with Leslie, then age 10, and Emily, then age 12. It is undisputed that on that date, Oscar hit Leslie several times on the leg with his open hand.

On July 3, 2017, Maria filed a petition and affidavit on Leslie's behalf to obtain a domestic abuse protection order against Oscar pursuant to Neb. Rev. Stat. § 42-924 (Reissue 2016). The standardized form alleged that Maria was "in fear of domestic abuse" on behalf of Leslie. Maria's petition and affidavit also provided facts to support her request for a protection order. According to Maria, on June 4, Emily called

her and informed her that Oscar had hit Leslie because Leslie was involved in breaking her stepbrother's electronic tablet. Maria reported that Oscar was angry and that Leslie had run into her room and locked the door to avoid being hit by Oscar. Maria stated that Oscar then broke the door with his foot and hit Leslie with his hand. Emily, who was in the room at the time, shared a video of the incident with Maria and asked her not to show anyone. Upon viewing the video, Maria said she was "shocked" by Oscar's violent actions toward Leslie. Maria reported that she feared Oscar would hit her daughters in the future with more violence or become angry that Emily had shown her the video. As a result, Maria immediately reported the incident to law enforcement. The record shows that Oscar was arrested and charged with child abuse pursuant to Neb. Rev. Stat. § 28-707 (Reissue 2016), but our record does not contain the disposition of that charge.

On the same day that Maria filed her petition and affidavit, the district court found that Maria had stated facts showing that Oscar had committed abuse as defined in Neb. Rev. Stat. § 42-903 (Reissue 2016) and that there was immediate danger of abuse before the matter could be heard on notice. Therefore, the district court entered an ex parte domestic abuse protection order, barring Oscar from any contact with Leslie. Oscar requested a hearing on the matter pursuant to Neb. Rev. Stat. § 42-925 (Reissue 2016) to show cause why the protection order should not remain in effect.

At the show cause hearing, the district court received Maria's petition and affidavit. Oscar's counsel called Maria to testify, and she confirmed the allegations. Maria further confirmed that minor children, other than Emily and Leslie, remained in Oscar's home. The district court also received the 9-second video recorded by Emily and referenced in the petition and affidavit. It shows Oscar breaking through the door, lunging at Leslie, and striking her five times with an open hand while Leslie is on a bed on her side with her legs drawn up. Emily and Leslie can be heard screaming, and Oscar can

be heard yelling in a language that is not English and striking Leslie. During the encounter, Leslie's facial expression is not discernible.

When Maria testified that Emily and Leslie were in the courthouse, the district court advised the parties that they could be called as witnesses. Oscar called Emily to testify. Emily testified, questioned only by the district court in chambers and with counsel present, but outside the presence of the parents. She stated that after Leslie broke the electronic tablet, Leslie ran to the bedroom they shared and locked the door. Emily testified that Oscar screamed at Leslie to open the door and that Leslie refused. Emily testified that she could not recall whether Oscar threatened to hit someone at that point, but in an earlier interview at the Child Advocacy Center in Lincoln, Nebraska (CAC), summarized by the sheriff's report offered by Oscar and received into evidence along with the probable cause affidavit for Oscar's arrest, both Emily and Leslie stated that when Oscar was outside the door, he threatened to hit Leslie. According to Leslie, Oscar yelled, "'Open the door, then I am going to hit you.'" Emily reported that Oscar threatened to hit Leslie if she did not open the door.

At the hearing, Emily testified that Oscar next broke the door, entered the room, and hit Leslie on the leg. Emily stated that after she told Oscar to stop, he left the room and went to the kitchen to prepare food for the family. Sometime after Oscar left the room, Emily text messaged Maria and asked her to pick up her and Leslie because Emily did not want to be there anymore.

Emily testified that on the day of the incident, she "wasn't really afraid" of Oscar, but that she was afraid for Leslie because she thought that Leslie "would have gotten more in trouble." Emily explained that by "more in trouble" she meant that Leslie "could get grounded or get her stuff taken away." She testified that she was not afraid of Oscar on the day of the hearing. The district court had the following exchange with Emily at the end of her testimony:

> [Court:] . . . I can see you're kind of upset. Can you tell me why you're upset? Just take a big breath. Okay? All right. Can you tell me why you're upset?
>
> [Emily:] Because I miss my dad and my brothers.
>
> Q. Okay. I understand that. Do you think you would be safe with your dad?
>
> A. ([Emily] nodded affirmatively.)
>
> Q. She is nodding her head yes. Was that a yes?
>
> A. Yes.

Leslie did not testify. However, the parties stipulated that if she had, she would have testified that "she was afraid [on] the day of [the incident], but she has also said that she is not afraid of her dad at this time." Additionally, the parties stipulated that Leslie's testimony as to the facts of the incident would have been "substantially similar" to Emily's testimony. In her interview with the CAC, Leslie reported that when Oscar asked her who had broken the electronic tablet and referred to her calling Oscar "'[s]tupid'" during a family outing to a lake the night before, she ran to her room because she was scared of being in trouble.

The probable cause affidavit stated that Leslie had no "marks or bruises of any kind." However, in her interview at the CAC the next day, Leslie reported "a little mark on her leg." Leslie also stated during that interview that Oscar had hit her in the past, but that she could not recall the circumstances. Emily stated during her CAC interview that Oscar had not previously used hitting as a consequence, but, rather, "'grounds'" them or takes items away.

According to the probable cause affidavit, on the day of the incident, Oscar admitted to law enforcement that he had hit Leslie because, in addition to breaking the electronic tablet, she had called him "'[s]tupid'" the night before. He further reported that the door to the bedroom was previously broken before he barged through it and that he did not believe he hit Leslie "too hard."

The district court entered an order rescinding the ex parte domestic abuse protection order pertaining to Leslie. See § 42-925. The district court stated:

> 1. No evidence of bodily injury (no testimony of pain or evidence of bruising).
>
> 2. Neb. Rev. Stat. §28-1413 (1)(a) and (b) allows a parent to use physical discipline so long as no extreme pain or serious bodily harm.
>
> 3. The only threat was perceived to be additional discipline, such as grounding.

Maria now appeals.

ASSIGNMENTS OF ERROR

Maria assigns, condensed and restated, (1) that based upon the evidence presented at the show cause hearing, the district court erred in rescinding the ex parte domestic abuse protection order, and (2) that the district court erred in assigning weight to Neb. Rev. Stat. § 28-1413 (Reissue 2016).

STANDARD OF REVIEW

[1] A protection order pursuant to § 42-924 is analogous to an injunction. Thus, the grant or denial of a protection order is reviewed de novo on the record. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014).

ANALYSIS

Issue Is Whether Ex Parte Domestic Abuse Order Should Remain in Effect, and Here, District Court Did Not Err in Finding That It Should Not.

We begin our analysis by reviewing the statutes pertinent to the procedural aspects of this case. The Protection from

Domestic Abuse Act, Neb. Rev. Stat. § 42-901 et seq. (Reissue 2016) (the Act), provides that a victim of domestic abuse may file a petition and affidavit for a protection order with the clerk of the district court. § 42-924. For the purposes of the Act, abuse is defined by § 42-903(1) as the occurrence of one or more of the following acts between family or household members:

> (a) Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument;
>
> (b) Placing, by means of credible threat, another person in fear of bodily injury. For purposes of this subdivision, credible threat means a verbal or written threat, including a threat performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct that is made by a person with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the person making the threat had the intent to actually carry out the threat. The present incarceration of the person making the threat shall not prevent the threat from being deemed a credible threat under this section; or
>
> (c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318.

Section 42-924(1) states that upon the filing of a petition for a protection order by any victim of domestic abuse and affidavit in support thereof, "the court may issue a protection order without bond," enjoining the respondent from varying degrees of contact with the petitioner, awarding petitioner temporary custody of any minor children, enjoining the respondent from possessing or purchasing a firearm, or "[o]rdering such other relief deemed necessary to provide for the safety and

welfare of the petitioner and any designated family or household member."

Section 42-925(1) provides that a domestic abuse protection order under § 42-924 may be issued ex parte prior to a hearing if it reasonably appears from the specific facts included in the affidavit that the petitioner will be in immediate danger of abuse before the matter can be heard on notice. If a court issues a domestic abuse protection order ex parte:

> [S]uch order is a temporary order and the court shall forthwith cause notice of the petition and order to be given to the respondent. The court shall also cause a form to request a show-cause hearing to be served upon the respondent. . . . If the respondent appears at the hearing and shows cause why such order should not remain in effect, the court shall rescind the temporary order. If the respondent does not so appear and show cause, the temporary order shall be affirmed and shall be deemed the final protection order.

§ 42-925(1).

If grounds do not exist for issuance of an ex parte domestic abuse protection order, the court must schedule an evidentiary hearing within 14 days. § 42-925(2). If the respondent does not appear and show cause why the protection order should not be issued, the court shall issue a final protection order. *Id.*

Here, Maria appeals from the order of the district court that rescinded an ex parte domestic abuse protection order following a show cause hearing requested by Oscar pursuant to § 42-925(1). Maria's appellate brief focuses mainly on whether Oscar committed abuse as defined by § 42-903. She argues that if such abuse occurred, the district court erred in rescinding the ex parte protection order. However, as we will explain, based on the procedural framework of this case and the above-quoted statutory language, the inquiry before the district court was whether the ex parte order ought to have remained in effect once it was in place. See § 42-925(1). In addressing this question, the district court was not guided exclusively by the

definition of abuse in § 42-903, as Maria's brief implies, or by whether the ex parte order was permissible at its inception. Instead, the district court could also consider other factors in its determination as to whether the ex parte order should remain in effect to prevent future harm.

[2] As noted above, § 42-925(1) provides, "If the respondent appears at the hearing and shows cause why such [ex parte] order *should not remain in effect*, the court shall rescind the temporary order. If the respondent does not so appear and show cause, the temporary order shall be affirmed . . . ." (Emphasis supplied.) Whether domestic abuse occurred is a threshold issue in determining whether an ex parte protection order should be affirmed; absent abuse as defined by § 42-903, a protection order may not remain in effect. See §§ 42-903, 42-924, and 42-925. See, also, *Linda N. on behalf of Rebecca N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014) (reversing order that affirmed ex parte domestic abuse protection order where respondent's conduct did not meet definition of abuse under § 42-903). But even when domestic abuse as defined by § 42-903 has occurred, the language of § 42-925(1) suggests a wider inquiry in deciding whether to affirm or rescind an ex parte protection order. Section 42-925(1) frames the issue as whether the protection order should remain in effect and thus orients the court's view toward the future and the goal of domestic abuse protection orders, which is to protect victims of domestic abuse from further harm. See Introducer's Statement of Intent, L.B. 310, Judiciary Committee, 102d Leg., 1st Sess. (Jan. 26, 2011). See, also, 25 Am. Jur. 2d *Domestic Abuse and Violence* § 31 (2014).

[3] Therefore, in considering whether to continue an ex parte domestic abuse protection order following a finding that domestic abuse has occurred, a court is not limited to considering only whether the ex parte order was proper, but may also consider a number of factors pertinent to the likelihood of future harm. Those factors might include, but are not limited to, the remoteness, severity, nature, and frequency of

past abuse; past or pending credible threats of harm; the psychological impact of domestic abuse; the potential impact on the parent-child relationship; and the nuances of household relationships.

The principles governing injunctions support this prospective, or forward-looking, approach. Our jurisprudence has consistently analogized domestic abuse protection orders to injunctions. See, e.g., *Linda N. on behalf of Rebecca N. v. William N., supra*; *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014); *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999). An injunction is a tool of equity, to be implemented on a case-by-case basis as justice and fairness require. See *ConAgra Foods v. Zimmerman*, 288 Neb. 81, 846 N.W.2d 223 (2014). This court has described an injunction as "'an extraordinary remedial process which is granted, not as a matter of right, but in the exercise of the sound discretion of the court, to be determined on a consideration of all the circumstances of each case . . . .'" *Daugherty v. Ashton Feed and Grain Co., Inc.*, 208 Neb. 159, 164, 303 N.W.2d 64, 68 (1981). The purpose of an injunction is not to punish past actions but to prevent future mischief. See, *Nesbitt v. Frakes*, 300 Neb. 1, 911 N.W.2d 598 (2018); *Conrad v. Kaup*, 137 Neb. 900, 291 N.W. 687 (1940). And a court has the discretion to withhold injunctive relief "when it is likely to inflict greater injury than the grievance complained of." *City of Omaha v. Rubin*, 177 Neb. 314, 318, 128 N.W.2d 814, 816 (1964).

A prospective approach in deciding whether to rescind ex parte domestic abuse protection orders is also consistent with other provisions of the Act. The language of § 42-924 does not limit the court to considering only whether abuse has occurred in deciding whether to issue a protection order. Section 42-924(1) provides that upon the filing of a petition and affidavit for a protection order by a victim of domestic abuse, the court "*may* issue a protection order." (Emphasis supplied.) Giving the word "may" its ordinary, permissive, and

discretionary meaning, see *Livingston v. Metro. Utilities Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005), the court's analysis can be more expansive than finding that abuse occurred pursuant to § 42-903. The Nebraska Court of Appeals acknowledged this wider analysis in *Sarah K. v. Jonathan K.*, 23 Neb. App. 471, 873 N.W.2d 428 (2015).

In *Sarah K. v. Jonathan K., supra*, the Court of Appeals affirmed an order granting domestic abuse protection orders pursuant to § 42-924, even though the instances of alleged abuse were remote in time. It noted that neither § 42-903(1)(a) nor § 42-924(1) imposes any limitation on the time during which a victim of domestic abuse may file a petition and affidavit seeking a protection order. However, the Court of Appeals acknowledged that the remoteness of past abuse may be considered by the court in deciding whether a protection order is warranted and that a remote incident of abuse may not always support the issuance of a domestic abuse protection order. It further cited authority that "'[d]ifferent remedies are required when there has been an isolated act of abuse that is unlikely to recur, as compared to an egregious act of abuse preceded by a pattern of abuse.'" *Id*. at 480, 873 N.W.2d at 434, quoting *Coburn v. Coburn*, 342 Md. 244, 674 A.2d 951 (1996). In concluding that the protection orders in *Sarah K. v. Jonathan K., supra*, were warranted despite the remoteness of the abuse, the Court of Appeals reasoned that the petitioner had a present fear of future abuse due to the history and pattern of past abuse. As *Sarah K. v. Jonathan K.* illustrates, the approach we have described for deciding whether an ex parte domestic abuse protection order should remain in effect is in harmony with the provisions for non-ex-parte protection orders issued under § 42-924.

In addition, in the context of modification, the Act does not limit the court to considering only whether there has been abuse. Section 42-925(4) provided, "An order issued under subsection (1) of section 42-924 shall remain in effect for a period of one year from the date of issuance, unless dismissed

or modified by the court prior to such date." The court can only decide whether an order should be modified or dismissed by evaluating the parties' situation at the time modification or dismissal is sought. This suggests a consideration of the initial determination that abuse pursuant to § 42-903 has occurred along with facts that emerge later and show that a protection order, as originally issued, is no longer necessary. While dismissal or modification under § 42-925(4) occurs at a different procedural stage than affirming or rescinding an ex parte order pursuant to § 42-925(1), engaging in such an analysis at either stage is not meaningfully different.

Having framed the issue as whether the domestic abuse protection order should have remained in effect, we now turn to the evidence presented at the show cause hearing. It is at this point that our dissenting colleague parts ways with us: We disagree on whether the record properly before us supports the district court's order rescinding the ex parte protection order. As our discussion below explains, the majority cannot say that the district court, having heard and observed the witnesses as the trier of fact, erred in finding cause why the ex parte order should not remain in effect. But as an initial matter, we address the burdens of proof.

[4] A show cause hearing in protection order proceedings is a contested factual hearing, in which the issues before the court are whether the facts stated in the sworn application are true. See *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). See, also, *Hronek v. Brosnan*, 20 Neb. App. 200, 823 N.W.2d 204 (2012). As noted above, a protection order is analogous to an injunction. See *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014). A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief. *Abboud v. Lakeview*, Inc., 237 Neb. 326, 466 N.W.2d 442 (1991). In *Mahmood v. Mahmud, supra*, we cited this authority in the context of harassment protection orders pursuant to Neb. Rev. Stat. § 28-311.09 (Reissue 2016) and stated that an

ex parte order does not relieve the petitioner of the burden to establish by a preponderance of the evidence the truth of the facts supporting a protection order.

[5] Given that domestic abuse protection orders are a species of injunction and given the procedural similarities between § 28-311.09 and § 42-925 as they relate to show cause hearings following ex parte orders, we now apply the burden of proof we articulated in *Mahmood v. Mahmud, supra*. Such application is in line with the analytical framework set forth above, in which the occurrence of abuse defined by § 42-903 is a threshold consideration in deciding whether to affirm or rescind an ex parte domestic abuse protection order. Accordingly, the petitioner at a show cause hearing following an ex parte order has the burden to prove by a preponderance of the evidence the truth of the facts supporting a protection order. Once that burden is met, the burden shifts to the respondent to show cause as to why the protection order should not remain in effect. § 42-925(1).

The dissenting opinion would have us overrule or disapprove our previous holdings to the extent that they suggest that the truth of the facts supporting a protection order is the only issue at a show cause hearing under § 43-925(1). However, our holding here does not change our interpretation of that section or our existing precedent. More precisely, our majority opinion speaks directly to the procedures and considerations at the show cause hearing, and our analysis does not abrogate our prior cases.

We turn now to the facts of this case**,** which are contained in the record to which our review is confined. See *Hulse v. Schelkopf*, 220 Neb. 617, 371 N.W.2d 673 (1985) (evidence which does not appear in record cannot be considered by this court on appeal). Assuming without deciding that Maria sustained her burden of proof, we cannot say that the district court erred in finding that Oscar met his burden of proof and showed cause why the ex parte domestic abuse protection order should not remain in effect.

The primary evidence before us for consideration relates to the events of June 4, 2017, when Oscar broke through the door to Leslie's room, entered the room, and hit her several times on the leg with his open hand. We acknowledge that the video footage of this incident is disturbing. We are not insensitive to its emotional impact, and we do not condone or intend to minimize Oscar's conduct. However, the 9-second video depicts only a piece of the larger family dynamic at play in this case. That family dynamic is fleshed out more thoroughly by the documentary and testimonial evidence, which the district court heard and observed as the trier of fact. After hearing this evidence, the district court implicitly determined that it was not necessary to keep the domestic abuse protection order in place to prevent future harm.

There was no documentary or testimonial evidence that Emily or Leslie feared for Leslie's physical safety on June 4, 2017, or in the future. On the day of the incident, Emily's concern was not for Leslie's physical well-being but for the potential loss of privileges, which was the consequence Oscar typically imposed. The parties are bound by their stipulation that Leslie was "afraid [on] the day of [the incident]." See *Shearer v. Shearer*, 270 Neb. 178, 700 N.W.2d 580 (2005). But the stipulation does not specify that Leslie feared present or future physical harm on that day. Further, according to Emily's testimony and the parties' stipulation, neither child feared Oscar at the time of the show cause hearing. To the contrary, Emily volunteered that she missed Oscar and testified that she thought she would be safe with him.

There was some evidence that Oscar may have threatened to hit Leslie before he broke through the door. Both Emily and Leslie stated during the CAC interview that Oscar threatened to hit Leslie at that point, but Emily testified at the show cause hearing that she could not remember whether Oscar made such a threat. Either way, moments after breaking through the door, Oscar hit Leslie. A protection order at the time of the show cause hearing could not have prevented that outcome,

and Maria concedes that Leslie suffered no bodily injury as a result.

Further, the evidence does not show any pending threat of future harm or a pattern of abuse foreshadowing future harm. Oscar offered the probable cause affidavit and evidence of the CAC interview to demonstrate that the events on June 4, 2017, were a single incident and not part of a pattern of using physical force. In her affidavit supporting her request for a protection order, Maria herself affirmed that she was "shocked" by Oscar's actions, suggesting that he had not behaved this way in the past. While Leslie reported in the CAC interview that Oscar had hit her in the past, she could not recall the circumstances, and Emily denied that Oscar had previously used hitting as a consequence. Further, at the time of the show cause hearing, other minor children remained in Oscar's home, despite pending child abuse charges, the disposition of which is not in our record. The foregoing evidence suggests that the events of June 4 were an isolated incident not likely to recur and that a protection order was not needed to prevent future harm.

As Oscar's counsel emphasized in his closing remarks, the district court was faced with deciding whether it should enter a final protection order, which had the potential to inflict greater "lasting damage" than the conduct that prompted the ex parte order. Had the district court affirmed the ex parte protection order, Oscar would have been enjoined from contact with Leslie for 1 year, absent modification. See §§ 42-924(3)(a) and 42-925(4). As noted, while the parties stipulated that Leslie was afraid on the day of the incident, the stipulation did not specify whether she was afraid of bodily injury on that day, which Maria concedes did not occur; for her future physical safety; or of the prospect of appropriate disciplinary measures. And the parties stipulated that Leslie did not fear Oscar in any way on the day of the show cause hearing. Further, Emily's testimony indicated that they typically received appropriate consequences from Oscar, whom she

stated she misses and feels safe with. According to the record, Oscar had been a regular fixture in his daughters' lives, exercising parenting time for 4 days every 2 weeks at his residence, where Emily and Leslie had their own room and where Oscar played a role in their care and leisure activities. Considering this evidence, the harm occasioned by separating Leslie and Oscar potentially could have been greater than the harm caused by the isolated incident that precipitated the ex parte protection order. See *City of Omaha v. Rubin*, 177 Neb. 314, 128 N.W.2d 814 (1964) (court has discretion to withhold injunctive relief when it is likely to inflict greater injury than grievance complained of).

Although the dissenting opinion states that it subscribes to the analytical framework articulated by the majority, its reasoning seems to suggest that an ex parte protection order should never be rescinded if it was warranted at its inception. This is not correct. We recognize that in many, if not most, instances, a showing of abuse under § 42-903 is sufficient to merit the affirmation of an ex parte protection order; but as we have explained, it is not the only consideration in resolving the issue presented: whether an ex parte protection order should remain in effect to prevent future harm. We agree with the dissenting opinion that protecting victims of domestic abuse is of the utmost importance, but courts do not have license to assume future risk where the record does not support such a finding. Our dissenting colleague relies heavily on statements contained in the probable cause affidavit and suggests that these averments point to a future risk of harm. However, the dissent ignores altogether the testimony at the show cause hearing that countered such a conclusion. The district court apparently found this testimony to be credible in assessing the risk of future harm. And we give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014).

After giving due deference to the fact that the trial judge heard and observed the witnesses and relying exclusively on the record before us, we cannot say upon our de novo review of the specific facts of this case that the district court erred in finding that the evidence as a whole was sufficient to show cause why the protection order should not remain in effect. Consequently, we conclude that the district court did not err in rescinding the ex parte domestic abuse protection order. In so holding, we express no opinion on Maria's addressing Oscar's conduct through other avenues.

We Need Not Consider Whether District Court Erred in Referencing § 28-1413.

Finally, we conclude by addressing Maria's contention that the district court incorrectly relied on § 28-1413(1)(a) and (b), which provides that a parent's use of physical discipline on his or her child under certain circumstances is a justifiable use of force under the criminal code. At common law, a parent, or one standing in the relation of parent, was not liable either civilly or criminally for moderately and reasonably correcting a child, but it was otherwise if the correction was immoderate and unreasonable. See *Clasen v. Pruhs*, 69 Neb. 278, 95 N.W. 640 (1903). Section 28-1413(1)(a) is the codification of the common-law rule. We have held that § 28-1413 does not create or confer an affirmative right to use physical or corporal punishment, but, rather, only provides a defense against criminal liability. See *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987). Thus, § 28-1413(1)(a) reflects the common-law policy of allowing parents some latitude in disciplining their children. However, having determined that the district court did not err in rescinding the ex parte protection order, we do not address the applicability of § 28-1413 to this case.

CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in rescinding the ex parte domestic abuse protection order against Oscar, and we affirm.

Affirmed.

Miller-Lerman, J., dissenting.

I respectfully dissent. For purposes of this dissent, although I do not necessarily subscribe to the burden-shifting framework announced by the court today, I will employ it. However, contrary to the majority opinion, given this record and our de novo review thereof, I would accord greater credence to the known observed facts which, I believe, established the propriety of the temporary order, and less credence to future imagined evidence on which the majority relies to support its determination that a protection order is not warranted. Thus, I would find that the temporary order was properly entered and, because Oscar's evidence does not show that he cares more for the well-being of his young daughter than his electronic device, to protect the child, it should not have been rescinded. I would reverse the order of the district court.

In the context of the show cause hearing from which this appeal is taken, as I see it, courts should focus on the language of Neb. Rev. Stat. § 42-925(1) (Reissue 2016), which describes the issue at the show cause hearing, i.e., whether the respondent has shown that the temporary order should be rescinded. This is not a motion to dismiss or for modification under § 42-925(4); so, contrary to the majority, I resist reliance on this inapplicable statute. Of course, Oscar can seek dismissal or modification at a future stage.

Before today's gloss, we have said that the fact issue before the court deciding whether to rescind an ex parte domestic abuse protection order at a show cause hearing is whether the plaintiff proved the truth of the facts of abuse as stated in the sworn domestic violence protection order application. *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014); *Mahmood v.*

Mahmud, 279 Neb. 390, 778 N.W.2d 426 (2010). To the extent that past cases suggest that the truth of the application is the *only* issue at a show cause hearing under § 42-925(1) where the respondent appears, they should be overruled or at least disapproved by the majority. *Torres v. Morales, supra*; *Mahmood v. Mahmud, supra*. See, also, *Rosberg v. Rosberg*, 25 Neb. App. 856, 916 N.W.2d 62 (2018); *Hronek v. Brosnan*, 20 Neb. App. 200, 823 N.W.2d 204 (2012); *Zuco v. Tucker*, 9 Neb. App. 155, 609 N.W.2d 59 (2000).

Maria Showed That Oscar Abused Leslie, as Defined by Statute, and the Temporary Protection Order Was Properly Entered.

For purposes of this dissent, I employ the majority's burden-shifting framework. In so doing, I would find that Maria carried her burden on the "threshold question" of whether abuse occurred as defined by Neb. Rev. Stat. § 42-903(1) (Reissue 2016), thus supporting the temporary protection order. According to both Emily and Leslie, the video of the incident, and the affidavit of Deputy John Hensel, the evidence showed that Oscar threatened to hit his 10-year-old daughter Leslie; that Oscar kicked open her bedroom door with a force so great as to destroy the door; that Oscar rushed at Leslie and hit her multiple times, enraged and screaming at her; and that Leslie hid from Oscar in her room, assumed a defensive posture, and screamed as he approached and hit her.

Deputy Hensel swore in a probable cause affidavit filed in Oscar's corresponding criminal case that the video filmed by Emily shows: "a bedroom with children in it; then the bedroom door is broken in half . . . and an adult male [Oscar] is seen running in and hitting one of the children with an open hand multiple times very aggressively while another child screams and cries in the background." Oscar's strikes are forceful, and they are audible in the video. Leslie reported to Deputy Hensel that Oscar had hit her before, but could not remember when or how it happened.

The evidence established that Leslie feared for her physical safety on the day Oscar hit her. There is no evidence that Leslie did not fear Oscar; on the contrary, the parties actually stipulated that Leslie was afraid of Oscar on the day of this incident, and this is fully supported by the record.

Thus, I believe that the preponderance of the evidence at the hearing was that Oscar made a "credible threat" which placed Leslie "in fear of bodily injury," meeting the definition of abuse under § 42-903(1)(b). The temporary protection order was properly entered.

Oscar Did Not Establish by Evidence That There Was No Risk of Future Harm and Therefore Failed to Show Cause Why the Temporary Order Properly Entered Should Be Rescinded.

As stated above, for purposes of this dissent, I employ the burden-shifting framework announced by the majority today. In so doing, I look to the evidence presented by Oscar and jurisprudence which inform the assessment of future harm. I do not believe that Oscar demonstrated that a protection order was not needed to protect Leslie against future harm.

Under § 42-925(1), when the respondent, in this case Oscar, requests a show cause hearing, "the court shall immediately schedule a show-cause hearing." The statute continues: "If the respondent appears at the hearing and shows cause why such order should not remain in effect, the court shall rescind the temporary order." As I read the statute, there is a statutory presumption that the temporary order properly entered should be continued—and Oscar's evidence did not overcome the presumption. Of course, even if the ex parte protection order was warranted, it can be rescinded based on the evidence presented by the respondent at the show cause hearing.

Several factors are relevant in evaluating the likelihood of future harm to the subject of a protection order, such as Leslie. Those factors might include, but are not limited to, the

remoteness, severity, nature, and frequency of past abuse; past or pending credible threats of harm; the psychological impact of domestic abuse; and the nuances of household relationships. I note that some jurisdictions list the relevant factors statutorily. See, e.g., 725 Ill. Comp. Stat. Ann. 5/112A-14(c) (LexisNexis Cum. Supp. 2009). In these jurisdictions, the courts consider the pattern and consequences of past abuse and consider the danger that any minor child will be abused, neglected, or improperly removed from the jurisdiction or improperly separated from the child's primary caretaker. *Id*. Applying the many factors listed above, Oscar did not show by the preponderance of the evidence that the protection order should be rescinded.

The district court received only limited testimony from Emily and no testimony from Oscar or his partner and other children to "flesh out" the larger family dynamic at play in this case. I reviewed the testimony and the other limited evidence, and it does not weigh in favor of Oscar. I agree with the majority that the "family dynamic" is an important consideration. And while I agree with the majority's subtext in support of family reunification, Oscar did not necessarily establish the profile of "unity" the majority hopes to create. According to this record, Maria, Leslie's mother, has full custody of Leslie, and Oscar has parenting time every other weekend. Oscar and Maria are not married, and Oscar did not demonstrate, such as by a court order, that his parenting is formalized. In any event, the object of the current case is to protect the child.

Turning to the evidence, approximately 3 months passed between the June 4, 2017, incident captured on video and the September 11 show cause hearing; this abuse was not remote. Oscar, who carried the burden to show cause at this hearing, failed to create a record which would demonstrate that his conduct was a one-time lapse of judgment. On the contrary, the record indicates that Oscar was angry because his investment in an electronic device was lost. His unrestrained

reaction suggests a lack of control, not a pattern of thoughtful discipline.

In an interview with law enforcement directly following the June 4, 2017, incident, Leslie reported that Oscar had hit her in the past. In a contemporaneous interview, Leslie's sister, Emily, denied being hit by Oscar. I disagree with the majority that this limited evidence compels the conclusion that the "events . . . were an isolated incident not likely to recur." The burden was on Oscar at this stage, not on Leslie.

As noted, Leslie reported that Oscar had hit her in the past, Leslie chose to lock herself in her bedroom away from Oscar, and Emily felt she should videotape Oscar's display of rage and send it to Maria by text message. The majority minimizes the risk of harm of escalating domestic violence and ignores the possibility that its decision may subject Leslie to future abuse or a cycle of abuse despite Maria's attempt to protect her daughter. In this regard, I note that some states, by statute, recognize that domestic violence between family members may include a mother's justified fear of harm to her child by that child's father. E.g., Wash. Rev. Code Ann. § 26.50.010(3) (West 2016); *Rodriguez v. Zavala*, 188 Wash. 2d 586, 398 P.3d 1071 (2017). Oscar could have shown this was an isolated incident unlikely to recur, but he did not do so; the preponderance of the evidence is that he has placed Leslie in fear of bodily injury, and there is no evidence that he would not do so again.

This case raises serious concern about the psychological impact of domestic abuse and the future possible abuse of Leslie given the nuances of household relationships demonstrably in place here. Leslie is a 10-year-old child and did not testify at the show cause hearing. The parties stipulated that "she was afraid [on] the day of [the June 4 incident], but she has also said that she is not afraid of her dad at this time." This change in her reporting should be taken at face value and stretched no further. It is not uncommon for battered children, as well as abused partners, to recant their claims or express

reluctance with proceeding against an abuser. A child's willingness to return to his or her parent does not discredit the child's original report of domestic abuse. The lack of fear at the time of the show cause hearing may even be evidence the ex parte protection order has been serving its purpose to protect the victim.

As one court noted in a case where a mother obtained a protection order against a father who disciplined a 4-year-old child with a belt and left bruises:

> "[The children] were asked if they wanted to see their father. Of course they do. Children who suffer way more serious abuse still want to see their abuser. That is not uncommon. It is not their decision. The Court must decide for them. In this case, there was no testimony to allow the Court to believe the father won't do this again. He has not participated in any services. He doesn't even think he did anything wrong."

Smith v. Murphy, 2017 Ark. App. 188, at 10, 517 S.W.3d 453, 459 (Mar. 29, 2017).

When a child expresses reluctance to continue with legal proceedings, as with an adult petitioner, it has been observed that it is prudent for a court to question the child outside the presence of the abuser to ascertain fully whether the respondent is coercing the child victim. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801 (1993). We should not automatically exclude a child from a protection order because she fails to show fear of a potential harm which she may not fully understand.

I would not discredit the child's report of abuse which initiated this ex parte protection order. See *Bacchus v. Bacchus*, 108 So. 3d 712 (Fla. App. 2013) (noting that courts should consider both circumstances giving rise to protection order and events occurring after protection order was issued). Nor should Leslie's report that Oscar had hit her in the past be discredited. A person's past conduct is important evidence in

predicting his or her future conduct. Likewise, I find it significant that Oscar faced legal culpability for his conduct in the Saline County District Court based on this incident.

I also consider events occurring after the ex parte protection order was put in place. Despite facing criminal consequences, Oscar did not admit wrongdoing in his approach to "discipline" toward Leslie. The record is also silent on whether Oscar acknowledged the psychological effect of his behavior or whether he had changed his behavior around his children to assuage their reasonable fears. Oscar reported that he hit Leslie three times, but Deputy Hensel stated in his report that the video shows him hitting Leslie five times. Oscar submitted no evidence that he participated in any services, such as therapy sessions, parenting classes, anger management classes, or any other remedial measures. See *Smith v. Murphy, supra*. He offered no evidence demonstrating a prospect for insight or change. Without evidence that the event was isolated, or evidence of Oscar's recent conduct, I cannot find that he showed that Leslie did not need protection from future harm. "'[T]here was no testimony to allow the Court to believe the father won't do this again.'" *Id*. at 10, 517 S.W.3d at 459.

The district court's decision to rescind the ex parte protection order did not rest on correct legal principles, and it is not apparent that the court took into consideration the entirety of the facts in the record. "'[A] court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child.'" *In re Interest of Lilly S. & Vincent S.*, 298 Neb. 306, 316, 903 N.W.2d 651, 660 (2017). I conclude that the district court erred when it found that Oscar had carried his burden of proof to show that the ex parte domestic abuse protection order should be rescinded. I would reverse the order of the district court.

State of Nebraska, appellee, v. Travis L. Ferguson, appellant.

919 N.W.2d 863

Filed November 30, 2018. No. S-17-1197.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
3. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation for an abuse of discretion.
4. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
5. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.

6. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
7. **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.
8. **Constitutional Law: Search and Seizure.** The ultimate touchstone of the Fourth Amendment is reasonableness.
9. ____: ____. Reasonableness is determined by balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests.
10. ____: ____. A seizure that is lawful at its inception can violate the Fourth Amendment by its manner of execution.
11. ____: ____. A "search" under the Fourth Amendment occurs if either (1) the defendant's legitimate expectation of privacy is infringed or (2) the government physically intrudes on a protected area.
12. **Constitutional Law: Search and Seizure: Words and Phrases.** A reasonable expectation of privacy is an expectation that has a source outside of the Fourth Amendment, by reference either to concepts of real or personal property law or to understandings that are recognized and permitted by society.
13. **Constitutional Law: Search and Seizure: Animals.** Drug detection dog sniffs in themselves do not infringe upon a constitutionally protected privacy interest, because they are designed to reveal no information other than the possession of contraband and its location, and society is not prepared to consider as either reasonable or legitimate any subjective expectation that possession of contraband will not come to the attention of the authorities.
14. **Investigative Stops: Motor Vehicles: Animals: Time.** The tolerable duration of a traffic stop is that which is reasonably necessary to address the mission of the stop and the ordinary inquiries incident thereto, and a drug detection dog sniff is not an ordinary incident of a traffic stop.
15. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Animals: Probable Cause.** Where a law enforcement officer has probable cause or reasonable suspicion to continue the detention after the initial mission of the stop is completed, the officer may conduct a drug detection dog sniff while the suspect is properly detained.
16. **Arrests: Probable Cause: Time: Proof.** Judicial probable cause determinations must be made promptly after a warrantless arrest, and unreasonable delays in such judicial determinations of probable cause include delays for the purpose of gathering additional evidence to justify the arrest. However, the arrested individual bears the burden of proving the

delay was unreasonable when the probable cause determination occurs within 48 hours.

17. **Rules of Evidence: Hearsay: Words and Phrases.** Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.
18. **Rules of Evidence: Hearsay: Testimony: Records: Proof.** Testimony as to the content of records, entered into evidence to prove the truth of the information contained therein, is hearsay.
19. **Rules of Evidence: Rules of the Supreme Court: Hearsay.** Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska or by the discovery rules of the Nebraska Supreme Court.
20. **Hearsay: Proof.** The proponent of the hearsay evidence has the burden of identifying the appropriate exception and demonstrating that the testimony falls within it.
21. **Trial: Hearsay: Evidence: Appeal and Error.** When the opposing party objects to evidence as hearsay and the trial court sustains the objection, the proponent is required to point out the possible hearsay exceptions in order to preserve the point for appeal.
22. **Trial: Evidence: Witnesses.** There is sufficient foundation to render communications by telephone admissible in evidence where the identity of the person with whom the witness spoke or the person whom he or she heard speak is satisfactorily established.
23. ____: ____: ____. A witness testifying positively that he or she recognized, by voice, the person with whom he or she was talking, is generally sufficient to present the evidence to the jury to determine whether the conversation actually occurred.
24. **Criminal Law: Juries: Verdicts: Presumptions.** Jurors in a criminal case are presumed well equipped to analyze the evidence in order to avoid resting a guilty verdict on a factually inadequate theory.
25. **Juries: Verdicts: Appeal and Error.** If there are two possible factual grounds for the jury's general verdict, one factually inadequate and unreasonable and the other factually adequate and reasonable, an appellate court will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable and factually adequate ground.

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

Candice C. Wooster, of Brennan & Nielsen Law Offices, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Freudenberg, J.

I. NATURE OF CASE

The defendant appeals his convictions for possession of a controlled substance and child abuse. The defendant was driving a vehicle owned by the defendant's girlfriend when he was stopped by law enforcement to investigate a citizen report of dangerous driving. The stop occurred at a gas station. The defendant's two young children were in the back seat of the vehicle. Methamphetamine was found during a search of the vehicle, which was conducted subsequent to a drug detection dog sniff. The dog sniff took place approximately 30 minutes after law enforcement had completed their routine investigation related to the stop and had discovered that the defendant was driving with a suspended license, had given them false information, and had an outstanding civil contempt warrant for his arrest. The principle issue presented is whether continuing the defendant's detention at the gas station beyond the time reasonably necessary to complete the traffic stop's mission of investigating the report of dangerous driving constituted an unreasonable seizure when the detention occurred after law enforcement had probable cause to arrest the defendant.

II. BACKGROUND

Travis L. Ferguson was charged with one count of possession of a controlled substance in violation of Neb. Rev. Stat. § 28-416(3) (Supp. 2015); one count of false reporting in violation of Neb. Rev. Stat. § 28-907(1) (Reissue 2016); and one count of child abuse in violation of Neb. Rev. Stat. § 28-707(1) and (3) (Reissue 2016)—specifically, that Ferguson, acting negligently, had placed his minor children, ages 8 and 6 at the time of the stop, in a situation that endangered their lives or

physical or mental health, or deprived them of necessary food, clothing, shelter, or care. The charges stem from the events of March 9, 2016. Ferguson was driving his girlfriend's 1998 four-door silver Honda Accord sedan with his children in the back seat. He was stopped by law enforcement after another driver called the 911 emergency dispatch service to report dangerous driving, and methamphetamine was eventually found inside the vehicle.

1. Motion to Suppress

Before trial, Ferguson moved to suppress any and all evidence and statements obtained by law enforcement on March 9, 2016, for the reason that they were allegedly obtained in violation of Ferguson's constitutional rights under the 4th, 5th, 6th, and 14th Amendments to the U.S. Constitution and the respective guarantees of the Constitution of the State of Nebraska. The following evidence was adduced at the hearing on the motion.

(a) Traffic Stop

Around 5 p.m. on March 9, 2016, Bradley Kinzie called 911 to report a vehicle swerving on Highway 77. The vehicle was described as a gray, four-door sedan moving northbound from Roca Road in Lancaster County, Nebraska. Kinzie also reported the vehicle's license plate number.

Deputy Sheriff Jeremy Schwarz was in his cruiser headed southbound on Highway 77 in the same general vicinity when he received the report of the 911 call. One or two minutes later, Schwarz saw a man in a vehicle headed northbound on Highway 77 behind a white, four-door sedan using hand gestures to emphatically direct Schwarz' attention to the sedan. Schwarz understood, and it was later confirmed, that the man gesturing was the 911 caller and the sedan was the vehicle reported.

Schwarz made a U-turn to pursue the vehicle. The vehicle pulled into a gas station before he could catch up with it. Schwarz pulled up behind the vehicle. Schwarz confirmed

that the license plate number was only one digit off from the number reported during the 911 call. Schwarz activated the cruiser's overhead lights.

At 5:05 p.m., Schwarz exited the cruiser and approached the driver of the vehicle, who was later identified as Ferguson. Schwarz observed two children in the back seat. Ferguson informed Schwarz that he did not have his driver's license with him. Ferguson acknowledged that he was tired and had been swerving the vehicle.

Ferguson originally identified himself using his brother's name. In the databases accessed through the mobile data terminal of his cruiser, Schwarz could not find a person with that name who matched the other information given by Ferguson.

At 5:16 p.m., Ferguson was asked to sit in the cruiser while Schwarz further investigated Ferguson's identity. During the pat-down search conducted before entering the cruiser, Schwarz found Ferguson's electronic benefit transfer card which included his real name. By 5:22 p.m., Schwarz was able to confirm Ferguson's identity through the databases, which revealed that Ferguson had a suspended driver's license and an outstanding warrant for civil contempt related to unpaid child support. At approximately that same time, Schwarz learned the identity of the children's mother.

(b) Probable Cause

Schwarz described that he had probable cause to arrest Ferguson both for driving with a suspended license and on the child support warrant.

Ferguson's criminal history also caused Schwarz to suspect that there might be narcotics in the sedan. Ferguson denied consent to search the vehicle.

Schwarz did not transport Ferguson immediately to the police station, because he was trying to make arrangements for the children to be picked up by their mother and for Lindsey Koch, the owner of the vehicle, to pick it up. Schwarz contacted the children's mother, who agreed to pick up the

children, but she lived 30 to 45 minutes away. Two officers who had arrived at the scene took the children out of the vehicle and into the convenience store for snacks while they waited.

(c) Dog Sniff and Subsequent Search

At 5:25 p.m., approximately the same time that Schwarz contacted the children's mother, he decided to call in a canine unit to conduct a dog sniff of the vehicle. Schwarz asked Koch for her consent to the search, explaining that the canine unit was on its way, but she refused. Koch agreed to pick up her vehicle at the gas station. The canine unit arrived approximately 30 minutes after Schwarz called it in. When the canine unit arrived, neither Koch nor the children's mother had yet arrived.

The dog sniff was conducted around the exterior of the sedan, and the dog alerted to the odor of narcotics. After that, the officers searched the sedan and found a plastic bag of what appeared to be methamphetamine on the driver's side floorboard between the center console and the driver's seat. At trial, the parties stipulated that the bag found in the sedan contained approximately 1.6 grams of methamphetamine.

Approximately 15 minutes after the search of the sedan had been completed, Koch arrived and removed the vehicle from the premises. Five minutes later, the children's mother arrived and the children were turned over to her. Ferguson was then taken to jail.

(d) Court's Ruling

In support of the motion to suppress, defense counsel argued that prolonging the stop while waiting for Koch and the canine unit to arrive was unreasonable, because the officers were no longer handling the matter for which the stop was initially made. Defense counsel also argued that the search was not incident to arrest. Without addressing Ferguson's suspended license, defense counsel argued that if Ferguson would have

been taken to jail sooner, he could have purged himself sooner of the civil contempt warrant. Defense counsel explained that the delay at the gas station unreasonably denied Ferguson the "opportunity to go and bond himself out or purge himself of that warrant." The State responded that the continued detention was a "non-issue," because at that point, there was probable cause for Ferguson's arrest.

The court denied the motion to suppress. The court granted defense counsel's request for a continuing objection to evidence of the methamphetamine found in the sedan, and the case proceeded to trial.

2. Evidence Presented at Trial

(a) Kinzie's Testimony

At trial, Kinzie testified that while driving along Highway 77 on March 9, 2016, he spotted in his rearview mirror a gray, four-door Toyota or Mazda sedan behind him. He saw the sedan going from one side of the road to the other. He slowed down, and the sedan passed him. While passing him, the sedan encroached into Kinzie's lane so much that he had to drive on the curb in order to avoid a collision.

Kinzie watched as the sedan, driving at that point in front of him, veered past the white line of the right-hand lane and back into the left-hand lane. The sedan then proceeded to encroach into the right-hand lane again, even though there was another vehicle in its path. The sedan pushed that vehicle off the road and into a ditch.

After ensuring that the people in the vehicle that went off the road were "okay," Kinzie called 911. Kinzie described seeing a police cruiser soon thereafter and pointing out the sedan to the law enforcement officer. While stopped at a red light, Kinzie witnessed the cruiser follow the sedan to a nearby gas station and park behind it.

The speed limit in that area of Highway 77 was 65 miles per hour. It was rush-hour traffic. Kinzie testified that both he and the driver of the other vehicle were forced to take evasive

action to avoid colliding with the sedan, stating, "At least nobody was killed. That's the main thing."

(b) Schwarz' Testimony and Motion in Limine

At trial, Schwarz reiterated much of his testimony given at the hearing on the motion to suppress. Schwarz also described that when he approached the sedan, the children in the back seat were moving around and not completely buckled in. Schwarz testified that the children had access to the area by the floorboards where the methamphetamine was found and that they were apparently in the sedan alone for a brief period of time after Schwarz directed Ferguson into his cruiser for further investigation as to his identity.

Schwarz testified that he had received extensive training in narcotics. According to Schwarz, methamphetamine is very toxic and can be lethal to children if they accidentally ingest it. He opined that a child who is within reach of methamphetamine is placed in a situation that endangers the child's life.

During a recess, the State moved in limine to prohibit any questioning or evidence concerning pending charges against Koch originating from an arrest in April 2017, as well as any other drug history associated with Koch or her sedan after the March 9, 2016, arrest of Ferguson. Defense counsel responded that it was part of the theory of Ferguson's defense to demonstrate that the methamphetamine might have belonged to Koch or someone else she lent her vehicle to. The court expressed concern that any questioning of Schwarz as to the criminal record associated with Koch or the sedan would be outside of Schwarz' personal knowledge. The court sustained the motion at that point in time, explaining that if defense counsel wanted to "get into anything like that," she was going to have to first demonstrate to the court outside the presence of the jury that it was admissible.

Subsequently, defense counsel questioned Schwarz outside the presence of the jury as a proffer of "what he knows about

the vehicle." Schwarz testified that during the stop, he had run the license plate of the vehicle through the databases he had access to. That information, he explained, would be found in his report, but he recalled a prior arrest of Koch for possession of methamphetamine. He could not specifically recall anything else. During cross-examination for the proffer, Schwarz affirmed that his report described other prior arrests for possession of a controlled substance in relation to the vehicle.

At the close of the proffer, the State objected on the grounds of hearsay, relevance, unfair prejudice, and improper use of character evidence for impeachment. The State explained that the prior criminal history of Koch or her vehicle was not relevant to the events of March 9, 2016, and that it would improperly suggest that, because she had possessed methamphetamine in the past, Koch was not telling the truth about the methamphetamine found on March 9 when she stated it did not belong to her. Defense counsel did not suggest that the proffered statement fell under an exception to the hearsay rule. The court sustained the objection on the ground of hearsay, and did not specifically address the other grounds presented.

(c) Children's Mother's Testimony and Foundation Objection

The children's mother testified without objection that the older child reported that Ferguson had been falling asleep at the wheel that day.

The children's mother testified further that she and Ferguson had a telephone conversation about his arrest a week or so after Ferguson was released from jail, which she said was in April 2016. She described that she was at home. No one else was around at the time, and she did not know where Ferguson was calling from. She confirmed that, as a result of having previously dated Ferguson for 8 years, she had talked to him on the telephone previously and knew the sound of his voice.

Defense counsel objected on foundation grounds to any further testimony about the telephone conversation. Defense counsel explained that the State had failed to present evidence as to both parties' locations or precise information about when it took place. The court overruled the objection.

The children's mother proceeded to testify that during the conversation, Ferguson apologized for his actions that had caused the Department of Health and Human Services to make inquiries into the children's welfare. Ferguson explained that he thought he had left the methamphetamine at home.

(d) Koch's Testimony

Koch testified that after she had agreed to lend Ferguson her car in order for him to be able to go see his children, she spent about an hour cleaning it. She testified that her car was normally very messy and that she wanted to make sure there was room for the children and there was nothing "dangerous" in the car. She denied placing any methamphetamine in the car on March 9, 2016, and she denied that the methamphetamine found in the car on that date was hers. Koch admitted that during that general period of time, it was not unusual for her to allow others to borrow her car, but clarified that no one had borrowed her car from the time she cleaned it until the time that Ferguson drove it to go see his children on March 9.

(e) Ferguson's Testimony

Ferguson testified in his own defense. He generally denied the allegations against him, except that he admitted he lied to Schwarz when he identified himself as his brother rather than as himself. He admitted to swerving his vehicle, because he was tired, and he explained that he had been helping one of his children with her seatbelt. He denied having any knowledge that there were drugs in the vehicle. He conceded that children can get hurt when they are within reach of methamphetamine.

3. Verdict

The jury found Ferguson guilty of all three charges.

4. Sentences

The court sentenced Ferguson to 365 days of imprisonment and 12 months of postrelease supervision on count 1. The court sentenced Ferguson to 90 days of imprisonment on count 2, to be served consecutively to count 1. On count 3, the court sentenced Ferguson to 30 days of imprisonment, to be served concurrently to counts 1 and 2.

The court explained that it was not placing Ferguson on probation because he did not appear to be capable of completing probation successfully. The court explained that Ferguson was being sentenced to jail time, not to prison, and that if he were given probation instead, he would likely engage in criminal conduct in violation of the terms of his probation and face a prison sentence. The court noted Ferguson's history during the proceedings of not showing up to court and not going to his probation evaluation on time. The court further noted that Ferguson was convicted of other crimes committed while awaiting trial. The record contains a bench warrant for Ferguson's failure to appear. Ferguson agreed that he would likely fail probation.

Ferguson appeals his convictions for child abuse and possession of a controlled substance and his sentences.

III. ASSIGNMENTS OF ERROR

Ferguson assigns that the district court erred by (1) overruling his motion to suppress, (2) refusing to admit evidence that the vehicle he was driving had previously been involved in drug convictions, (3) admitting evidence of a telephone conversation between Ferguson and the children's mother, (4) finding the evidence sufficient to support the child abuse conviction, and (5) imposing excessive sentences.

IV. STANDARD OF REVIEW

[1] When 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.[1] 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]

[2] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.[3]

[3] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation for an abuse of discretion.[4]

[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.[5] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[6]

[5] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[7]

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[1] *State v. Barbeau, ante* p. 293, 917 N.W.2d 913 (2018).

[2] *Id.*

[3] *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

[4] *Midland Properties v. Wells Fargo*, 296 Neb. 407, 893 N.W.2d 460 (2017).

[5] *State v. McCurdy, ante* p. 343, 918 N.W.2d 292 (2018).

[6] *Id.*

[7] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

V. ANALYSIS

On appeal, Ferguson challenges the denial of his motion to suppress, which sought to prevent the jury from considering the methamphetamine found in Koch's vehicle. He also asserts that the district court erred in sustaining the State's hearsay objection to the proposed testimony of Schwarz regarding his recollection of the criminal records associated with Koch's vehicle. He asserts, further, that the court should not have allowed into evidence over Ferguson's foundation objection statements made by Ferguson during a telephone conversation. Lastly, Ferguson argues that there was insufficient evidence to support the conviction for child abuse and that his sentences to jail time rather than probation were excessive.

1. Motion to Suppress

We first address the motion to suppress, which alleged that the discovery of the methamphetamine in the vehicle Ferguson was driving was the product of an illegal search and seizure. Ferguson does not contest that Schwarz had reasonable suspicion for conducting the traffic stop, that Schwarz had probable cause to arrest Ferguson by the time the dog sniff of the vehicle occurred, or that the officers had probable cause to search inside the vehicle once the dog alerted to the presence of illegal substances inside. In arguing that there was an unreasonable seizure of Ferguson's person and an unreasonable search of the vehicle, Ferguson instead focuses on the length and place of his detention and the fact that the search and seizure occurred after Schwarz had completed all inquiries incident to the citizen report of dangerous driving.

[6-10] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.[8] Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state

[8] *State v. Avey*, 288 Neb. 233, 846 N.W.2d 662 (2014).

prosecution and must be excluded.[9] The ultimate touchstone of the Fourth Amendment is reasonableness.[10] Reasonableness is determined by balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests.[11] A seizure that is lawful at its inception can violate the Fourth Amendment by its manner of execution.[12]

In asserting that his seizure, lawful at its inception, was unreasonable, Ferguson relies chiefly upon the holding of the U.S. Supreme Court in *Rodriguez v. U.S.*[13] that a seizure justified by a legitimate traffic stop becomes unlawful if prolonged beyond the time reasonably required to complete the mission of the stop.[14] Ferguson has taken this proposition out of context.

The U.S. Supreme Court has explained that the Fourth Amendment tolerates certain investigations unrelated to the traffic stop, so long as those investigations do not lengthen the roadside detention.[15] Before *Rodriguez*, in *Illinois v. Caballes*,[16] the U.S. Supreme Court held that a dog sniff unsupported by reasonable suspicion or probable cause was nevertheless reasonable when conducted while the driver was lawfully seized during a traffic stop and where the duration of the stop was

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[9] *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

[10] *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006).

[11] *Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990).

[12] See *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005).

[13] *Rodriguez v. U.S.*, 575 U.S. 348, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015). See, also, *State v. Barbeau, supra* note 1.

[14] See, *Rodriguez v. U.S., supra* note 13; *Illinois v. Caballes, supra* note 12.

[15] *Arizona v. Johnson*, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009). See, also, e.g., *Illinois v. Caballes, supra* note 12.

[16] *Illinois v. Caballes, supra* note 12.

justified by the traffic offense and the ordinary inquiries incident thereto.

[11-13] The Court in *Caballes* held that the dog sniff, conducted around the exterior of a vehicle without physically intruding into a constitutionally protected area[17] or prolonging the seizure, did not change the lawful character of the traffic stop.[18] This was because a dog sniff, in itself, does not infringe upon the driver's constitutionally protected interest in privacy.[19] A "search" under the Fourth Amendment occurs if either (1) the defendant's legitimate expectation of privacy is infringed or (2) the government physically intrudes on a protected area.[20] A reasonable expectation of privacy is an expectation that has a source outside of the Fourth Amendment, by reference either to concepts of real or personal property law or to understandings that are recognized and permitted by society.[21] The Court in *Caballes* explained that drug detection dog sniffs in themselves do not infringe upon a constitutionally protected privacy interest, because they are designed to reveal no information other than the possession of contraband and its location.[22] And society, the Court explained, is not prepared to consider as either reasonable or legitimate any subjective expectation that possession of contraband will not come to the attention of the authorities.[23]

[14] Subsequently, in *Rodriguez*, the U.S. Supreme Court addressed the seizure of the driver and the vehicle in order to conduct a dog sniff after the traffic stop had been completed.[24]

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[17] Compare *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).

[18] See *Illinois v. Caballes, supra* note 12.

[19] See *id.*

[20] *City of Beatrice v. Meints*, 289 Neb. 558, 856 N.W.2d 410 (2014).

[21] *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013).

[22] *Illinois v. Caballes, supra* note 12.

[23] *Id.*

[24] *Rodriguez v. U.S., supra* note 13. See, also, *State v. Barbeau, supra* note 1.

The U.S. Supreme Court reiterated that the tolerable duration of a traffic stop is that which is reasonably necessary to address the mission of the stop and the ordinary inquiries incident thereto, and it clarified that a drug detection dog sniff is not an ordinary incident of a traffic stop.[25] Since it was undisputed in *Rodriguez* that the delay for purposes of conducting the dog sniff occurred beyond the time reasonably necessary to complete the tasks tied to the traffic infraction that justified the stop, the Court vacated the circuit court's judgment, which had held that the prolonged seizure was an acceptable de minimis intrusion. The Court noted, however, that it remained open for the circuit court on remand to determine whether reasonable suspicion of criminal activity justified detaining the driver beyond completion of the traffic infraction investigation.

[15] Read together, *Caballes* and *Rodriguez* instruct that the fact that a dog sniff is conducted after the time reasonably required to complete the initial mission of a traffic stop is not, in and of itself, a Fourth Amendment violation. A Fourth Amendment violation arises only when the dog sniff is conducted after the initial mission of a stop is completed and the officer lacks probable cause or reasonable suspicion to investigate further. Where, on the other hand, the officer has probable cause or reasonable suspicion to continue the detention after the initial mission of the stop is completed, the officer may conduct a drug detection dog sniff while the suspect is properly detained. We accordingly held in *State v. Verling*[26] and *State v. Rogers*[27] that seizures that took place in order to facilitate dog sniffs after the completion of traffic infraction investigations did not violate the Fourth Amendment when the officers had reasonable suspicion of criminal activity, developed during the ordinary inquiries incident to the stops.

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[25] See *id.*

[26] *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005).

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

Like in *Verling* and *Rogers*, Ferguson's detention at the time of the dog sniff was independently justified. It was no longer the temporary detention associated with an investigatory stop, but was a tier-three encounter that necessarily entails a prolonged detention.[28] That prolonged detention was supported by probable cause for the officers to believe, based on information lawfully obtained during the stop, that Ferguson had committed the law violations of driving with a suspended license and giving false information to a police officer. Additionally, the prolonged detention was supported by a contempt warrant for Ferguson's arrest. We find no merit to Ferguson's argument that the dog sniff was unlawful because it occurred past the time necessary to investigate the reported traffic violation.

Ferguson also argues that the prolonged seizure was conducted in an unlawful manner because of the place where he was being detained. He suggests that rather than being detained at the gas station, "Ferguson should have immediately been taken to the jail to begin the booking process and to allow Ferguson the opportunity to attempt to get his child support payments up to date."[29] He argues that he was unreasonably detained at the gas station in order to facilitate the dog sniff.

[16] The U.S. Supreme Court has held that judicial probable cause determinations must be made promptly after a warrantless arrest and, further, that unreasonable delays in such judicial determinations of probable cause include delays for the purpose of gathering additional evidence to justify the arrest.[30] However, the Court has also held in this context that the arrested individual bears the burden of proving the delay was unreasonable when the probable cause determination occurs

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[28] See *State v. Petsch*, 300 Neb. 401, 914 N.W.2d 448 (2018).

[29] Brief for appellant at 13.

[30] *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991).

within 48 hours.[31] Ferguson was arrested under a civil warrant issued by a judge and, regardless, he made no attempt to prove that a judicial probable cause determination was unreasonably delayed by virtue of being held at the gas station for an additional 30 minutes.

Moreover, we fail to comprehend how any delay in reaching the jail was causally connected to the dog sniff of Koch's vehicle and the resulting discovery of the methamphetamine. In other words, his detention at the gas station was not for the purpose of gathering additional evidence to justify the arrest and, further, there is no evidence that the methamphetamine was derivative[32] of Ferguson's detention at the gas station rather than at the jail. Regardless of where Ferguson was detained, the vehicle would have been parked in a place of public access until Koch arrived, which was after the dog sniff. Ferguson does not assert that he could have reached the jail, been released, and returned to the vehicle before Koch arrived.

Finally, Ferguson suggests that the dog sniff was an unreasonable "search" of the vehicle, because it was "merely parked at a gas station waiting for the owner . . . to arrive."[33] It is not clear that Ferguson had "standing" to claim a possessory or privacy interest in the borrowed vehicle once he entered into a tier-three encounter with law enforcement justified by probable cause.[34] In any event, the dog sniff did not unreasonably intrude upon any reasonable expectation of privacy, no matter how innocuously the vehicle was parked at the gas station.[35] When the drug detection dog does not physically intrude into a constitutionally protected area,[36] the dog sniff is not a "search"

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[31] *Id.*

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

[33] Brief for appellant at 13.

[34] See *State v. Lowery*, 23 Neb. App. 621, 875 N.W.2d 12 (2016).

[35] See *Illinois v. Caballes, supra* note 12.

[36] Compare *Florida v. Jardines, supra* note 17.

at all.[37] Ferguson does not suggest that the gas station was a constitutionally protected area.

The district court did not err in denying Ferguson's motion to suppress.

2. Sustaining Hearsay Objection Regarding Koch's Criminal History

[17] We turn next to Ferguson's contention that the court should have allowed him to adduce testimony from Schwarz that Koch's vehicle had been involved in prior drug possession charges not involving Ferguson. The court sustained the State's objection to the proposed testimony on the ground of hearsay. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.[38]

[18] Ferguson asserts that Schwarz' testimony as to what he discovered while running a records search for the vehicle was not hearsay. He cites to no law in support of such proposition. Our courts have repeatedly held that testimony as to the content of records, entered into evidence to prove the truth of the information contained therein, is hearsay.[39] Ferguson's theory of defense was that the methamphetamine belonged to someone else. Schwarz' testimony of what he remembered of the content of the databases was proffered for the truth of the matters asserted: that there were other incidents involving illegal drugs in Koch's vehicle that did not involve Ferguson. The proffered testimony was hearsay.

[19-21] Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes

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[37] See *Illinois v. Caballes, supra* note 12.

[38] *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

[39] See, e.g., *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992); *Hoelck v. ICI Americas, Inc.*, 7 Neb. App. 622, 584 N.W.2d 52 (1998); *State v. Ward*, 1 Neb. App. 558, 510 N.W.2d 320 (1993).

of the State of Nebraska or by the discovery rules of this court.[40] Therefore, the proponent of the hearsay evidence has the burden of identifying the appropriate exception and demonstrating that the testimony falls within it.[41] When the opposing party objects to evidence as hearsay and the trial court sustains the objection, the proponent is required to point out the possible hearsay exceptions in order to preserve the point for appeal.[42]

During trial, Ferguson did not identify the appropriate exception to the hearsay rule that would render the proffered testimony admissible, and he makes no argument on appeal that it falls under any exception. Ferguson did not offer the records themselves into evidence. We find no merit to Ferguson's argument that the district court erred in refusing to allow into evidence Schwarz' testimony concerning what he remembered to be the content of the databases he searched during the stop.

3. Overruling Foundation Objection to Telephone Conversation

[22,23] Ferguson next contests the admission into evidence of Ferguson's statements to the children's mother during a telephone conversation. The court overruled Ferguson's foundation objection to the testimony. We have long held that there is sufficient foundation to render communications by telephone admissible in evidence where the identity of the person with whom the witness spoke or the person whom he or she heard speak is satisfactorily established.[43] And a witness testifying positively that he or she recognized, by voice, the person with

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[40] *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[41] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[42] *Id.*

[43] See, *Midland Properties v. Wells Fargo, supra* note 4; *Linch v. Carlson*, 156 Neb. 308, 56 N.W.2d 101 (1952).

whom he or she was talking, is generally sufficient to present the evidence to the jury to determine whether the conversation actually occurred.[44]

While additional evidence as to the surrounding circumstances of the telephone conversation may be necessary where the witness was unable to identify the caller by voice,[45] that was not the circumstance here. The children's mother testified that as a result of having previously dated Ferguson for 8 years, she had spoken to him on the telephone before and knew the sound of his voice. She testified that she was able to identify Ferguson by his voice and that it was Ferguson with whom she had been speaking over the telephone. The district court did not abuse its discretion in overruling Ferguson's foundation objection to the children's mother's testimony.

4. Sufficiency of Evidence

Having addressed the assignments of error related to the evidentiary rulings at trial, we now consider Ferguson's argument that the evidence was insufficient to support the jury's verdict that he committed child abuse. Ferguson's challenge to his child abuse conviction derives from the possibility the jury concluded that the presence of methamphetamine in the vehicle within reach of the children—as opposed to Ferguson's alleged reckless driving—was child abuse. Ferguson concedes that the evidence that Ferguson was swerving the vehicle all over the road was legally sufficient to support his conviction for child abuse, but argues that the facts relating to the methamphetamine in the vehicle were not.

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

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[44] See *id.*

[45] See *Midland Properties v. Wells Fargo, supra* note 4.

matters are for the finder of fact.[46] 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.[47]

Section 28-707(1) provides in relevant part that "[a] person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be: (a) Placed in a situation that endangers his or her life or physical or mental health." "Endangers" for purposes of § 28-707(1)(a) means to expose a minor child's life or health to danger or the peril of probable harm or loss.[48] The purpose of criminalizing conduct under the statute is that where a child is endangered, it may be injured; it is the likelihood of injury against which the statute speaks.[49] Criminal endangerment in § 28-707(1)(a) encompasses not only conduct directed at the child but also conduct which presents the likelihood of injury due to the child's having been placed in a situation caused by the defendant's conduct.[50]

Ferguson was charged with negligently placing his children in a situation that endangered their lives or physical or mental health under § 28-707(3). Section 28-707(9) explains that "negligently" in this context "refers to criminal negligence and means that a person knew or should have known of the danger involved and acted recklessly, as defined in section 28-109, with respect to the safety or health of the minor child." Neb. Rev. Stat. § 28-109 (Supp. 2015), in turn, defines "[r]ecklessly" as

> acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable

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[46] *State v. McCurdy, supra* note 5.

[47] *Id.*

[48] *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017); *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990).

[49] *Id.*

[50] *Id.*

> risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Without citation to legal authority, Ferguson argues that being within reach of methamphetamine is insufficient to support a child abuse conviction, because "[a] child can at almost any time reach an object that could be harmful to the child if used by the child. For example, knives in a kitchen drawer, lighters in a drawer, alcohol in a cabinet, and guns on a shelf."[51] Ferguson also points out that the only time the children were alone in the vehicle within reach of the methamphetamine was when law enforcement removed Ferguson from the vehicle in an attempt to identify him.

[24,25] We find no merit to Ferguson's arguments that the evidence was insufficient to support the child abuse conviction. First, Ferguson's reliance on the inability to know the factual theory underlying the jury's general verdict is misplaced. Jurors in a criminal case are presumed well equipped to analyze the evidence in order to avoid resting a guilty verdict on a factually inadequate theory.[52] Thus, if there are two possible factual grounds for the jury's general verdict, one factually inadequate and unreasonable and the other factually adequate and reasonable, we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable and factually adequate ground.[53]

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[51] Brief for appellant at 20.

[52] *Griffin v. United States*, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). See, also, e.g., *U.S. v. Richardson*, 421 F.3d 17 (1st Cir. 2005).

[53] See, *People v. Guiton*, 4 Cal. 4th 1116, 847 P.2d 45, 17 Cal. Rptr. 2d 365 (1993); *People v. Spaccia*, 12 Cal. App. 5th 1278, 220 Cal. Rptr. 3d 65 (2017).

But we also reject the reckless driving and access to methamphetamine as two disparate factual theories. The jury was presented with evidence that on March 9, 2016, Ferguson, without a license, drove recklessly and was falling asleep at the wheel during rush-hour traffic at a speed of approximately 65 miles per hour, while his young children, able to unbuckle themselves, could have reached for methamphetamine contained in a bag lying on the floorboard and ingested it. The jury was presented with further evidence that Ferguson chose to leave the bag of methamphetamine in the vehicle with his unattended children while he answered questions in Schwarz' cruiser. This evidence was sufficient to support the conviction of child abuse.

Finally, even if we were to parse out the children's access to the methamphetamine from the reckless driving, that evidence was legally sufficient to support the child abuse conviction. Unlike many of the common household risks illustrated by Ferguson, the risk of access to methamphetamine, an illegal and toxic substance, involves a gross deviation from the standard of conduct that a law-abiding person would observe.

In *Carosi v. Com.*,[54] the Supreme Court of Virginia rejected a similar argument that storage of illegal drugs where children could have obtained access to them was no different than the common methods of storing various dangerous household items. "[T]hey differ," the court explained, "in the important respect that the latter items, though unquestionably dangerous if left accessible to unsupervised children, are possessed by the parent or custodian for lawful purposes, whereas drugs that are illegally present . . . are not."[55] The court in *Carosi* further explained:

> The myriad factors to be considered in such cases—such as the ages of the children, the length of the exposure, the level of supervision or lack thereof, and the quantity

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[54] *Carosi v. Com.*, 280 Va. 545, 701 S.E.2d 441 (2010).

[55] *Id.* at 556, 701 S.E.2d at 447.

> and variety of the drugs—suggest that as with most cases where criminal negligence is at issue, this determination is necessarily fact-specific [and] best left to the jury.[56]

We agree.

We have explained that "'[a]s a matter of practicability for general application, child abuse statutes, by virtue of the nature of their subject matter and the nature of the conduct sought to be prohibited, usually contain broad and rather comprehensive language.'"[57] There was evidence that methamphetamine was within reach of the children both while Ferguson was driving, tired and distracted, and while they were unattended in the stopped vehicle. The jury could have inferred that the children, ages 8 and 6, were likely to see the bag of methamphetamine and explore its contents out of curiosity. Schwarz testified that he had received extensive training in narcotics and that methamphetamine is very toxic and potentially lethal to children if they accidentally ingest it. He opined that a child who is within reach of methamphetamine is placed in a situation that endangers the child's life.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime of negligent endangerment child abuse beyond a reasonable doubt.[58]

5. Excessive Sentences

Lastly, Ferguson asserts that the court imposed excessive sentences. There is no dispute that the sentences imposed were within the statutory limits, but Ferguson argues that his sentences were excessive, because probation would have been better suited to Ferguson's rehabilitative needs. An appellate court will not disturb a sentence imposed within the statutory limits

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[56] *Id*. at 557, 701 S.E.2d at 447-48.

[57] *State v. Mendez-Osorio, supra* note 48, 297 Neb. at 534, 900 N.W.2d at 786-87, quoting *State v. Crowdell, supra* note 48.

[58] See *State v. Swindle, supra* note 7.

absent an abuse of discretion by the trial court.[59] 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.[60]

The court explained that it was not placing Ferguson on probation because he was unlikely to complete probation successfully, given Ferguson's history during the proceedings of not showing up to court and not going to his probation evaluation on time. The court further noted that Ferguson was convicted of other crimes committed while awaiting trial. Ferguson himself admitted at the sentencing hearing that he would probably fail probation. The court did not abuse its discretion in sentencing Ferguson to jail time with postrelease supervision, rather than to probation.

VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

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[59] *Id.*

[60] *Id.*

Virginia Fidler and Keith Fidler, appellees, v. Life Care Centers of America, Inc., doing business as Life Care Center of Elkhorn, et al., appellants.

919 N.W.2d 903

Filed November 30, 2018. No. S-17-1243.

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, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the appeal.
3. **Final Orders: Appeal and Error.** An order is final for purposes of appeal under Neb. Rev. Stat. § 25-1902 (Reissue 2016) if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
4. **Final Orders: Motions to Dismiss: Appeal and Error.** There is no blanket rule that every order vacating a dismissal and reinstating a case is final and appealable; rather, the statutory criteria of Neb. Rev. Stat. § 25-1902 (Reissue 2016) must be applied to determine whether the order appealed from is final.
5. **Final Orders: Appeal and Error.** Broadly stated, an order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
6. ____: ____. Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter. It also depends on whether the right could otherwise effectively be vindicated. An order affects a substantial right when the right would

be significantly undermined or irrevocably lost by postponing appellate review.

7. **Final Orders: Case Disapproved: Appeal and Error.** The Nebraska Supreme Court's decision in *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993), is disapproved to the extent it held that the order appealed from affected a substantial right by destroying a defense in a future hypothetical action. The decisions in *Gutchewsky v. Ready Mixed Concrete Co.*, 219 Neb. 803, 366 N.W.2d 751 (1985); *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. 397, 315 N.W.2d 236 (1982); and *Fanning v. Richards*, 193 Neb. 431, 227 N.W.2d 595 (1975), are disapproved to the extent that they implicitly rely upon that same reasoning in *Jarrett*.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Appeal dismissed.

Mark E. Novotny and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., for appellants.

Shayla Reed, of Reed Law Offices, P.C., L.L.O., for appellees.

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

Per Curiam.

INTRODUCTION

After the district court administratively dismissed a negligence action for failure to timely submit a proposed scheduling order, it granted a motion to reinstate the case. This appeal followed. Because we conclude that the district court's reinstatement order was not a final, appealable order, we dismiss the appeal. In doing so, we disapprove of several decisions to the extent that they conflict with our reasoning here.

BACKGROUND

Virginia Fidler resided at a skilled nursing and rehabilitation facility in Elkhorn, Nebraska, from September 16 to 21, 2013, while recovering from an infection. During Virginia's

stay at the facility, a large blood clot developed on her left lower leg which thereafter required hospitalization and emergency surgery.

Virginia and Keith Fidler brought this professional and medical malpractice action against Life Care Centers of America, Inc., doing business as Life Care Center of Elkhorn, and related entities (collectively Life Care Centers) arising from allegedly negligent conduct. The Fidlers claimed that Virginia suffered permanent nerve damage and functional loss in her leg due to a delay of treatment occasioned by Life Care Centers' negligence. The Fidlers filed the action on September 8, 2015.

Because no proposed scheduling order had been filed, a "Notice of Intent to Dismiss" was filed by the district court administrator on January 31, 2017. The notice stated it was issued "[p]ursuant to Rule 4-10" and was "sent to inform each party that, within thirty (30) days from the date of this notice, you must submit a Proposed Scheduling Order (PSO) indicating" various items reflecting the status of the case or the case would be dismissed. The notice also provided that if the case were so dismissed, "[p]ursuant to Rule 4-10(C), . . . the judge to whom the case is assigned has the discretion to reinstate the case." On March 6, the case was administratively dismissed for lack of prosecution.

On July 17, 2017, the Fidlers filed a motion to set aside the order of dismissal and reinstate the case. They attached to their motion an affidavit of counsel setting forth a detailed accounting of the activity that had occurred in the case, designed to show that the parties had been actively prosecuting the case. The affidavit of the Fidlers' counsel also stated that due to an error, the 30-day deadline contained in the notice was not entered on the calendar.

The district court conducted an evidentiary hearing on August 8, 2017, at which the affidavit of the Fidlers' counsel was received. Following briefing by both parties, the court entered an order on November 16 reinstating the case. The

court noted that the Fidlers presented an affidavit showing they were properly pursuing prosecution of the case and that they submitted a proposed scheduling order. The court found good cause to reinstate the case and further stated that "dismissal of this matter would be an extreme remedy and would be a miscarriage of justice." The court also stated that reinstatement of the case would not prejudice Life Care Centers. With minor alteration, the court executed the proposed scheduling order submitted by the Fidlers.

Life Care Centers appeals.

ASSIGNMENTS OF ERROR

Life Care Centers claims, restated, that (1) the district court erred when it applied the local rules regarding reinstatement of cases instead of Neb. Rev. Stat. § 25-201.01 (Reissue 2016) to decide whether to reinstate the case and (2) even if the local court rule for case progression applies, the district court erred when it found that the Fidlers had demonstrated good cause for reinstatement.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[1]

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the appeal.[2] There was no judgment entered finally determining the rights and liabilities of the parties. Therefore, our inquiry focuses on the order vacating dismissal

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[1] *State ex rel. Rhiley v. Nebraska State Patrol, ante* p. 241, 917 N.W.2d 903 (2018).

[2] *Id.*

and reinstating the case. Neither party contests the validity of the order administratively dismissing the action, and for purposes of this opinion, we assume that the dismissal order was valid and effective.

[3,4] Appellate jurisdiction turns on whether the order vacating dismissal and reinstating the case was a final order under Neb. Rev. Stat. § 25-1902 (Reissue 2016). An order is final for purposes of appeal under § 25-1902 if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[3] In *Deines v. Essex Corp.*,[4] we clarified there is no "blanket rule that every order vacating a dismissal and reinstating a case is final and appealable. Rather, the statutory criteria of § 25-1902 must be applied to determine whether the order appealed from is final."[5]

[5,6] Broadly stated, an order affects a substantial right if it "'"affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing."'"[6] Our final order jurisprudence recognizes that it is not enough that a right be substantial; the effect of the subject order on that right must also be substantial.[7] "Whether the effect of an order is substantial depends on '"whether it affects with finality the rights of the parties in the subject matter."'"[8] It also depends on whether the right could be effectively vindicated absent interlocutory review; an order affects a substantial right when

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[3] See *Cullinane v. Beverly Enters. - Neb.*, 300 Neb. 210, 912 N.W.2d 774 (2018).

[4] *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016).

[5] *Id.* at 580, 879 N.W.2d at 33.

[6] *Id.* at 581, 879 N.W.2d at 33-34.

[7] See *Deines, supra* note 4.

[8] *Id.* at 581, 879 N.W.2d at 33.

the right would be significantly undermined or irrevocably lost by postponing appellate review.[9]

Life Care Centers relies on our reasoning in *Jarrett v. Eichler*[10] to argue that a substantial right was affected by the order reinstating this case to the active docket. In *Jarrett*, a negligence action was timely filed, but was dismissed for want of prosecution after the statute of limitations expired. In considering whether the order vacating the dismissal and reinstating the action was a final, appealable order, we found it significant that the plaintiff would not have been able to successfully file a new negligence action, because the defendants "could have prevailed on a statute of limitations defense."[11] From there, we reasoned that the order reinstating the case "destroyed [a] defense which was previously available to appellant" and thus affected a substantial right.[12] *Jarrett* did not consider the effect of the savings clause in § 25-201.01, as that statute was not enacted until several years after *Jarrett* was decided.

Jarrett supports, we acknowledge, the argument that the order appealed from here is a final order. However, our "substantial right" analysis in *Jarrett* focused on the wrong action. Rather than asking whether a substantial right of the parties in the subject action was affected by reinstatement, *Jarrett* focused on whether reinstatement would affect a substantial right available in a new, hypothetical action. That misdirected focus caused us to answer the wrong question and allowed us to find a final, appealable order where none existed.

In *Jarrett*, we relied upon two earlier decisions, neither of which compelled our reasoning regarding the statute of limitations in a future case. First, we relied upon *Gutchewsky*

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[9] *Deines, supra* note 4.

[10] *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993).

[11] *Id.* at 314, 506 N.W.2d at 685.

[12] *Id.*

v. Ready Mixed Concrete Co.[13] However, in that case, we did not consider our jurisdiction over an appeal from an order vacating an earlier dismissal. Instead, we cited case law addressing the merits of a reinstatement order, noting that the "'fact that a new suit would be barred is an important consideration . . . .'"[14] This first case did *not* stand for the proposition that the inability to assert a statute of limitations defense in a future, hypothetical case affected a substantial right in the current case. Second, we cited to *A. Hirsh, Inc. v. National Hair Co.*[15] In that case, we did not even mention a statute of limitations, although it seems clear that the case had pended beyond the limitation. We did not discuss jurisdiction. The most that can be said for either of these earlier cases is that because we did not discuss jurisdiction, we implicitly determined that it existed. But neither case discussed whether a reinstatement order affected a substantial right because of an inability to raise a statute of limitations defense in the reinstated case.

A respected commentator noted that in *Jarrett*, this court could have held that the order under review was not final but that to do so would have required us "to say that [we had] made a mistake in reviewing the order in five cases."[16] In addition to the two discussed in the preceding paragraph, the commentator identified three other cases.[17] In one of these decisions, *Fanning v. Richards*,[18] we addressed a reinstatement order

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[13] *Gutchewsky v. Ready Mixed Concrete Co.*, 219 Neb. 803, 366 N.W.2d 751 (1985).

[14] *Id.* at 806, 366 N.W.2d at 753 (quoting *Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978)).

[15] *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. 397, 315 N.W.2d 236 (1982).

[16] See John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239, 248 (2001).

[17] *Id.* at 248 n.46.

[18] *Fanning v. Richards*, 193 Neb. 431, 227 N.W.2d 595 (1975).

(after a dismissal for lack of prosecution) without discussing jurisdiction or the substantial right supposedly affected by the reinstatement order. There is no indication in our opinion that a statute of limitations had expired. And we simply did not discuss jurisdiction. In the two other cases, *Vacca v. DeJardine*[19] and *Jones v. Nebraska Blue Cross Hospital Service Assn.*,[20] we addressed appeals for orders vacating default judgments and permitting suits to go forward. In both of these cases, the affected party had secured a judgment, of which it was deprived by the appealed order. There, the judgment creditor's right to collect by execution of its judgment in the current case—not some future, hypothetical case—was affected by taking away that default judgment. We do not agree that those two cases were wrongly decided.

[7] We conclude that our final order jurisprudence would be strengthened by expressly disapproving of the statute of limitations reasoning in *Jarrett*, and we do so to the extent that *Jarrett* held that the order appealed from affected a substantial right by destroying a defense in a future hypothetical action. We also disapprove of *Gutchewsky*[21]; *A. Hirsh, Inc.*[22]; and *Fanning*[23] to the extent that they implicitly rely upon that same reasoning in *Jarrett*.

We instead emphasize that courts should apply the statutory criteria of § 25-1902 to determine whether orders vacating dismissal and reinstating cases are final and appealable.[24] Doing so here, we conclude Life Care Centers has not appealed from a final order.

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[19] *Vacca v. DeJardine*, 213 Neb. 736, 331 N.W.2d 516 (1983).

[20] *Jones v. Nebraska Blue Cross Hospital Service Assn.*, 175 Neb. 101, 120 N.W.2d 557 (1963).

[21] *Gutchewsky, supra* note 13.

[22] *A. Hirsch, Inc., supra* note 15.

[23] *Fanning, supra* note 18.

[24] See *Deines, supra* note 4.

Life Care Centers contends the order affected a substantial right for two reasons: "[T]he case was reinstated (1) after the statute of limitations had expired and (2) after [the Fidlers] retained an expert to testify as to liability and causation."[25] On this record, neither circumstance affects a substantial right in this action.

First, because to that extent *Jarrett* was wrongly decided, it makes no difference to our substantial right analysis that Life Care Centers may have a viable statute of limitations defense to a hypothetical new action brought by the Fidlers. We consider only the existing case, as, obviously, no new case was filed by the Fidlers. And our final order inquiry asks whether a substantial right in the instant case, not a hypothetical future case, was affected by the order of reinstatement.

Nor are we persuaded by the argument that the order of reinstatement affected a substantial right due to the Fidlers' retention of an expert witness. Life Care Centers argues that when the case was dismissed, the Fidlers had not yet retained an expert to testify regarding liability or causation, but that by the time the case was reinstated several months later, they had. Life Care Centers does not suggest the Fidlers would have been unable, absent the dismissal, to retain an expert, nor do they explain how the relatively common development of hiring an expert to prepare a medical negligence case for trial affected a substantial right.

The fact that an order of reinstatement may allow the case to move forward to trial does not, without more, mean the order affects a substantial right of the opposing party.[26] And although reinstatement of this case may require Life Care Centers to defend this case to conclusion, that was true before dismissal as well, and the "'[o]rdinary burdens of trial do not necessarily affect a substantial right.'"[27]

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[25] Brief for appellants at 1.

[26] See *Deines, supra* note 4.

[27] *Id.* at 582, 879 N.W.2d at 34.

On this record, the most that can be said regarding the effect of the order vacating dismissal and reinstating the case is that it put the parties back in roughly the same litigation posture as before the action was dismissed. There is nothing about the order reinstating this case that affected with finality the parties' rights in this action. And there is no evidence that any right would be diminished, undermined, or lost by postponing appellate review of the order until after this case proceeds to final judgment. Where, as here, reinstatement cannot be shown to affect a substantial right in the action, there is no reason to disrupt the orderly progression of the case and postpone final resolution of the parties' claims and defenses by entertaining an interlocutory appeal.

CONCLUSION

Because we lack jurisdiction to consider the order appealed from, we dismiss the appeal.

Appeal dismissed.

State of Nebraska, appellee, v. Tyeric L. Lessley, appellant.

919 N.W.2d 884

Filed November 30, 2018. No. S-18-096.

1. **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.
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. **Homicide: Lesser-Included Offenses: Jury Instructions.** A court is required to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury, whether requested to do so or not.
4. ____: ____: ____. A court is not required to instruct a jury on lesser degrees of homicide where the first degree murder charge against the defendant is based upon a theory of felony murder.
5. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
6. **Sentences.** When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.
7. **Sentences: Judges: Records.** The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his

> or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

Thomas C. Riley, Douglas County Public Defender, Matthew J. Miller, and Natalie M. Andrews for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

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

Heavican, C.J.

INTRODUCTION

Tyeric L. Lessley was convicted of first degree murder, first degree assault, two counts of use of a weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Lessley appeals, arguing that the evidence was not sufficient to support his convictions and that he was entitled to a manslaughter instruction. We affirm Lessley's convictions and sentences for first degree murder and first degree assault, affirm his convictions and vacate the sentences for use of a weapon to commit a felony and possession of a deadly weapon by a prohibited person, and remand the cause for resentencing.

BACKGROUND

Events of October 29, 2016.

Between 4 and 4:30 a.m. on October 29, 2016, Curtis Goodwin was awake in the home shared with his fiance, Suzanne Pope. The home was located on North 39th Street in Omaha, Nebraska, at the corner of 39th and Kansas Streets. Goodwin was paying bills on his laptop computer, and Pope

was sleeping in a bed in the main floor living room of the residence, which the couple used as their bedroom. Also in the home was Pope's 7-year-old daughter.

During this time, Goodwin left the home through the back door to investigate a knocking sound he heard at the front of the house. Goodwin testified that family and friends never used the front door of the residence, which faced North 39th Street, but instead entered and exited through the rear door. Indeed, pictures of the scene show that the front door was blocked from the inside by Goodwin and Pope's bed.

Goodwin grabbed a baseball bat before leaving the house. Goodwin then walked around to his front door, where he discovered a male knocking on the door. Goodwin asked the male if he could help him. The male pointed a gun in Goodwin's face and responded, "Yeah, n-----, I'm your worst mother fucking nightmare." The male, whom Goodwin testified he did not recognize, then told Goodwin to get into the house.

The two walked around the side of the house to the back entrance. Goodwin testified that at some point along the way, he dropped the bat. Once inside, the male told Goodwin to "give me all your money and your shit." Goodwin woke Pope to tell her that someone was there to rob them. According to Goodwin, both he and Pope told the intruder they did not have any money. At that point, the intruder shot Pope, took Goodwin's laptop, and shot Goodwin as Goodwin lunged at him.

Goodwin was able to follow the intruder out of the house and into the backyard, where Goodwin collapsed as the intruder ran down the street carrying Goodwin's laptop. At this time, Goodwin noticed an unfamiliar dark-colored Chevrolet Suburban or Tahoe parked in his driveway, which was located in the backyard of the residence and opened onto Kansas Street. Goodwin testified that this vehicle had no license plates and described the back doors as opening "like kitchen cabinets." The intruder walked back past Goodwin. By this time,

Goodwin had retrieved the bat he dropped earlier and swung it in the direction of the intruder. Goodwin testified that he hit "something," but did not know if it was the intruder. The intruder then shot Goodwin again, dropped the laptop, and drove away in the vehicle, westbound on Kansas Street.

Pope was killed and Goodwin was injured in this incident. Goodwin was in a coma for nearly 3 months and sustained the loss of one of his kidneys, his spleen and gallbladder, and several feet of his small intestine. Goodwin has been diagnosed with short bowel syndrome, which requires liquid nutrition and a colostomy bag. Complications from his injuries caused Goodwin to fall into a second coma, during which he nearly died.

"ShotSpotter" evidence corroborated the timing of the gunshots. ShotSpotter is a technology utilized by the Omaha Police Department to determine the location of gunshots based upon sounds captured by microphones positioned in certain parts of the city. Here, ShotSpotter captured the sound of two gunshots, 20 seconds apart, sounding from outside Goodwin and Pope's residence at 4:30 and 4:31 a.m. Neighbors also testified they heard gunshots around that time.

In addition, neighbors witnessed a vehicle travel west from the residence after they heard the gunshots. One neighbor testified that she saw a dark blue, green, or black Suburban or Tahoe. A second neighbor testified that he witnessed a dark-colored Suburban or Tahoe with a loud exhaust, custom wheels, and tinted windows, and that based upon his experience with vehicles, he estimated the vehicle was between a 1996 and a 1999 model due to its more squared frame.

DNA and Other Evidence.

Multiple items were located at the scene of the shooting. In particular, one firearm projectile was found in the driveway of the residence; another was dug from a wall of the living room of the residence; and a third was retrieved from Pope's body during autopsy. A firearms examiner determined that all

three projectiles were fired from the same firearm. No firearm was ever recovered in this case.

Goodwin's laptop computer was found in the backyard near the driveway. It had a partial shoeprint on its cover. A tread expert testified that the shoeprint was consistent with a Nike "Shox" tennis shoe. The laptop was swabbed for DNA, but the only profiles recovered were Goodwin's and Pope's; testing as to Lessley was inconclusive.

Various items of evidence were also recovered from the scene and tested. A substance appearing to be blood was found on the driveway and on a section of the bat. In addition, a swab was taken from the end of the bat. The State's DNA expert testified that the blood found on the driveway was a match to Lessley's profile and that the probability that the DNA belonged to another person was 1 in 1.67 quintillion. Lessley could also not be excluded as a contributor to the DNA found at the end of the bat, and the probability that the DNA belonged to a person other than Lessley was 1 in 6.60 quadrillion. Finally, Lessley could not be excluded as a contributor to the DNA from the blood found elsewhere on the bat, with the probability of that DNA belonging to another person being 1 in 23.9 trillion.

Initially, the DNA profile obtained was from an unidentified male, but a DNA database eventually identified the male as Lessley. Based upon that identification, law enforcement determined that on October 12, 2016, Lessley had purchased a 2001 green Chevrolet Suburban from an Omaha dealership. That dealership had global positioning system (GPS) records placing the Suburban less than a mile southeast of the Goodwin-Pope residence at 4:18 a.m. on October 29. One of the investigating officers testified that it had taken him about 2 minutes to drive from the residence to the location noted in the GPS records.

Lessley was arrested in January 2017. At the time of arrest, Lessley was wearing a pair of Nike Shox shoes, which were consistent with the shoeprint found on the laptop computer.

Lessley's Suburban was impounded at the time of his arrest. The Suburban still had in-transit signs and no license plates. It also had tinted windows, "barn-door" style rear doors, and a louder-than-stock exhaust. A search of Lessley's residence recovered custom aftermarket rims.

At the time of the shooting, Lessley and his girlfriend lived a 3-minute drive northwest of the Goodwin-Pope residence. Lessley's girlfriend testified that Lessley returned from work on October 28, 2016, between 11:45 p.m. and 12 a.m. She fell asleep shortly after Lessley returned home and was awoken before 5:30 a.m. by Lessley talking on the telephone. At this time, Lessley's girlfriend noticed a "hole" in the right side of Lessley's forehead that he did not have when he came home from work. Lessley's cell phone records show that he was on the cell phone between 4:58 and 5:06 a.m. on October 29. Lessley later told his girlfriend during a jailhouse telephone call that she did not have to say anything at his trial.

Lessley was charged with first degree murder for Pope's death, under alternative theories of premeditated murder or felony murder during the commission of a robbery or attempted robbery. Additionally, Lessley was charged with first degree assault for Goodwin's injuries, possession of a deadly weapon by a prohibited person, and two counts of use of a weapon to commit a felony.

On the first day of trial, the State amended the information by interlineation to remove the premeditated murder theory. Trial proceeded under the State's felony murder theory. The jury was instructed only on felony murder and was not instructed as to any other theory of first degree murder, or as to any other degree of murder. Lessley did not object to the instructions as given and did not offer any proposed instructions. Lessley was found guilty on all five counts in less than 2 hours.

The district court initially sentenced Lessley to consecutive sentences of life imprisonment for felony murder, 20 to 20 years' imprisonment for first degree assault, 3 to 3 years'

imprisonment for possession of a weapon by a prohibited person, and 5 to 5 years' imprisonment on each use conviction. Following a discussion with counsel for the State and for Lessley, the court added 1 day to the maximum term of each sentence (except the life sentence), so that the minimum and maximum terms would not be the same.

Lessley appeals.

ASSIGNMENTS OF ERROR

On appeal, Lessley assigns that (1) there was insufficient evidence to support his convictions and (2) the district court erred in not instructing the jury on the lesser-included offense of manslaughter.

STANDARD OF REVIEW

[1] 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.[1]

[2] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[2]

ANALYSIS

Sufficiency of Evidence.

In his first assignment of error, Lessley contends that the evidence was insufficient to support his convictions. This contention is without merit.

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[1] *State v. McCurdy, ante* p. 343, 918 N.W.2d 292 (2018).

[2] *State v. Wells*, 300 Neb. 296, 912 N.W.2d 896 (2018).

Lessley argues that "[t]he testimony provided by witnesses was not consistent with the testimony of one another, nor was it consistent with other evidence adduced at trial so as to amount to competent evidence . . . ."[3] Lessley concedes that DNA profiles were obtained, but argues that it is not possible to "determine definitively whether or not the evidence collected belongs to a particular individual. . . . [E]ven if the DNA collected from the bat and driveway belonged to [Lessley], this evidence does not connect [Lessley] to the crimes" conclusively, because it is not possible to discern how long the DNA has been present at a particular location.[4] Finally, Lessley takes issue with multiple individual pieces of evidence to support his conclusion that a jury should have found reasonable doubt.

But this is not our standard of review. This court does not resolve conflicts in the evidence or reweigh the evidence, but instead only reviews the evidence to determine whether the evidence offered supported the convictions.

In this case, Goodwin testified that an intruder pointed a gun at him and told him to give him all his money and "shit." In addition, Goodwin testified that the intruder took a laptop computer from the residence. This testimony supported the robbery or attempted robbery allegations underlying the felony murder charge.

Goodwin further testified that he hit "something" with his bat when he was struggling with the intruder. DNA evidence found on the bat and on the driveway near where the struggle occurred matched Lessley, with a probability of between 1 in 23.9 trillion and 1 in 1.67 quintillion (depending on the evidence) that the DNA belonged to another individual. Meanwhile, Lessley sustained an injury on his forehead during the same timeframe as when Goodwin hit "something" with the bat.

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[3] Brief for appellant at 19.

[4] *Id.*

Also found in the driveway at the Goodwin-Pope residence was a laptop computer with a shoeprint on it. The shoeprint was consistent with a Nike Shox shoe, the same type of shoe worn by Lessley at the time of his arrest. Lessley's vehicle generally matched the description of a vehicle observed leaving the scene. The vehicle's GPS records indicated that it was within a 2-minute drive of the residence approximately 12 minutes prior to the shooting.

The evidence plainly supported Lessley's convictions. There is no merit to Lessley's first assignment of error.

Manslaughter Instruction.

In his second assignment of error, Lessley contends that the district court erred in not instructing the jury on the elements of manslaughter. The State contends both that manslaughter is not a lesser-included offense of felony murder, and thus no instruction was required, and that in any case, there was insufficient evidence to support a manslaughter instruction.

[3] Neb. Rev. Stat. § 29-2027 (Reissue 2016) provides in part that "[i]n all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it is murder in the first or second degree or manslaughter." We have held that under § 29-2027, a court is required to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury, whether requested to do so or not.[5]

[4] But a court is not required to instruct a jury on lesser degrees of homicide where the first degree murder charge against the defendant is based upon a theory of felony murder.[6] The distinction between felony murder and other degrees of murder involves the element of intent. We have reasoned that when a first degree murder charge is predicated on a theory of

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[5] *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

[6] See, e.g., *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994).

premeditated murder, second degree murder, or voluntary manslaughter, the intent of the defendant is relevant, but that "[i]n a felony murder case, the proof of a particular mental state is not required as to the killing."[7] We therefore conclude that under § 29-2027, where a defendant is charged solely under a felony murder theory, a jury need not be instructed on the lesser degrees of homicide.

But in any event, there was insufficient evidence to support a manslaughter instruction. Lessley argues that there was evidence in the record indicating there was a struggle at the Goodwin-Pope home. As such, there was evidence adduced that there had been a quarrel, and an instruction should have been given.

Lessley's contentions are without merit. In *State v. Smith*,[8] we concluded that evidence that the defendant and the victim had been arguing was not enough to support a sudden quarrel manslaughter instruction. We reasoned that even if there had been an argument, there was no evidence about who started the argument, what words were said or actions taken, or whether there was evidence of provocation. We noted that "[i]n the absence of some provocation, a defendant's anger with the victim is not sufficient to establish the requisite heat of passion"[9] for sudden quarrel manslaughter.

Here, Lessley points us to some disarray at the scene, including a stove seemingly out of place, refrigerator magnets on the floor, a tipped-over laundry basket and fan, and the bat used on the intruder inside the residence (rather than outside, where Goodwin testified he swung at the intruder and hit "something"). But there is no evidence in the record that these items were in disarray because of these events. And there is certainly no evidence of any provocation that might have

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[7] *State v. McDonald*, 195 Neb. 625, 636-37, 240 N.W.2d 8, 15 (1976). Cf. *Hopkins v. Reeves*, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998).

[8] *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

[9] *Id*. at 735, 806 N.W.2d at 395.

provided any justification for the actions in this case. Lessley's counsel did ask Goodwin whether Pope and Lessley had been having an affair, but Goodwin denied that allegation and counsel offered no evidence to back up that assertion.

There is no merit to Lessley's second assignment of error.

Plain Error in Sentencing.

Finally, the State contends that the district court committed plain error with respect to the sentences imposed for Lessley's convictions for possession by a prohibited person and use of a deadly weapon.

[5-7] A sentence validly imposed takes effect from the time it is pronounced.[10] When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.[11] Any attempt to do so is of no effect, and the original sentence remains in force.[12] The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court.[13]

The district court originally sentenced Lessley to 3 to 3 years' imprisonment for the possession conviction and to 5 to 5 years' imprisonment for the use convictions. During the same hearing, however, the district court attempted to modify those sentences to 3 to 3 years' imprisonment plus 1 day and to 5 to 5 years' imprisonment plus 1 day, respectively. This

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[10] *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000).

[11] *Id.*

[12] *Id.*

[13] *Id.*

modification was done after discussion with the parties due to the prosecuting attorney's concern that the minimum and maximum terms of the sentences could not be the same.

The State argues that the original sentences for the use and possession convictions were valid and thus could not be modified. But the State agrees that the original sentence for first degree assault was invalid and thus was subject to modification. Use of a weapon to commit a felony is a Class IC felony, punishable by 5 to 50 years' imprisonment. Possession of a deadly weapon by a prohibited person is a Class ID felony, punishable by 3 to 50 years' imprisonment. First degree assault is a Class II felony, punishable by 1 to 50 years' imprisonment.

The State bases its argument in the language of Neb. Rev. Stat. § 29-2204 (Supp. 2017). As relevant, § 29-2204 provides:

> (1) Except when a term of life imprisonment is required by law, in imposing a sentence upon an offender for any class of felony other than a Class III, IIIA, or IV felony, the court shall fix the minimum and the maximum terms of the sentence to be served within the limits provided by law. The maximum term shall not be greater than the maximum limit provided by law, and:
>
> (a) The minimum term fixed by the court shall be any term of years less than the maximum term imposed by the court; or
>
> (b) The minimum term shall be the minimum limit provided by law.

We turn first to the use convictions. Section 29-2204(1) provides that the maximum term shall not be greater than the maximum term provided by law, which, for a Class IC felony, is 50 years. As for the minimum term, it shall be *either* any term of years less than the maximum term imposed by the court *or* the minimum term provided by law. The State argues that the sentences of 5 to 5 years' imprisonment initially imposed on Lessley by the district court were proper, because the maximum term imposed by the court (5 years) was not

greater than the maximum term provided for by law (50 years) and the minimum term was the minimum term provided for by law (5 years) as set forth in § 29-2204(1)(b).

The same reasoning goes for the possession conviction. The maximum term for a Class ID felony is 50 years; the maximum term imposed by the district court of 3 years was less than 50 years, and the minimum term of 3 years is the minimum provided for by law. As such, these sentences were valid, and the attempt to modify them was unsuccessful.

Because the district court's intended sentences are apparent from the record,[14] we vacate the sentences imposed for the use and possession convictions and remand the cause for resentencing Lessley in conformity with the initial sentences imposed by the district court of 5 to 5 years' imprisonment for each use conviction and 3 to 3 years' imprisonment for the possession conviction.

We turn now to the sentence imposed on Lessley's first degree assault conviction. The State asserts that the sentence initially imposed by the district court of 20 to 20 years' imprisonment was not valid.

The maximum term provided for by law for a Class II felony is 50 years' imprisonment. The 20-year maximum imposed on Lessley was less than the allowed maximum. But the minimum imposed by the district court was also 20 years' imprisonment. The minimum provided for by law is 1 year, so the minimum term imposed on this conviction did not comply with § 29-2204(1)(b). Nor did it comply with § 29-2204(1)(a), which provides that "[t]he minimum term fixed by the court shall be any term of years less than the maximum term imposed by the court[.]" As such, the State is correct that the initial sentence of 20 to 20 years' imprisonment was invalid. Therefore, the sentence was subject to modification, and we accordingly affirm the modified sentence of 20 to 20 years' imprisonment plus 1 day for first degree assault.

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[14] See *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018).

CONCLUSION

Lessley's convictions are affirmed. Lessley's sentences for first degree felony murder and first degree assault are also affirmed. But the sentences imposed for use of a weapon to commit a felony and possession of a deadly weapon by a prohibited person are vacated and new sentences are to be imposed as set forth above. We remand this cause to the district court for resentencing.

Affirmed in part, and in part vacated and remanded for resentencing.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Frank E. Robak, Sr., respondent.

919 N.W.2d 727

Filed November 30, 2018. No. S-18-165.

1. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
2. **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 disciplines: (1) disbarment; (2) suspension; (3) probation in lieu of or subsequent to suspension, on such terms as the court may designate; or (4) censure and reprimand.
3. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. With respect to the imposition of attorney discipline in an individual case, the Nebraska Supreme Court evaluates each attorney discipline case 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 acts both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.
6. ____. Responding to inquiries and requests for information from the Counsel for Discipline is an important matter, and an attorney's cooperation with the discipline process is fundamental to the credibility of attorney disciplinary proceedings.

Original action. Judgment of suspension.

Julie L. Agena, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

Per Curiam.

INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court, relator, filed formal charges against Frank E. Robak, Sr., for violations of the Nebraska Rules of Professional Conduct and his oath of office as an attorney. Robak failed to respond. We then granted relator's motion for judgment on the pleadings limited to the facts but reserved ruling on the appropriate discipline. Robak defaulted in submitting a brief. We now conclude that the uncontested violations and the state of our record mandate that we indefinitely suspend Robak from the practice of law.

BACKGROUND

Robak was admitted to the practice of law in Nebraska in September 1983. At all relevant times, he engaged in the practice of law in Omaha, Nebraska.

The record in this case is composed of the uncontested formal charges. In May 2013, C.H. retained Robak to represent him in a civil action and paid Robak $5,000. Over the following 3 years, Robak sporadically communicated with C.H., with the communication mostly being initiated by C.H. Robak repeatedly told C.H. that he was working on C.H.'s case. In October 2016, Robak declined C.H.'s request for a refund of his money.

C.H. filed a grievance. Relator sent C.H.'s grievance to Robak, and Robak provided a written response. Robak reported that he had been hospitalized several times since October 2014, that the illness took a toll on his law practice, that he informed

C.H. he was "'not in a position'" to provide a full refund, and that he was on Social Security disability. Relator sent two written requests for additional information from Robak, but Robak failed to respond. The matter was upgraded to a formal grievance, but Robak did not respond.

Relator subsequently filed formal charges against Robak. According to the formal charges, Robak violated his oath of office as an attorney[1] and violated provisions of the Nebraska Rules of Professional Conduct. Specifically, relator alleged that Robak violated rules regarding competence,[2] diligence,[3] bar admission and disciplinary matters,[4] and misconduct.[5] Robak did not file an answer to the formal charges.

Relator moved for judgment on the pleadings. Robak did not file an objection. We granted the motion as to the facts and directed the parties to brief the issue of discipline. Relator recommended a suspension of at least 2 years followed by 2 years of monitored probation. Robak did not file a brief.

ANALYSIS

[1] Violation of a disciplinary rule concerning the practice of law is a ground for discipline.[6] Because Robak did not file an answer to the formal charges and we granted relator's motion for judgment on the pleadings, Robak's violation of several disciplinary rules has been established. The only issue before us is the appropriate discipline.

[2,3] Under Neb. Ct. R. § 3-304, we may impose one or more of the following disciplines: (1) disbarment; (2) suspension;

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[1] Neb. Rev. Stat. § 7-104 (Reissue 2012).

[2] Neb. Ct. R. of Prof. Cond. § 3-501.1.

[3] Neb. Ct. R. of Prof. Cond. § 3-501.3.

[4] Neb. Ct. R. of Prof. Cond. § 3-508.1(b).

[5] Neb. Ct. R. of Prof. Cond. § 3-508.4(a) and (d).

[6] *State ex rel. Counsel for Dis. v. Wolfe, ante* p. 117, 918 N.W.2d 244 (2018).

(3) probation in lieu of or subsequent to suspension, on such terms as we may designate; or (4) censure and reprimand.[7] 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 offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[8]

[4,5] With respect to the imposition of attorney discipline in an individual case, we evaluate each attorney discipline case in light of its particular facts and circumstances.[9] For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.[10]

The record on these formal charges establishes both client neglect and failure to cooperate with the disciplinary process. Robak failed to provide competent and diligent representation to C.H. and failed to communicate with him regarding his legal action. After C.H. filed a grievance, Robak initially responded to the grievance. But he thereafter failed to provide information requested by relator, failed to respond to the formal grievance notice, failed to file an answer to the formal complaint, and failed to file an answer to the formal charges.

[6] Responding to inquiries and requests for information from relator is an important matter, and an attorney's cooperation with the discipline process is fundamental to the

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[7] *State ex rel. Counsel for Dis. v. Tonderum*, 286 Neb. 942, 840 N.W.2d 487 (2013).

[8] *State ex rel. Counsel for Dis. v. Wolfe, supra* note 6.

[9] *Id.*

[10] *Id.*

credibility of attorney disciplinary proceedings.[11] Failing to participate in the disciplinary process is a very serious matter.[12] Moreover, Robak has not filed a brief with this court regarding the appropriate discipline.

In responding to C.H.'s grievance, Robak alluded to health issues. But his failure to provide additional information and to answer the formal charges leaves this potential mitigating factor undeveloped. One factor weighs in Robak's favor: Robak has been licensed to practice law for 35 years, and the record does not show any previous discipline in Nebraska.

In considering the appropriate sanction, we are mindful of the sanctions imposed in similar cases. In several cases, we have indefinitely suspended the attorney. For example, in *State ex rel. Counsel for Dis. v. Jorgenson*,[13] an attorney violated disciplinary rules in two separate incidents involving noncompliance and lack of communication. As an aggravating factor, we recognized that in 2012, the attorney received a public reprimand and 1 year's probation for incidents involving entering into a contingency fee agreement to represent a client when the attorney should have known the client's claims were time barred and entering into contingency fee agreements not committed to writing. Further, the attorney failed to cooperate with the disciplinary process. We suspended the attorney indefinitely, with a minimum suspension of 2 years. In *State ex rel. Counsel for Dis. v. Tighe*,[14] which involved two consolidated cases against an attorney, the attorney failed to work competently and failed to respond to inquiries regarding his clients' grievances. We ordered

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[11] See *State ex rel. Counsel for Dis. v. Jorgenson*, 298 Neb. 855, 906 N.W.2d 43 (2018).

[12] *Id.*

[13] *Id.*

[14] *State ex rel. Counsel for Dis. v. Tighe*, 295 Neb. 30, 886 N.W.2d 530 (2016).

an indefinite suspension. We imposed an indefinite suspension, with a minimum suspension of 3 years, in *State ex rel. Counsel for Dis. v. Tonderum*.[15] There, an attorney disclosed confidential information regarding a former client and then failed to respond to formal charges filed against her.

In other similar cases, we have suspended the attorney for a set term followed by a probationary period. In *State ex rel. Counsel for Dis. v. Ubbinga*,[16] an attorney failed to communicate with and complete work for a client, failed to provide the client with his file, and failed to cooperate with relator's investigation in a timely manner. We recognized as a mitigating factor the lack of any prior discipline. We suspended the attorney for 1 year and conditioned reinstatement on a 2-year period of probation. In *State ex rel. Counsel for Dis. v. Moore*,[17] we suspended an attorney for 2 years with 2 years' monitored probation upon reinstatement. In that case, the attorney eventually filed an answer to the formal charges and later submitted a conditional admission of two counts of client neglect and failure to communicate.

Under the facts of this case, we conclude that the appropriate discipline is an indefinite suspension, with a minimum suspension of 1 year, followed by 2 years' monitored probation. Any application for reinstatement filed by Robak after the minimum suspension period shall include a showing under oath which demonstrates his fitness to practice law and fully addresses the circumstances of the instant violation.

Upon reinstatement, Robak shall comply with the following terms of monitored probation: The monitoring shall be by an attorney licensed to practice law in the State of Nebraska and who shall be approved of by the Counsel for Discipline.

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[15] *State ex rel. Counsel for Dis. v. Tonderum, supra* note 7.

[16] *State ex rel. Counsel for Dis. v. Ubbinga*, 295 Neb. 995, 893 N.W.2d 694 (2017).

[17] *State ex rel. Counsel for Dis. v. Moore*, 294 Neb. 283, 881 N.W.2d 923 (2016).

Robak shall submit a monitoring plan with his application for reinstatement which shall include, but not be limited to, the following: During the first 6 months of probation, Robak will meet with and provide the monitor a weekly list of cases for which Robak is currently responsible, which list shall include the date the attorney-client relationship began; the general type of case; the date of last contact with the client; the last type and date of work completed on the file (pleading, correspondence, document preparation, discovery, or court hearing); the next type of work and date that work should be completed on the case; any applicable statutes of limitations and their dates; and the financial terms of the relationship (hourly, contingency, et cetera). After the first 6 months through the end of probation, Robak shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information as set forth above. Robak shall work with the monitor to develop and implement appropriate office procedures to ensure protection of the clients' interests. Robak shall reconcile his trust account within 10 working days of receipt of the monthly bank statement and provide the monitor with a copy within 5 working days. Robak shall submit a quarterly compliance report to the Counsel for Discipline, demonstrating adherence to the foregoing terms of probation. The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that Robak continues to abide by the terms of probation. If at any time the monitor believes Robak has violated the professional conduct rules or has failed to comply with the terms of probation, the monitor shall report the same to the Counsel for Discipline. Robak shall pay all of the costs in this case, including the fees and expenses of the monitor, if any.

CONCLUSION

We order that Robak be indefinitely suspended from the practice of law in the State of Nebraska, with a minimum suspension of 1 year, effective immediately. Robak may apply

for reinstatement consistent with the terms outlined above. Robak's reinstatement shall be conditioned upon his being on monitored probation for a period of 2 years following reinstatement, subject to the terms set forth above. Acceptance of an application for reinstatement is conditioned on the application's being accompanied by a proposed monitored probation plan, the terms of which are consistent with this opinion.

Robak shall comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, he shall be subject to punishment for contempt of this court. Robak is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of suspension.

STATE OF NEBRASKA, APPELLEE, V.
JAMES E. MYERS, APPELLANT.
919 N.W.2d 893

Filed November 30, 2018. No. S-18-239.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. ____: ____. An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.
3. ____: ____. Decisions regarding appointment of counsel under the DNA Testing Act are reviewed for an abuse of discretion.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded for further proceedings.

James E. Myers, pro se.

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

Nearly 20 years after a jury convicted James E. Myers of murder, he filed a motion for testing under the DNA Testing

Act.[1] The district court denied that motion as well as Myers' motion for the appointment of counsel. We would review these denials for an abuse of discretion. But to do so, the court below must have applied only the part of the legal framework governing whether to grant testing. Because the district court may have relied instead upon principles governing relief available after testing, we must reverse the order and remand the cause for reconsideration of the motions under only the correct portion of the governing framework.

BACKGROUND

Circumstances of Crimes

The State charged Myers with first degree murder, use of a deadly weapon in the commission of a felony, and possession of a deadly weapon by a felon in connection with the 1995 shooting death of Lynette Mainelli. A jury convicted Myers of the charges, and we affirmed his convictions on direct appeal.[2]

The factual background relating to Myers' convictions is set forth in more detail in our opinion involving Myers' direct appeal.[3] Our opinion stated in part:

> Edward Wilson testified that he was in the van driven by Myers the night Mainelli was killed. Myers drove to the Blue Lake Manor Apartments, where Mainelli lived. Myers got out of the van, and Edward Wilson saw that he had on gloves. Myers went to the back of the van, and Edward Wilson heard a "clacking" noise, which he recognized as the sound of a bullet moving into a chamber. Myers then left the van and walked toward the apartment complex. He was gone for about 1 hour, and upon his return, he got in the van and took the passengers home.

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[1] See Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2016).

[2] See *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[3] *Id.*

> Sam Edwards testified that as Myers dropped him off, Myers gave him a handgun and told him to "put it up" because the police were out and Myers had in-transit stickers on the van. Earlier, Edwards had seen the pistol on Myers' lap. Edwards subsequently retrieved the pistol and gave it to Edward Wilson, who stated the pistol had once belonged to his sister, Edwina Wilson. Edward Wilson testified that he recognized the gun because it had a unique color and a name written on it and that he thought the black handle was unusual. Edward Wilson sold the pistol because he suspected that it had been used in the murder of Mainelli. The pistol was the same caliber as two .22-caliber casings found beside Mainelli's body. Daniel Bredow, a firearm toolmarks examiner with the city of Omaha, testified that he compared the bullets found at the crime scene with bullets fired from the gun Myers gave Edwards. Bredow concluded that the bullets taken from the crime scene had been fired by the gun which could be traced to Myers.
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> [Timothy] Sanders testified that in the summer and early fall of 1995, Myers had said that Mainelli was going to testify against Charles Duncan, so she needed to have "her cap pulled back and to be shot." Sanders saw Myers with a small .22-caliber handgun in the summer of 1995. Edwina Wilson testified that in December 1996, after Mainelli's death, Myers had told her to tell the police he was with her at the time of the killing.[4]

Other information relevant to the instant appeal is derived from the trial record. The State presented evidence about Myers' plan to be intimate with Mainelli. Timothy Sanders, who was in the same gang as Myers, testified that Myers said Mainelli needed to be shot and that Myers said he was going to have sex with Mainelli. Sanders testified that after Mainelli's death, Myers told him that Mainelli walked into

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[4] *Id.* at 312-13, 603 N.W.2d at 388-89.

her bedroom, took off her clothes, laid on the bed, and Myers shot her once the lights were out. In closing arguments, the prosecutor summarized: "She took off her clothes; she laid on the bed. He put the gun towards her temple and he shot her."

Motion for DNA Testing

In 2016, Myers filed a motion pursuant to the DNA Testing Act seeking "DNA testing of items of evidence that may contain biological material." He listed 26 items of evidence taken from the crime scene, and he wished to have those items tested in order to exclude himself as a donor of any biological material. The items included Mainelli's bedding, bullets and spent .22-caliber casings, beverage containers, clothing, spiral notebooks, cigarette butts and contents of ashtrays, gunshot residue test kit from Mainelli's hands, vials of Mainelli's blood, a rape kit, and hair samples.

Myers sought a variety of different DNA tests. He wanted testing of any hairs, blood, semen, saliva, or skin cells on various items, asserting that if such DNA evidence excluded Myers and was found to be of another male, "this would prove that the story from the informant was false, and Myers is in fact [i]nnocent." Myers alleged there was "good cause to believe biological evidence still exists and can be identified and profiled with today's DNA technology." Myers asserted that if a suspect touched his face or head while wearing gloves, the skin cells could be transferred to other objects. Myers wanted the spent .22-caliber casings tested, because "it has become possible to obtain DNA profiles from few skin cells left by the person who loaded a shell into a gun." Myers also moved for the appointment of counsel. In connection with a motion to preserve evidence, Myers included a laboratory report showing that a sexual assault examination of Mainelli was performed and that a vaginal swab and vaginal smear slide from a sexual assault kit revealed "[v]ery few spermatozoa."

Myers filed an affidavit in support of his motion for DNA testing. He stated that DNA evidence was not available at the

time of his trial, that law enforcement withheld any findings of biological evidence from him, and that testing all of the items would exonerate him. Myers also stated that he was with his girlfriend on the night of the murder and that testing all of the items would prove that the State's informant lied. He subsequently filed a supplemental amendment to his motion, seeking DNA testing of the sexual assault kit.

The State filed an inventory of evidence that had been gathered in connection with the case. It showed that the items Myers wished to have tested were in the State's possession.

The district court held a hearing. Myers asked the court to consider his motion along with the supplemental amendment and to take judicial notice of § 29-4120(5). He presented no evidence. The State likewise presented no evidence, but it requested that the court review the bill of exceptions from the trial, along with Myers' motion to determine whether DNA testing was appropriate.

District Court's Decision

The district court denied Myers' motion. It found that DNA testing was not warranted under § 29-4120(5)(c), because the results would not provide exculpatory evidence. The court quoted extensively from a portion of *State v. Buckman*[5] (including portions of the *Buckman* opinion which relied on *State v. Bronson*[6]) where we discussed when a court may vacate and set aside a judgment based on test results that "exonerate or exculpate" an accused and "show a complete lack of evidence to establish an essential element of the crime charged."

The court explained that testing of the evidence would not exonerate or exculpate Myers in light of the evidence at trial, because "the absence of [Myers'] DNA from these items would not establish [Myers'] innocence considering witnesses

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[5] *State v. Buckman*, 267 Neb. 505, 517, 675 N.W.2d 372, 382 (2004).

[6] *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003).

testified he intentionally wore gloves that would prevent his DNA from being left at the scene." The court reasoned that "the absence of [Myers'] DNA or the presence of another person's DNA at the scene on those items would not alone be enough to exonerate [Myers] considering his motive for the crime, inculpatory statements made and witness testimony regarding his actions directly before and after the murder." Further, the court stated that testing of a sexual assault kit would not exonerate or exculpate Myers, because the State did not argue that Myers had sex with Mainelli on the night of the murder. The court concluded that "regardless of whether [Myers'] DNA was excluded or someone else's DNA could be found on this evidence, such DNA results would not 'show a complete lack of evidence to establish an essential element of the crime charged' when you consider the totality of the evidence."

Myers timely appealed.

ASSIGNMENTS OF ERROR

Myers assigns that the district court erred in (1) refusing to order DNA testing, (2) making findings of fact and conclusions of law without actual DNA results, (3) failing to determine whether the State refused to allow him access to DNA evidence, and (4) failing to appoint counsel to represent him.

STANDARD OF REVIEW

[1,2] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[7] An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.[8]

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[7] *State v. Betancourt-Garcia*, 299 Neb. 775, 910 N.W.2d 164 (2018).

[8] *Id.*

[3] Decisions regarding appointment of counsel under the DNA Testing Act are reviewed for an abuse of discretion.[9]

ANALYSIS

Motion for DNA Testing

In denying Myers' motion for DNA testing, the district court relied in large part on our decision in *Buckman*.[10] We agree that *Buckman* is instructive regarding the showing that must be made at various stages. But it is also important to remember that both *Buckman* and the *Bronson*[11] decision cited in *Buckman* were appeals where DNA testing had been ordered and focused on the relief sought and denied based upon the test results.

In *Buckman*, we first summarized the legal framework applicable in determining *whether* to order testing. We said:

> The initial step toward obtaining relief under the DNA Testing Act is for a person in custody to file a motion requesting forensic DNA testing of biological material. . . . Forensic DNA testing is available for any biological material that is related to the investigation or prosecution that resulted in the judgment; is in the actual or constructive possession of the state, or others likely to safeguard the integrity of the biological material; and either was not previously subjected to DNA testing or can be retested with more accurate current techniques.[12]

We pause at this point to observe there is no dispute that Myers met these criteria.

If the above criteria are met and if the court further determines that the requirements of § 29-4120(5) have been met, the court must order testing. Although our *Buckman* opinion

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[9] *State v. Phelps*, 273 Neb. 36, 727 N.W.2d 224 (2007).

[10] *State v. Buckman, supra* note 5.

[11] *State v. Bronson, supra* note 6.

[12] *State v. Buckman, supra* note 5, 267 Neb. at 514, 675 N.W.2d at 380 (citation omitted).

used permissive "may order testing"[13] language, we have subsequently made clear—consistent with the statute's use of the phrase "shall order DNA testing"[14]—that the court is required to order testing if the requirements of § 29-4120(5) are met.[15] We recognize the Legislature has amended § 29-4120(5) since the time of the *Buckman* decision, but the amendment is not significant to the issue before us. For convenience, we quote the current version, which was in effect at the time of Myers' motion:

> Upon consideration of affidavits or after a hearing, the court shall order DNA testing pursuant to a motion filed under subsection (1) of this section upon a determination that (a)(i) the biological material was not previously subjected to DNA testing or (ii) the biological material was tested previously, but current technology could provide a reasonable likelihood of more accurate and probative results, (b) the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and (c) such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.[16]

In *Buckman*, we elaborated on the last prong of § 29-4120(5) and clarified that the threshold to satisfy it was rather low. We stated:

> Exculpatory evidence is defined as evidence favorable to the person in custody and material to the issue of the guilt of the person in custody. . . . [T]his requirement is

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[13] *Id.* at 514, 675 N.W.2d at 380.

[14] § 29-4120(5).

[15] See, e.g., *State v. Betancourt-Garcia, supra* note 7; *State v. Marrs*, 295 Neb. 399, 888 N.W.2d 721 (2016); *State v. Young*, 287 Neb. 749, 844 N.W.2d 304 (2014); *State v. McDonald*, 269 Neb. 604, 694 N.W.2d 204 (2005).

[16] § 29-4120(5).

> relatively undemanding for a movant seeking DNA testing and will generally preclude testing only where the evidence at issue would have no bearing on the guilt or culpability of the movant.[17]

But a more rigorous standard applies *after* testing has been ordered. In *Buckman*,[18] we also set forth the procedure applicable after a court orders DNA testing. We stated:

> Once DNA testing is conducted, and results are obtained, the question is whether the evidence obtained exonerates or exculpates the movant. Based on the test results, the movant may obtain relief in one of two ways, each of which requires a different quantum of proof. As previously noted, when the test results exonerate or exculpate the movant, the court may "vacate and set aside the judgment and release the person from custody." . . . However, if the court does not vacate and set aside the judgment, the movant may file a motion for new trial based upon "newly discovered exculpatory DNA or similar forensic testing obtained under the DNA Testing Act."[19]

We summarized the proof necessary for each potential remedy:

> [T]he court may vacate and set aside the judgment in circumstances where the DNA testing results are either completely exonerative or highly exculpatory—when the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. . . . This requires a finding that guilt cannot be sustained because the evidence is doubtful in character and completely lacking in probative value. . . . [I]n other circumstances where the evidence

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[17] *State v. Buckman, supra* note 5, 267 Neb. at 515, 675 N.W.2d at 381 (citation omitted).

[18] *State v. Buckman, supra* note 5.

[19] *Id.* at 515, 675 N.W.2d at 381 (citation omitted).

> is merely exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.[20]

As *Buckman* demonstrates, the showing that must be made to obtain DNA testing presents a relatively low threshold. After testing, however, a much higher showing is required to either set aside a judgment or require a new trial.

Here, the district court was presented with the first step in the framework—whether to require testing. It denied testing on the basis that Myers failed to meet the "may produce noncumulative, exculpatory evidence" requirement of § 29-4120(5)(c). But in making its determination, the court discussed a more onerous standard governing relief which might be available after testing has been performed.

The court's order shows that it imported the legal standard for determining whether to vacate or set aside a conviction. It quoted, with emphasis, when a motion to vacate and set aside the judgment under § 29-4123(2) may be granted. It also quoted language from *Buckman*, highlighting that vacating or setting aside a judgment was intended "to apply to those cases in which DNA test results 'conclusively establish the guilt or innocence of a criminal defendant'"[21] and would be proper "only where the results of DNA testing either completely exonerated the movant or were highly exculpatory."[22] Finally, the court found that "regardless of whether [Myers'] DNA was excluded or someone else's DNA could be found on this evidence, such DNA results would not 'show a complete lack of evidence to establish an essential element of the crime charged' when you consider the totality of the evidence."

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[20] *Id.* at 518, 675 N.W.2d at 383 (citations omitted).

[21] *Id.* at 516, 675 N.W.2d at 382.

[22] *Id.* at 516-17, 675 N.W.2d at 382.

On appeal, we are tasked with determining whether the district court abused its discretion in denying Myers' motion for DNA testing. But we cannot do so, because the court mingled standards applicable to § 29-4123(2) and (3) into its analysis under § 29-4120(5). Where it should have addressed only the first part of the statutory framework, its decision can be read to instead delve into the questions that apply in the latter part of the framework. Here, the question before the court was whether to allow testing.

Because the court's order fails to make clear that its denial of DNA testing was based solely on § 29-4120(5), we must remand the cause to the district court for a determination under that section, based upon the existing record. On remand, the court shall determine whether the requirements of § 29-4120(5) have been met, including whether DNA testing of the items requested may produce noncumulative evidence which is favorable to Myers and material to the issue of his guilt.

Appointment of Counsel

Myers also assigns error to the district court's denial of his motion for the appointment of counsel. A court shall appoint counsel for an indigent person upon a showing that DNA testing may be relevant to the person's claim of wrongful conviction.[23] Because we are remanding the cause to the district court to consider whether Myers' motion for DNA testing should be granted under the proper standard, we also remand the cause for a determination as to whether he made the requisite showing to require the appointment of counsel.

Access to Biological Material

Myers also contends that the Omaha Police Department did not disclose to the defense that it secured a sexual assault examination kit and collected a vaginal vault sample from the

[23] § 29-4122.

victim. He argues that such action violated his right to due process and equal protection of law. This is not part of the DNA Testing Act framework.

The DNA Testing Act is a limited remedy providing inmates an opportunity to obtain DNA testing in order to establish innocence after a conviction.[24] We have previously stated, although in dicta, that a constitutional challenge to the destruction of evidence is outside the purview of the DNA Testing Act.[25] We conclude that whether the prosecution improperly withheld evidence is not properly presented in a motion for DNA testing. Upon remand, the district court need not consider this argument further.

CONCLUSION

Because the district court applied principles governing relief which might be available after testing when it should have limited its consideration to whether it was required to order testing, we must reverse the order and remand the cause for reconsideration of the motions under the correct portion of the governing framework. We likewise reverse the denial of counsel and remand the cause for a determination as to whether Myers made the requisite showing to be entitled to the appointment of counsel.

Reversed and remanded for
further proceedings.

Freudenberg, J., not participating.

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[24] *State v. Betancourt-Garcia, supra* note 7.

[25] See *id.*

State of Nebraska, appellee, v. Joshua Uhing, appellant.

919 N.W.2d 909

Filed November 30, 2018. No. S-18-375.

1. **Jurisdiction.** A question of jurisdiction is a question of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** Appellate courts independently review questions of law decided by a lower court.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
5. **Appeal and Error.** Appellate courts do not generally consider arguments and theories raised for the first time on appeal.
6. **Legislature: Courts: Time: Appeal and Error.** When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Appeal dismissed.

Thomas C. Riley, Douglas County Public Defender, Jeanine Tlustos, and Lori A. Hoetger for appellant.

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

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

Funke, J.

Joshua Uhing appeals the district court's order overruling his motion to reconsider the denial of his motion to

transfer to juvenile court under Neb. Rev. Stat. § 29-1816 (Supp. 2017). For the reasons set forth herein, we dismiss the appeal for lack of jurisdiction as untimely under § 29-1816(2) and (3)(c).

BACKGROUND

Uhing was charged in the district court with two counts of sexual assault in the first degree, Class II felonies, and one count of incest with a victim age 17 or under, a Class IIA felony. The alleged victims were Uhing's sisters. Uhing was born in April 2000 and, on the date the charges were filed, was 17 years old.

In October 2017, within 30 days of being charged, Uhing filed a motion to transfer to juvenile court. On December 15, the court overruled Uhing's motion to transfer. The court's order noted the significance of the charges, Uhing's age, the likelihood of Uhing's need for long-term treatment if found guilty, the short amount of time Uhing had before reaching majority, concern for public safety, and the lack of ability of the juvenile court to provide Uhing meaningful benefit. The district court thus retained Uhing's felony charges in adult criminal court, and Uhing did not appeal this order.

On February 8, 2018, Uhing filed a motion captioned "Motion to Reconsider Denial of Defendant's Motion to Transfer to Juvenile Court." The motion did not cite the specific statutory or legal authority that provided a basis for the motion. Uhing alleged that in the time since the order was issued, he underwent an evaluation that recommended offense-specific treatment and he was accepted into a youth psychosexual center which believed Uhing could complete treatment prior to his 19th birthday. Uhing claimed that this information was unavailable prior to the hearing on the motion to transfer and that in the interest of justice, he should be allowed to present evidence of these factual allegations for consideration.

After a hearing on Uhing's motion to reconsider, the court entered an order on March 19, 2018, overruling the motion. The court's order stated:

> [Uhing] has been abused since he has been at least ten years old and is alleged to have been involved in sexual abuse of his sisters for some time. [Uhing] has significant issues of abuse and neglect, family relationship/abandonment, mood, depression, sexual/mental health, and substance abuse. The program[] as set forth in the additional evidence is under optimal conditions and it does not address the need or length of the aftercare programs after the nine month to twelve-month treatment.
>
> Based upon this additional evidence and the evidence offered at the initial hearing on December 8, 2017, this Court is still concerned that thirteen and a half months is not adequate time to resolve [Uhing's] significant and multiple issues. As such, . . . in consideration of all the evidence, and the requirements pursuant to *Neb. Rev. Stat*. § 43-276, this Court still has great concern for public safety and the ability of a Juvenile Court to provide long term meaningful benefit to [Uhing] in the thirteen months that is remaining until his nineteenth birthday.

On April 9, 2018, Uhing appealed the order overruling his motion to reconsider. Uhing's notice of appeal stated: "This appeal stems from the Order overruling the Motion to Reconsider. Said Order is dated March 19, 2018 and this appeal is filed pursuant to LB11 which went into effect March 29, 2017." Uhing asserts this court has jurisdiction to consider the district court's order on the motion to reconsider, because the underlying order on the motion to transfer was a final, appealable order.

The State, in turn, argues this court lacks jurisdiction of the motion to reconsider, because the motion is not a final, appealable order. The State asserts that a rule which treats as a final, appealable order any order overruling a motion to reconsider an order on a motion to transfer is overly broad and would undermine appellate deadlines. We granted a petition to bypass submitted by the State.

ASSIGNMENTS OF ERROR

Uhing assigns, restated, that the district court abused its discretion in overruling his motion to reconsider the court's denial of his motion to transfer to juvenile court, because the State failed to meet its burden to show a sound basis for retaining Uhing's case in district court.

STANDARD OF REVIEW

[1-3] A question of jurisdiction is a question of law.[1] Statutory interpretation presents a question of law.[2] Appellate courts independently review questions of law decided by a lower court.[3]

ANALYSIS

[4] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[4]

[5] Uhing argues that the denial of a motion to reconsider is a final, appealable order.[5] In support of this argument, Uhing contends, for the first time on appeal, that his motion to_reconsider was brought under Neb. Rev. Stat. § 25-2001 (Reissue 2016). However, there is nothing in the record indicating Uhing ever presented this theory to the district court. Appellate courts do not generally consider arguments and theories raised for the first time on appeal.[6]

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[1] *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] See *Capitol Construction v. Skinner*, 279 Neb. 419, 778 N.W.2d 721 (2010).

[6] *State ex rel. Rhiley v. Nebraska State Patrol, ante* p. 241, 917 N.W.2d 903 (2018).

Section 29-1816(2) provides alleged juvenile offenders the ability to move for a transfer of their case from a county or district court to a juvenile court. This motion must be made within 30 days after arraignment "unless otherwise permitted by the court for good cause shown."[7] Uhing apparently chose not to attempt to make this showing of good cause and, thus, is left only with taking an appeal.

Section 29-1816(3)(c) provides the procedure for appealing an order on a motion to transfer and states:

> An order granting or denying transfer of the case from county or district court to juvenile court shall be considered a final order for the purposes of appeal. Upon entry of an order, any party may appeal to the Court of Appeals within ten days. Such review shall be advanced on the court docket without an extension of time granted to any party except upon a showing of exceptional cause. Appeals shall be submitted, assigned, and scheduled for oral argument as soon as the appellee's brief is due to be filed. The Court of Appeals shall conduct its review in an expedited manner and shall render the judgment and opinion, if any, as speedily as possible.

Summarized, subsections (2) and (3)(c) of § 29-1816 provide that an alleged juvenile offender can move for transfer to juvenile court within 30 days of the juvenile's arraignment and that either the juvenile or the State can appeal an order on the motion within 10 days of its entry. This procedure is in contrast to the typical appeal process in which a party has 30 days from the entry of a judgment or final order to appeal the decision of a district court unless a party has filed a timely terminating motion.[8]

In previous appeals of a denial of a motion to transfer to juvenile court, we have held that a trial court's denial of the

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[7] § 29-1816(2).

[8] See Neb. Rev. Stat. § 25-1912 (Supp. 2017).

motion was not a final, appealable order.[9] In response to our decision in *State v. Bluett*,[10] the Nebraska Legislature amended § 29-1816 to include the language that "[a]n order granting or denying transfer of the case from county or district court to juvenile court shall be considered a final order for the purposes of appeal" and to impose the 10-day limitation of the time to file the appeal. The Legislature, however, did not include language that filing a motion to reconsider would terminate the appeal period.

Here, Uhing filed the underlying motion to transfer within 30 days of his arraignment. However, he failed to appeal the order denying this motion within the 10 days required by § 29-1816(3)(c). Therefore, we lack jurisdiction to consider any subsequent appeal of the order on Uhing's motion to transfer.

[6] Uhing's motion for reconsideration does not cure this jurisdictional deficiency. Allowing the appeal of Uhing's motion to reconsider would have the effect of extending the time for filing the original appeal. But when the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.[11] Because the motion to reconsider did not extend the time for appeal, which had run 10 days after the transfer motion was denied, we lack jurisdiction to consider this appeal.

CONCLUSION

For the reasons stated above, we dismiss the appeal for lack of jurisdiction.

Appeal dismissed.

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[9] See *State v. Bluett*, 295 Neb. 369, 889 N.W.2d 83 (2016).

[10] *Id.*

[11] *State v. Lotter, ante* p. 125, 917 N.W.2d 850 (2018).

State of Nebraska, appellee, v.
Tracy N. Parnell, appellant.
919 N.W.2d 900

Filed November 30, 2018. No. S-18-413.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
2. **Negligence: Public Officers and Employees: Pleadings: Appeal and Error.** The appropriate filing procedure when an appeal is lost due to official negligence is for the party seeking relief to file a motion in the lower court, seeking the ability to establish the basis for obtaining relief.
3. **Presumptions.** A letter properly addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails.
4. **Public Officers and Employees: Presumptions.** In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties, and absent evidence showing misconduct or disregard of the law, the regularity of official acts is presumed.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Reversed and remanded.

Tracy N. Parnell, pro se.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

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

Heavican, C.J.

INTRODUCTION

Tracy N. Parnell filed a pro se motion for postconviction relief on July 12, 2017. The district court denied the motion without a hearing. Parnell then filed a motion to vacate or modify the judgment, contending that he was not informed of the denial and was thus unable to file a timely appeal. Parnell sought a hearing at which he could prove that he was not served with the district court's order denying his motion. The district court denied the motion without a hearing. Parnell appeals. We reverse.

BACKGROUND

Parnell was convicted of first degree murder, attempted first degree murder, two counts of use of a deadly weapon to commit a felony, and possession of a weapon by a prohibited person. This court affirmed Parnell's convictions and sentences on direct appeal.[1]

On July 12, 2017, Parnell filed a motion seeking postconviction relief. The district court dismissed the motion without an evidentiary hearing on August 17. The clerk of the court certified that a copy of that dismissal was sent to the State and to Parnell.

On March 16, 2018, Parnell filed a motion alleging that he never received a copy of the order dismissing his postconviction motion and thus was unable to file a timely appeal. Along with the motion to vacate, Parnell requested a hearing on his motion. Parnell's motion to vacate was denied on March 21 without a hearing.

Parnell appeals from that denial. In its brief, the State agrees with Parnell that the district court erred in denying the motion without first holding a hearing.

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[1] See *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

ASSIGNMENT OF ERROR

Parnell assigns that the district court erred in denying his motion to vacate without a hearing.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[2]

ANALYSIS

Parnell argues that the district court erred in denying his "Motion to Vacate or Modify Judgement and Motion to Compel[]" and his request for a hearing on that motion. The basis of Parnell's motion is his allegation that he did not receive a copy of the district court's order dismissing his motion for postconviction relief and therefore did not timely appeal from that denial. In denying Parnell's motion without a hearing, the district court reasoned that the certificate of service on the postconviction motion indicated that it was served on Parnell.

[2] The appropriate filing procedure when an appeal is lost due to official negligence is for the party seeking relief to file a motion in the lower court, seeking the ability to establish the basis for obtaining relief.[3]

[3,4] A letter properly addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails.[4] In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties, and absent evidence showing

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[2] *Hotz v. Hotz, ante* p. 102, 917 N.W.2d 467 (2018).

[3] See *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

[4] *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997), *overruled on other grounds, Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).

misconduct or disregard of the law, the regularity of official acts is presumed.[5]

Parnell's motion alleged that he did not receive a copy of the order dismissing his postconviction motion. He sought the ability to obtain proof of his allegation and submit the same to the court. This was sufficient to obtain a hearing on his claim for official negligence.

Furthermore, while the law presumes that a public officer will faithfully perform his or her official duties and that a letter, once properly mailed, will reach its addressee, both are presumptions that can be overcome by the showing of evidence to the contrary. In this case, while Parnell sought the ability to rebut these presumptions, the district court's denial of his motion without a hearing prevented Parnell from offering evidence to that end. Whether the presumption can be successfully rebutted will depend on the evidence presented.

The district court erred when it denied the motion without holding a hearing at which Parnell was able to offer proof of his allegation.

CONCLUSION

The district court erred in denying Parnell's motion without a hearing. We reverse that decision and remand the cause for a hearing at which Parnell may offer evidence in connection with his assertion that he never received the order dismissing his motion for postconviction relief.

Reversed and remanded.

Freudenberg, J., not participating.

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[5] See *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

State of Nebraska, appellee, v. Zachary A. Mueller, appellant.

920 N.W.2d 424

Filed December 7, 2018. No. S-17-387.

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. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
4. ____: ____. Whether a defendant is entitled to credit for time served and in what amount are questions of law, subject to appellate review independent of the lower court.
5. **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. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
6. ____: ____: ____. 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.

7. **Criminal Law: Venue: Proof: Waiver.** Proof of venue is essential in a criminal prosecution, and in the absence of a defendant's waiver by requesting a change of venue, the State has the burden to prove proper venue beyond a reasonable doubt.
8. **Criminal Law: Statutes: Time.** Statutes governing substantive matters in effect at the time of a crime govern, and not later enacted statutes. In contrast, procedural statutes in effect on the date of a hearing or proceeding govern, and not those in effect when the violation took place.
9. ____: ____: ____. A statute defining the elements of a crime is substantive, and the statute in effect at the time of the offense governs.
10. **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.
11. **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.
12. ____. 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.
13. ____. Because of the mandatory "shall" language used in Neb. Rev. Stat. § 83-1,106 (Reissue 2014), the statute mandates that credit for time served must be given for time spent in custody on a charge when a prison sentence is imposed for a conviction of such charge.
14. ____. Neb. Rev. Stat. § 83-1,106(4) (Reissue 2014) requires that credit for time served shall be given which has not otherwise been applied, and the import of this subsection is that all credit available due to presentence incarceration shall be applied, but only once.
15. ____. What matters in the credit for time served analysis is not whether the defendant was detained in Nebraska and awaiting trial and sentencing on Nebraska charges, but, rather, whether the defendant was forced to be in custody because of those charges.

Appeal from the District Court for Morrill County: Leo P. Dobrovolny, Judge. Affirmed as modified.

Sarah P. Newell, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Zachary A. Mueller appeals his convictions and sentences in the district court for Morrill County for first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. With respect to his convictions, Mueller assigns various errors related to instructions that the court gave or refused to give and also contends that there was not sufficient evidence to support his conviction for first degree murder. With respect to his sentences, Mueller claims that the court imposed excessive sentences and failed to give him adequate credit for time served. We affirm Mueller's convictions and his sentences, but we modify the sentencing order to reflect additional credit for time served.

STATEMENT OF FACTS

Mueller was charged with first degree murder and use of a deadly weapon to commit a felony in connection with the shooting death of Pedro Adrian Dominguez. Mueller was also charged with possession of a deadly weapon by a prohibited person based on his previous felony conviction.

The investigation that resulted in the charges against Mueller began on December 4, 2015, when the body of an unidentified male was discovered inside a barrel in rural Morrill County, Nebraska. The barrel containing the body was found in a creek underneath a bridge on County Road 104, east of Bayard, Nebraska, and northwest of Bridgeport, Nebraska. On December 8, the body was identified as being that of Dominguez based on fingerprints that had been taken from the

body during an autopsy. The autopsy revealed that Dominguez had died as the result of a single gunshot to the left side of the head. The entrance wound was located on the back left side of the head, and a bullet was recovered from the right temporal bone, just above the right ear inside the skull. The trajectory of the bullet was determined to be left to right, back to front, and downward. The doctor performing the autopsy could not determine whether the gunshot wound was immediately fatal or whether Dominguez had lived for a period of time after being shot. Toxicology reports indicated that Dominguez' blood contained controlled substances, including methamphetamine and the active ingredient of marijuana.

On December 5, 2015, after the body had been discovered but before it had been identified, law enforcement officials issued a press release stating that an unidentified body had been found in a barrel on County Road 104. On December 7, officers responded to a report that a burned vehicle had been found near County Road 104 north of Bridgeport. The vehicle was a Volkswagen that had been completely burned. The passenger seat was missing from the vehicle. Because of the burned condition of the vehicle, officers were unable to find a vehicle identification number.

The investigation regarding the body in the barrel began to focus on Mueller after an acquaintance of Mueller's reported to law enforcement on December 5, 2015, that in November, he had been visiting Mueller when Mueller asked him to help get the "locking ring" sealed on the top of a barrel. The witness stated that he had asked Mueller what was inside the barrel and that Mueller replied that he did not want to know. On December 7, investigators began talking with various witnesses connected with Mueller. Investigators obtained a search warrant for Mueller's residence, which was located near Bridgeport. On December 8, they executed the search warrant. Items seized in the search of Mueller's residence included a car seat and two Colorado license plates that appeared to have been burned. Investigators retrieved other burned items, including, inter alia,

clothing, a cell phone, and a pair of glasses. Testimony at trial indicated that Dominguez wore glasses but that no glasses had been found with the body in the barrel.

Dallas Schnell, one of the witnesses interviewed in the investigation, testified at trial that on or around December 4, 2015, she had loaned her vehicle to Mueller and that in exchange, Mueller had left her a blue Volkswagen. Schnell used the Volkswagen while Mueller had her vehicle, and she noticed that the front passenger seat of the Volkswagen was missing. After hearing reports of the body found in the barrel, Schnell had conversations with Mueller, and afterward, she decided that in order to get her vehicle back from Mueller, she needed to get rid of the Volkswagen. On the evening of December 5, Schnell and a friend obtained gasoline and drove the Volkswagen to a country road outside of Bridgeport where they set the Volkswagen on fire. Schnell got her vehicle back a "[c]ouple weeks later" when the vehicle was impounded in Cheyenne, Wyoming, after Mueller had been arrested there.

The investigation led officers to believe that Felicia Talley had knowledge regarding Dominguez' death. Talley had previously been in a relationship with Mueller, and the two had a daughter together who was born in 2008. The daughter had been adopted and was being raised by Mueller's mother, Michelle Litke. Talley's testimony at trial was generally as follows.

In November 2015, Talley was living in Greeley, Colorado, and she was in a relationship with Dominguez. Talley informed Mueller that she was coming to Bridgeport the weekend before Thanksgiving, and the two planned that they would visit their daughter. Dominguez accompanied Talley on the trip, and they drove his blue Volkswagen. Talley and Dominguez went to Mueller's house, and there the three of them smoked methamphetamine that Talley and Dominguez had brought with them. Talley and Mueller later went to visit their daughter while Dominguez stayed at Mueller's house. At that time, the daughter was at the home of Schnell, who lived near Litke. After that visit, Talley and Mueller returned to Mueller's home.

Later, Talley went to visit her daughter at Litke's home. Mueller did not accompany her on this visit. Dominguez went with her but stayed outside in his car. During the visit, Talley and Dominguez went to a sandwich shop to get lunch for her daughter and for Litke. When Talley returned to Litke's home, Litke told her that Mueller was "freaking out" and "trying to kill himself." Litke thought that Talley might be able to calm him down, so Talley and Dominguez returned to Mueller's house. Talley spoke with Mueller, and she did not think that he appeared to be "really going crazy." Talley told Mueller that she and Dominguez were going to go away for a couple days and that if Mueller wanted to go with them, he could. Mueller eventually decided to go with them.

The three left Mueller's house in the blue Volkswagen, with Talley driving, Dominguez in the passenger seat, and Mueller in the back seat. They drove through Bridgeport and headed in the direction of Kimball, Nebraska. Their ultimate destination was Evanston, Wyoming, where Talley's best friend lived. Talley testified that she had been driving "probably about 15 minutes" and that she was having a conversation with Dominguez when:

> [A]ll of a sudden, "Boom!" And, I was like, what the hell? And, I looked over and there was [Dominguez] with a bullet in his head. And, he had blood coming out of the back of his head. And, [Mueller] is like, points the gun at me and says, give me a reason why I shouldn't kill you, too, Bitch. And, I was like, I don't know, maybe because we had a kid together, I don't know. That's what happened and then we got to Kimball.

Talley testified that during this time, Mueller kept calling her "Dallas."

When Talley and Mueller reached Kimball, they stopped and bought gas at a station. They then kept driving to Cheyenne, Wyoming. Talley testified that Dominguez remained in the passenger seat the entire time that she was driving. She did not see any signs that he was alive after he had been shot. When

they reached Cheyenne, Talley was "driving aimlessly around" because she "didn't know what to do." Mueller became angry that she was driving aimlessly, and he told her to let him drive, so she did. Mueller drove around Cheyenne for some time, but Talley told him he needed to stop because he had difficulty driving a manual transmission and she thought he might get pulled over. Mueller told Talley that he wanted her to kill him, and he handed his gun to Talley, who was then in the back seat. Talley took out the clip and put the gun in her pocket and told Mueller he needed to pull over. When he pulled over and opened the back seat for her, Talley got out of the vehicle and ran to a truckstop. She spent some time inside the truckstop before she saw Mueller drive away. She then asked a truckdriver for a ride so she could get away from her "crazy ex." When the truckdriver got close to Evanston, he dropped her off at a truckstop where she contacted her friend to pick her up.

Talley spent a few days in Evanston with her friend before returning to Greeley. Talley testified that she had the gun Mueller had given her for some time but that she eventually sold it for money and drugs. Talley was arrested and put in jail in Greeley on charges unrelated to this case. She was still incarcerated when law enforcement officers from Nebraska contacted her regarding the investigation into Dominguez' death. Talley initially did not cooperate with investigators. She testified that she did not report Mueller's shooting Dominguez to police because she was "raised not to be a snitch." She stated that when she was 12 years old, she had witnessed her mother commit a murder and that her mother was convicted based in part on her testimony. She testified that her mother's family blamed her for her mother's conviction and that they disowned her and "always started problems with [her]."

On cross-examination, Mueller's counsel questioned Talley regarding communications she had with acquaintances when she returned to Greeley after Dominguez had died. The general sense of the communications was that Talley told the

acquaintances that she and Dominguez were moving away but that she was back in Greeley and had methamphetamine she could sell.

During the defense presented by Mueller, the court received into evidence an agreement between Talley and the State to the effect that any statements made by Talley in connection with the investigation of Mueller or at Mueller's trial would not be used against her in any criminal prosecution except for a prosecution for perjury or giving a false statement. The agreement was described as an agreement for use immunity, and it additionally provided that Talley would not be charged with disposing of the firearm used to kill Dominguez.

As further evidence in his defense, Mueller presented the testimony of Alexandria Montoya, who was imprisoned with Talley in the Morrill County jail while Talley was being held as a witness in this case. Montoya testified that she observed Talley giving herself a tattoo on her face using a staple that she had found. Montoya asked Talley what she was doing, and Talley said that she was giving herself a tattoo of a teardrop. Montoya testified that she understood the significance of a teardrop tattoo to mean that the person with the tattoo had killed someone. Montoya testified that Talley told her that she "had killed somebody . . . she had finished off that guy, Pedro." Talley told Montoya that she "covered his face, his nose, and his mouth with her hand and so he stopped breathing." Talley told Montoya she did it because she did not want to "let anything suffer and that if they were suffering, she should take them out." Talley further told Montoya that the person to whom she had done this "was her boyfriend at the time" and that "they were having problems, something about that he owed money and she didn't — he didn't want to give her money and something in regards to her daughter." Montoya testified that Talley told her that before she put her hand over the person's mouth, someone else had shot him. She also testified that Talley told her that when this had happened, "they were out in the country, something like a farmhouse." On

cross-examination by the State, Montoya testified that Talley told her that it was Mueller who had shot her boyfriend in the back of the head.

At the jury instruction conference in Mueller's trial, Mueller requested an instruction regarding intoxication; the district court refused the instruction "based upon the evidence." Mueller objected to the court's proposed instruction defining premeditation for the reason that it included language that was not part of the statutory definition; the court overruled Mueller's objection.

The court proposed an instruction regarding venue that was based in part on Neb. Rev. Stat. § 29-1301.02 (Reissue 2016), regarding crimes committed on moving means of transportation. Mueller initially stated that he had "no objection in regards to the definition of venue," but he then suggested that Neb. Rev. Stat. § 29-1306 (Reissue 2016), regarding a "mortal blow" given in one county and the person stricken dying in another county or state, was the more appropriate venue statute under the facts of this case. He also noted that the court's proposed instruction left out language from § 29-1301.02 referring to "an offense is committed in this state," and argued that in this case, the offense was arguably not committed in this state. The court rejected Mueller's argument and determined that it would give its proposed instruction, stating that the instruction was a correct statement of law and "to give any more is not necessary and . . . may be confusing."

Mueller did not object to other instructions, including an instruction setting forth the elements of the offense of possession of a deadly weapon by a prohibited person. The case was submitted to the jury, and the jury found Mueller guilty of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person.

At the sentencing hearing, Mueller raised an issue regarding the amount of time he had served that should be credited against his sentence. Mueller presented evidence that an arrest warrant against him with regard to this case was

issued December 7, 2015, and that at that time he was being held in a jail in Wyoming based on local charges. Nebraska law enforcement officers placed a hold on Mueller, and on March 7, 2016, they were advised that Mueller was ready to be returned to Nebraska. At trial, the State argued that Mueller should be given credit for the 371 days he had served in prison in Nebraska after being returned from Wyoming. Mueller asked that he also be given credit for the additional 91 days that he had spent in jail in Wyoming after the arrest warrant was issued on December 7, 2015. As discussed below in our analysis, when Mueller was returned to Nebraska, there was no Wyoming sentence against which to credit the 91 days.

The district court sentenced Mueller to consecutive sentences of life imprisonment for first degree murder and of 20 to 40 years' imprisonment for each of the other two convictions. The court ordered that time served of 371 days be credited against his sentence for possession of a deadly weapon by a prohibited person. The court stated that it determined the correct credit to be the 371 days Mueller had spent in prison in Nebraska because "he was picked up and returned to Nebraska on the first possible day that he could be here while there was [sic] not charges pending and unresolved apparently in the State of Wyoming."

Mueller appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Mueller claims that the district court erred when it (1) gave an erroneous instruction regarding venue and refused to give a more appropriate instruction, (2) overruled his objection to the instruction defining premeditation, (3) refused his proposed instruction regarding intoxication, and (4) gave an instruction regarding the elements of possession of a deadly weapon by a prohibited person that did not reflect a statutory amendment defining the offense enacted after the trial. Mueller also claims that there was insufficient evidence to support his conviction for first degree murder. He further claims that the

district court imposed excessive sentences and that it erred when it failed to give him credit for the 91 days that he spent in custody in Wyoming.

STANDARDS 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. *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

[2] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. McCurdy, ante* p. 343, 918 N.W.2d 292 (2018).

[3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Leahy, ante* p. 228, 917 N.W.2d 895 (2018).

[4] Whether a defendant is entitled to credit for time served and in what amount are questions of law, subject to appellate review independent of the lower court. *Id*.

ANALYSIS

Standards Relating to Appellate Review of Jury Instructions.

In his first four assignments of error, Mueller claims that the court erred when it gave an erroneous jury instruction or refused to give a requested instruction. The following standards relate to our review of assignments of error regarding jury instructions given or refused.

[5] 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. Swindle, supra*. 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*.

[6] 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. *Id*.

Venue Instruction.

Mueller first claims that the district court erred when it gave an instruction regarding venue that was not appropriate based on the facts of the case and refused to give a more appropriate instruction. We conclude that although the instruction given by the district court did not fully state the applicable law, given the evidence in this case, the instruction was not prejudicial.

[7] Under Neb. Rev. Stat. § 29-1301 (Reissue 2016), unless certain exceptions apply, all criminal cases are to be tried in the county where the offense was committed. We have stated that proof of venue is essential in a criminal prosecution and that, in the absence of a defendant's waiver by requesting a change of venue, the State has the burden to prove proper venue beyond a reasonable doubt. *State v. Dodson*, 250 Neb. 584, 550 N.W.2d 347 (1996), *overruled on other grounds, State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999). Statutes related to § 29-1301, including §§ 29-1301.02 and 29-1306, provide for how venue is determined in certain specific circumstances.

At trial, Mueller argued that the venue instruction proposed by the court was not appropriate under the circumstances of this case and he suggested that a different venue instruction

should be given. The instruction proposed by the court was generally based on § 29-1301.02, which provides:

> When an offense is committed in this state, on board a vessel navigating a river, bay, slough, lake, or canal, or lying therein, in the prosecution of its voyage, or on a railroad train, or car, motor vehicle, common carrier transporting passengers, or on an aircraft prosecuting its trip, the accused may be tried in any county through, on, or over which the vessel, train, car, motor vehicle, common carrier, or aircraft passes in the course of its voyage or trip, or in the county in which the voyage or trip terminates.

The court's proposed instruction regarding venue read as follows:

> Venue for the crimes charged is Morrill County, Nebraska *if* the acts constituting the crime(s) occurred in Morrill County, Nebraska or, if the offense(s) was/were committed in a vehicle or motor vehicle and the vehicle or motor vehicle passed through, on, or over Morrill County, or the trip terminated in Morrill County, Nebraska.

(Emphasis supplied.)

Mueller argued that instead of the proposed venue instruction based on § 29-1301.02, the court should give an instruction based on § 29-1306, which provides:

> If any person shall give any mortal blow or administer any poison to another, in any county within this state, with intent to kill, and the party so stricken or poisoned thereof shall die in any other county or state, the person giving such mortal blow or administering such poison may be tried and convicted of murder or manslaughter, as the case may be, in the county where such mortal blow was given or poison administered.

Mueller argued that § 29-1306 was better suited to the circumstances of this case than § 29-1301.02, because § 29-1306 is specific to homicide cases. Mueller also noted that the portion of the court's venue instruction related to an offense committed

during a motor vehicle trip omitted the opening phrase of § 29-1301.02, which requires that the offense was committed in this state.

We note that although Mueller argued that the court should have given a venue instruction based on § 29-1306, he did not actually tender such an instruction, and that therefore, to the extent Mueller asserts on appeal that the court erred when it refused a requested instruction, under the applicable standards set forth above, we cannot review whether the "tendered instruction" was a correct statement of the law or whether it was warranted by the evidence. See *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018). However, we can review whether the venue instruction the court actually gave was proper under the circumstances; a consideration of whether the instruction should have included the content of § 29-1306 is an incidental part of that analysis.

In this appeal, Mueller has the burden to show that the venue instruction given by the court was prejudicial or otherwise adversely affected his substantial right, and in making this determination, we read all the jury instructions together and consider whether, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence. See *State v. Swindle, supra*. Based on these standards, we conclude that the venue instruction given by the court did not constitute prejudicial error requiring reversal.

The instruction generally stated venue in Morrill County was proper if either (1) the acts constituting the offense occurred in Morrill County or (2) the offense occurred during a motor vehicle trip that passed through or terminated in Morrill County. The part of the instruction regarding an offense occurring during a motor vehicle trip was an accurate, if not a complete, recitation of the statute. Although the instruction identified venue as "Morrill County, Nebraska," as Mueller notes, the instruction did not fully recite the statute, because it left off the part of § 29-1301.02 that said the offense had to

have been "committed in this state." But we do not think that this omission constituted prejudicial error in this case.

Talley's testimony was the main direct evidence regarding whether Mueller shot Dominguez and the location where the shooting occurred. Talley testified that the shooting in the motor vehicle occurred about 15 minutes after she, Mueller, and Dominguez left Bridgeport and were headed toward Kimball. The State had earlier presented testimony by the chief deputy of the Morrill County sheriff's office, regarding Highway 88, which ran south from Bridgeport in the direction of Kimball. The deputy testified that approximately 25 miles of Highway 88 along that route were in Morrill County before the route crossed into an adjacent county which was still in Nebraska. Based on this testimony, the inference regarding where the shooting occurred would be that it occurred in Morrill County or possibly in the adjacent Nebraska county.

Although Talley's testimony may have been uncertain as to the specific county in which the shooting occurred, her testimony was clear that the shooting happened en route between Bridgeport and Kimball. Therefore, although there may have been different reasonable inferences regarding the specific county in which the shooting occurred, the only reasonable inference from Talley's testimony to the effect that the shooting occurred after they left Bridgeport but before they reached Kimball was that the shooting occurred in Nebraska. There was no other evidence from which one could reasonably find that Mueller shot Dominguez in Wyoming or anywhere outside Nebraska. Because a state location issue was not presented by the evidence, the trial court's omission of the portion of § 29-1306 to the effect that the offense occurred in Nebraska did not constitute prejudicial error requiring reversal.

Mueller's argument that an instruction based on § 29-1306 would have been more appropriate is also not availing. Under § 29-1306, venue is established in the county in which the person is shot, and § 29-1306 addresses a situation in which a person is shot in one county but dies in a different county or a

different state. In the present case, in order to establish venue in Morrill County under § 29-1306, it would need to be shown that Dominguez was shot in Morrill County. The instruction given by the court did instruct that venue was in Morrill county *if*, inter alia, "the acts constituting the crime(s) occurred in Morrill County." We do not read § 29-1306 as adding a new requirement that venue is established in the county in which the victim is shot; instead, we read it as clarifying that the act constituting the crime is the shooting and that venue remains in the county where the shooting occurred whether the victim died in that county or in another county or state. By including the word "if" before the remaining substance of its instruction, the court effectively gave the jury the opportunity to decide if the State had carried its burden of establishing venue in Morrill County. Adding the content of § 29-1306 was unnecessary and would have confused the jury. Mueller was not prejudiced by the omission of the substance of § 29-1306.

We conclude that the court's venue instruction, based in part on § 29-1301.02, reflected the correct law, was not misleading, and adequately covered the issues supported by the pleadings and the evidence in this case. We conclude that the venue instruction given by the court did not constitute prejudicial error requiring reversal.

Premeditation Instruction.

Mueller next claims that the district court erred when it gave an instruction that he asserts incorrectly defined premeditation. We conclude that the instruction was consistent with our prior case law and was not erroneous.

The court's instruction regarding premeditation stated, "**Premeditation** means to form a design to do something before it is done. The time needed for premeditation may be so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneously with it." When this instruction was proposed, Mueller did not oppose the first sentence, which was based on the definition of premeditation in Neb. Rev. Stat. § 28-302(3) (Reissue 2016). Instead, he

specifically objected to the second sentence on the basis that it was not part of the statutory definition of "premeditation."

The second sentence of the instruction given in this case is based on NJI2d Crim. 4.0. In *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015), and *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011), we rejected a challenge comparable to that which Mueller raises in this case. Mueller acknowledges this precedent but asks us to overrule it. He argues the language of the second sentence comes from case law that preceded the statutory definition adopted by the Legislature in § 28-302(3) and that by approving the instruction, this court violates "the separation of powers clause and basic principles of statutory interpretation." Brief for appellant at 22.

We addressed these arguments in *Custer*, wherein we reasoned that "a court's proper role is to interpret statutes and clarify their meaning" and that the premeditation instruction given in that case "interprets and clarifies the statutory definition; it does not change or contradict the statutory definition." 292 Neb. at 105, 871 N.W.2d at 257. Our reasoning in *Custer* applies to the instant case, and we continue to believe it is a prudent approach to statutory interpretation. We see no reason to overrule our precedent, and we therefore conclude that the district court did not err when it gave the premeditation instruction in this case.

Intoxication Instruction.

Mueller also claims that the district court erred when it refused his proposed instruction regarding intoxication. We reject this assignment of error.

Mueller requested the following instruction regarding intoxication:

> There has been evidence that [Mueller] was intoxicated or under the influence of drugs at the time of the murder with which he is charged was committed.
>
> Intoxication is a defense only when a person's mental abilities were so far overcome by the use of alcohol and/or drugs that he could not have had the required intent of

> deliberation and/ or premeditation. You may consider evidence of alcohol and/ or drug use with all other evidence in deciding whether [Mueller] had the required intent.

The district court refused the instruction "based upon the evidence."

Mueller acknowledges the existence of Neb. Rev. Stat. § 29-122 (Reissue 2016), which provides:

> A person who is intoxicated is criminally responsible for his or her conduct. Intoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense unless the defendant proves, by clear and convincing evidence, that he or she did not (1) know that it was an intoxicating substance when he or she ingested, inhaled, injected, or absorbed the substance causing the intoxication or (2) ingest, inhale, inject, or absorb the intoxicating substance voluntarily.

In the present case, there was no evidence that Mueller did not know that what he had ingested was an intoxicating substance or that Mueller's ingestion of an intoxicating substance was not voluntary. However, Mueller argues that the application of § 29-122 in this case violated his constitutional rights, because it relieved the State of its burden to prove the requisite mental state beyond a reasonable doubt. We do not agree.

We note first that Mueller did not raise a constitutional challenge to § 29-122 below. But in any event, we further note that we rejected the same challenge that Mueller argues in this appeal in *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016). In *Abejide*, we determined that "[b]y removing voluntary intoxication from consideration of whether the defendant had the required mental state, § 29-122 redefines the circumstances under which the requisite mental state may be found but it does not relieve the State of its burden to prove the requisite mental state." 293 Neb. at 700, 879 N.W.2d at 695. In reaching this determination, we relied on *Montana v. Egelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996).

Mueller acknowledges *Abejide*, but asserts that we misread *Egelhoff* and urges us to overrule *Abejide*. We decline to do so. Mueller contends that § 29-122 limits the admissibility of otherwise relevant evidence and that such limitation would not be acceptable under *Egelhoff*. Contrary to Mueller's assertion, upon reexamination, we believe that we correctly reasoned in *Abejide* that "similar to the statute at issue in *Egelhoff, supra*, § 29-122 is a 'legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions.'" 293 Neb. at 700, 879 N.W.2d at 695. As such, it does not limit the admissibility of otherwise relevant evidence. And, in fact, in this case, evidence was admitted regarding Mueller's being under the influence of methamphetamine at the time of the shooting.

Mueller's proposed instruction did not correctly state the law under § 29-122, and there was no evidence that would warrant an instruction regarding involuntary intoxication under § 29-122. Here, as in *Abejide*, because the defendant presented no evidence that his intoxication was involuntary, we need not consider whether § 29-122 may constitutionally require "clear and convincing evidence" that intoxication was involuntary or whether § 29-122 may constitutionality require the defendant to bear the burden of persuasion on the issue of involuntary intoxication.

In this case, the only issue involving intoxication is whether the district court erred when it refused to give Mueller's requested instruction. As discussed above, Mueller's requested instruction on intoxication did not correctly state the law under § 29-122. For this and other reasons, Mueller has not shown that the district court's refusal to give his proposed instruction was reversible error.

Possession of a Deadly Weapon by a Prohibited Person Instruction.

Although he did not object to the instruction at trial, Mueller claims on appeal that the district court erred when it gave an instruction setting forth the elements of possession of a deadly

weapon by a prohibited person. We find Mueller's challenge to be without merit.

Mueller recognizes that the instruction given by the district court was consistent with the statutory definition of possession of a deadly weapon by a prohibited person set forth in Neb. Rev. Stat. § 28-1206 (Reissue 2016), which was in effect in 2015, the time the offense charged in this case was committed. However, he notes that the Legislature made amendments to § 28-1206 that went into effect on May 10, 2017, after Mueller's trial and sentencing in this case. Mueller argues that the amendments changed the elements of the crime with which he was charged and that he should have been given the benefit of those amendments.

[8] We have stated that statutes governing substantive matters in effect at the time of a crime govern, and not later enacted statutes. *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009). We have further stated that, in contrast, procedural statutes in effect on the date of a hearing or proceeding govern, and not those in effect when the violation took place. *Id*. We have elucidated the distinction between substantive and procedural statutes as follows:

> A change in law will be deemed to affect matters of substance where it increases the punishment or changes the ingredients of the offense or the ultimate facts necessary to establish guilt. In other words, a rule is substantive if it alters the range of conduct or the class of persons that the law punishes. In contrast, rules that regulate only the *manner of determining* a defendant's culpability are procedural.

State v. Galindo, 278 Neb. at 614-15, 774 N.W.2d at 210 (emphasis in original).

[9] Based on this reasoning, a statute defining the elements of a crime is substantive and the statute in effect at the time of the offense governs. Therefore, in the present case, the version of § 28-1206 that was in effect on the date of the charged offense governs and amendments to the statute pertaining to

possession of a deadly weapon by a prohibited person that were enacted after Mueller's trial do not apply. We conclude that the district court did not err when it instructed the jury using the elements set forth in the statute that was in effect at the time the charged offense was committed.

Sufficiency of Evidence to Support Conviction for First Degree Murder.

Mueller claims that there was not sufficient evidence to support his conviction for first degree murder. He specifically argues that there was significant evidence that pointed to Talley, rather than Mueller, as being the murderer and that even if the jury could find that Mueller killed Dominguez, there was not sufficient evidence to prove that he had done so purposely and with deliberate and premeditated malice. We conclude that there was sufficient evidence to support the conviction.

With regard to his argument that there was significant evidence that Talley killed Dominguez, Mueller refers to evidence of allegedly inculpatory statements Talley made in text messages and social media communications to friends as well as the statements she made to Montoya in the Morrill County jail. Mueller generally argues that such evidence indicates that Talley and Dominguez had relationship problems when they were in Bridgeport and that after Dominguez was killed, Talley was concerned that she would be in trouble in connection with his death. Mueller also emphasizes Montoya's testimony to the effect that Talley said she had killed her boyfriend by putting her hand over his mouth to stop his breathing and end his suffering after he had been shot.

The jury was able to consider the evidence that Mueller contends implicated Talley as being Dominguez' killer and could reasonably have determined that such competing evidence did not diminish its view that the State had proved Mueller guilty beyond a reasonable doubt. The evidence highlighted by Mueller could show that Talley was concerned she would be in trouble as an accomplice to the murder, which does not negate Mueller's involvement in the death of Dominguez. To the extent

Montoya testified that Talley said she had killed Dominguez by stopping his breathing, Montoya further testified that Talley had said that she had done so after Mueller shot Dominguez and that her actions were intended to stop Dominguez' suffering. The autopsy evidence indicated that Dominguez died as a result of the gunshot wound, and therefore, the jury could find that Mueller caused Dominguez' death even if it believed that Talley's actions may have hastened his death.

Mueller further contends that even if the jury found that he had shot Dominguez, it could not have found that he did so purposely and with deliberate and premeditated malice. He argues that a finding of premeditation is not consistent with Talley's testimony that Mueller shot Dominguez "very suddenly and seemingly out-of-the-blue." Brief for appellant at 41. Mueller also argues that there was evidence that he was showing signs of paranoia as a result of being under the influence of methamphetamine and that such condition prevented him from forming the requisite intent.

We have reviewed the record and determine that the jury could have found the requisite intent despite the evidence to which Mueller directs our attention. Talley's testimony that the shooting was "sudden" could reasonably be understood as happening suddenly from her perspective, because she was not aware of what Mueller may have been thinking or deliberating prior to shooting Dominguez. Talley did not testify regarding any sudden quarrel or other event that could have caused Mueller to shoot without deliberation or premeditation. Instead, she testified that immediately prior to the shooting, she was having a conversation with Dominguez while Mueller was in the back seat. Talley further testified that after shooting Dominguez, Mueller pointed the gun at her and asked her to give a reason he should not shoot her also. Based on Talley's description, the jury could reasonably have found that Mueller was acting purposely and deliberately and had premeditated the murder, even if only for a short time before taking such action.

The jury could also reasonably have found that Mueller had the requisite intent despite evidence that he was under the influence of methamphetamine and showing what lay people described as signs of paranoia. As discussed above in connection with Mueller's requested instruction on intoxication, under § 29-122, voluntary intoxication is not to be taken into consideration in determining the existence of a mental state that is an element of the criminal offense. Furthermore, there was evidence of Mueller's actions and statements at the time of the shooting and thereafter that indicated that he was not acting entirely without reason and that he could have formed the requisite intent to kill.

We conclude that there was sufficient evidence to support Mueller's conviction for first degree murder.

Excessive Sentences.

Mueller claims that the district court imposed excessive sentences. Mueller acknowledges that his conviction for first degree murder required a mandatory life sentence and that his sentence for use of a deadly weapon to commit a felony was statutorily required to be served consecutively to his life sentence. He therefore focuses his arguments on the length of his sentence for use and the consecutive sentence for possession of a deadly weapon by a prohibited person. We conclude that the district court did not abuse its discretion when it sentenced Mueller.

Use of a deadly weapon to commit a felony is a Class IC felony under Neb. Rev. Stat. § 28-1205(1)(c) (Reissue 2016), and possession of a deadly weapon by a prohibited person is a Class ID felony under § 28-1206(3)(b). Under Neb. Rev. Stat. § 28-105 (Reissue 2016), a Class IC felony is subject to a sentence of imprisonment for a mandatory minimum of 5 years and a maximum of 50 years, and a Class ID felony is subject to a sentence of imprisonment for a mandatory minimum of 3 years and a maximum of 50 years. Therefore, Mueller's sentences were within statutory limits and we review his sentencing for an abuse of discretion by the district court.

[10-12] 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. Leahy, ante* p. 228, 917 N.W.2d 895 (2018). 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. *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. *Id*.

Mueller generally argues that because he was already subject to a mandatory life sentence for first degree murder and a mandatorily consecutive sentence for the use conviction, it was excessive to add another consecutive and lengthy sentence of imprisonment for the possession of a deadly weapon conviction. He argues that the court did not give adequate weight to his individual circumstances, particularly his history of substance abuse which resulted from the influence of an uncle who was heavily involved in drugs and the lack of a relationship with his father. He also argues that his substance abuse mitigates the present offenses, as well as the previous offenses in his criminal history, because substance abuse caused him to act impulsively.

At the sentencing, the court stated that it had reviewed Mueller's presentence report and had considered all the required factors for sentencing. The record does not indicate that the court considered any improper factors. The State notes that Mueller's criminal record indicates a history of violence and that testing showed him to be at a very high risk to reoffend.

Mueller's argument that his substance abuse caused him to act impulsively carries less weight considering that, as discussed above, the evidence in this case supported the finding that his actions were deliberate and premeditated. Furthermore, the sentences at issue relate to his use and possession convictions and the evidence does not indicate that he acted impulsively in using or possessing the firearm in this case. We further note that Mueller's minimum sentence of 20 years for each conviction is in the middle of the statutory range and that it was within the court's discretion to order the sentence for possession to be served consecutively. See *State v. Leahy, supra*.

We conclude that the district court did not abuse its discretion in imposing consecutive sentences of imprisonment for 20 to 40 years for the use and possession convictions.

Credit for Time Served in Wyoming.

Finally, Mueller claims that the district court erred when it failed to give him credit against his sentences for time he served in Wyoming. The State concedes, and we agree, that Mueller should have been given credit for an additional 91 days.

The evidence presented at the sentencing hearing was that an arrest warrant had been issued against Mueller with regard to this case on December 7, 2015. At that time, he was being held in a jail in Wyoming based on charges that arose in Wyoming. Nebraska law enforcement officers placed a hold on Mueller, and on March 7, 2016, they were advised that Mueller was available to be returned to Nebraska.

In the district court, Mueller asked that he be given credit for the additional 91 days that he had spent in jail in Wyoming after the arrest warrant was issued on December 7, 2015, in addition to the 371 days he had served in prison in Nebraska after being returned from Wyoming. The court ordered that time served of 371 days be credited against Mueller's sentence for possession of a deadly weapon by a prohibited person. But the court did not give credit for the 91 days in the Wyoming jail, stating that Mueller had been "picked up and returned to

Nebraska on the first possible day that he could be here while there was [sic] not charges pending and unresolved apparently in the State of Wyoming."

Neb. Rev. Stat. § 83-1,106 (Reissue 2014) provides in relevant part:

> (1) Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services, the county board of corrections, or, in counties which do not have a county board of corrections, the county sheriff.
>
> . . . .
>
> (4) If the offender is arrested on one charge and prosecuted on another charge growing out of conduct which occurred prior to his or her arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge which has not been credited against another sentence.

[13-15] We have stated that because of the mandatory "shall" language used in § 83-1,106, the statute mandates that credit for time served must be given for time spent in custody on a charge when a prison sentence is imposed for a conviction of such charge. *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004). We further stated in *Banes* that § 83-1,106(4) was to be read "as requiring that such credit shall be given which has not otherwise been applied, and the import of this subsection is that all credit available due to presentence incarceration shall be applied, but only once." 268 Neb. at 811, 688 N.W.2d at 599. We also recently stated that "what

matters in the credit for time served analysis is not whether [the defendant] was detained in Nebraska and awaiting trial and sentencing on Nebraska charges, but, rather, whether [the defendant] was forced to be in custody *because of those charges*." *State v. Leahy, ante* p. 228, 235, 917 N.W.2d 895, 900-01 (2018) (emphasis in original). Given the existence of the arrest warrant and the hold placed on Mueller, we determine that he was forced to be in custody because of those charges. See *id*.

Mueller states in his brief on appeal that the Wyoming charges were dismissed without his time spent in custody being credited against any sentence in Wyoming. The State does not dispute this and notes that although the record on appeal does not explicitly reflect that the Wyoming charges were dismissed, the presentence report contains a court order from Wyoming stating that Mueller was being released on his own recognizance in order to "return to Nebraska to resolve pending charges there."

Contrary to its position at trial, the State now asserts that because the 91 days Mueller spent in custody in Wyoming had not been credited against any sentence imposed in Wyoming at the time Mueller was sentenced on the present convictions in Nebraska, the district court should have applied credit for the 91 days against one of his sentences in this case. We agree with the State's concession.

After Nebraska law enforcement officers placed a hold on Mueller on December 7, 2015, he was held in custody in Wyoming for 91 days. Section 83-1,106(4) required that he be given credit for that time, but only once. If Mueller had been given credit for that time against a sentence imposed in Wyoming, it would not be available for credit against his Nebraska sentences. But the Wyoming order noted by the State indicated that at the time he was returned to Nebraska, he had not been sentenced in Wyoming, and that therefore, there was no Wyoming sentence against which the time served could be credited.

In view of the above, the district court should have credited the 91 days Mueller spent in jail in Wyoming against one of Mueller's Nebraska sentences. Because the court credited the 371 days Mueller spent in prison in Nebraska against his sentence for possession of a deadly weapon by a prohibited person, it is clear that the district court intended that credit be given against that charge. We therefore conclude that the sentencing order should be modified to state that Mueller's sentence for possession of a deadly weapon by a prohibited person should be credited for time served in the amount of 462 days rather than the 371 days ordered by the district court.

CONCLUSION

Having rejected Mueller's assignments of error related to jury instructions and sufficiency of the evidence, we affirm his convictions for first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. We reject Mueller's claim that his sentences were excessive, but we agree that the district court erred when it did not give him credit for 91 days of time served in Wyoming. We therefore affirm Mueller's sentences, but the sentencing order shall be modified to state that he be given credit for time served in the amount of 462 days against his sentence for possession of a deadly weapon by a prohibited person.

Affirmed as modified.

Freudenberg, J., not participating.

State of Nebraska, appellee, v.
Colton W. Sievers, appellant.
920 N.W.2d 443

Filed December 7, 2018. No. S-17-518.

SUPPLEMENTAL OPINION

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Joseph D. Nigro, Lancaster County Public Defender, and Nathan J. Sohriakoff for appellant.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, and, on brief, Joe Meyer for appellee.

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

Per Curiam.

This case is before this court on the appellant's motion for rehearing concerning our opinion in *State v. Sievers*.[1] After reviewing the brief on rehearing, we requested supplemental briefing from both parties, which we have considered. We now overrule the motion, but we modify the original opinion as follows:

[1] *State v. Sievers*, 300 Neb. 26, 911 N.W.2d 607 (2018).

(1) We withdraw the first sentence of the first paragraph under the heading "ANALYSIS"[2] and substitute the following: "The issue presented is whether the stop of Sievers to prevent the truck from leaving with any stolen items from the residence that the truck had just left, a residence for which a search warrant was being sought, violated Sievers' Fourth Amendment rights."

The remainder of the original paragraph remains unmodified.

(2) We withdraw the entirety of the paragraph immediately preceding the subheading "Gravity of Public Concern"[3] and substitute the following:

> Here, even though there was no evidence that Sievers committed any traffic violation before his stop, the officer directing the stop was "not acting randomly in deciding that the only" vehicle emerging from the target residence should be stopped.[4] Instead, the officer decided to authorize the stop based on the fresh, firsthand information he had of the presence of stolen guns, money, and a large quantity of methamphetamine at the target residence, the near contemporaneous observation of the pickup at the residence after it was identified by the informant, and the fact the pickup was present there for only a short time. In this complex of special law enforcement concerns, the officer had compelling reasons to ask questions of the driver of the sole vehicle departing from the target residence and the facts relied upon to stop the truck make the application of the *Brown*[5] balancing test appropriate.

(3) We withdraw the entirety of the last two paragraphs immediately preceding the heading "CONCLUSION"[6] and substitute the following:

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[2] *Id*. at 33-34, 911 N.W.2d at 613-14.

[3] *Id*. at 40, 911 N.W.2d at 617.

[4] See *U.S. v. Brewer*, 561 F.3d 676, 679 (7th Cir. 2009).

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

[6] *Sievers, supra* note 1, 300 Neb. at 46, 911 N.W.2d at 620-21.

Although our reasoning differs from that of the district court, when all of the factors are weighed, we conclude that the stop was reasonable under *Brown*.[7] In reaching this conclusion, we find that the officer at the hub of the collective intelligence gathered, taking into account the totality of the circumstances, had reasonable, objective bases for believing the truck had evidence of criminal activity even though no law violation was observed.

While Sievers conceded that the determination of whether an officer has a constitutional basis to stop and question an individual depends on the "totality of the circumstances . . . determined on a case by case basis,"[8] he contended there was no specific and articulable facts sufficient to give rise to reasonable suspicion that Sievers had committed or was committing a crime.

However, "[a]rticulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with '"the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."'"[9] "As such, the standards are 'not readily, or even usefully, reduced to a neat set of legal rules.'"[10] A particularized and objective basis for stopping a vehicle, which is believed to be engaged in or about to engage in criminal activity, is present when "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[11]

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[7] *Brown, supra* note 5.

[8] Brief for appellant at 7.

[9] *Ornelas v. United States*, 517 U.S. 690, 695, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)).

[10] *Id.*, 517 U.S. at 695-96.

[11] *Id.*, 517 U.S. at 696.

Under the totality of the circumstances and the individualized and specific knowledge of the criminal activity afoot and its grave risk to public safety, it was reasonable for the officer to infer the driver of the truck had information about criminal activity in the target residence and that the truck may contain evidence of criminal activity and to direct the stop of the truck.

Despite the unusual circumstances here, the totality of these circumstances arising from the critical mass of law enforcement concerns was sufficient to justify this investigatory stop. We reach this conclusion only after ensuring the officers' conduct was based on compelling reasons, was part of a specific purposeful plan, was narrow in scope, and was reasonable under the totality of the circumstances, as well as the fact that Sievers' privacy interests were not subject to an arbitrary invasion at the unfettered discretion of officers in the field.

The remainder of the opinion shall remain unmodified.

Former opinion modified.

Motion for rehearing overruled.

Wright and Funke, JJ., not participating.

Azar Webb, appellee, v. Nebraska Department of Health and Human Services et al., appellants.

920 N.W.2d 268

Filed December 7, 2018. No. S-17-931.

1. **Jurisdiction.** A jurisdictional question which does not involve a factual dispute presents a question of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** Appellate courts independently review questions of law decided by a lower 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. **Courts: Jurisdiction: Legislature: Appeal and Error.** In order for the Nebraska Supreme Court to have jurisdiction over an appeal, appellate jurisdiction must be specifically provided by the Legislature.
6. **Jurisdiction: Final Orders: Appeal and Error.** When an appeal presents the two distinct jurisdictional issues of appellate jurisdiction and the trial court's lack of subject matter jurisdiction, the first step is to determine the existence of appellate jurisdiction by determining whether the lower court's order was final and appealable.
7. ____: ____: ____. For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.
8. **Final Orders: Appeal and Error.** The three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
9. **Judgments: Final Orders: Civil Rights: Appeal and Error.** A court's decision on the merits of an action under 42 U.S.C. § 1983 (2012) is an appealable order.

10. **Courts: Jurisdiction: Appeal and Error.** The matter of acquiring jurisdiction by an appellate court is indeed a technical matter and one over which courts have no discretion.
11. **Jurisdiction: Words and Phrases.** The term "jurisdictional" properly applies only to prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) implicating that authority.
12. **Jurisdiction: Presumptions.** In a court of general jurisdiction, jurisdiction may be presumed absent a record showing the contrary.
13. **Administrative Law: Courts: Appeal and Error.** An Administrative Procedure Act proceeding in district court for review of a decision by an administrative agency is not an "appeal" in the strict sense of the term, meaning the power and authority conferred upon a superior court to reexamine and redetermine causes tried in inferior courts, but, rather, is the institution of a suit to obtain judicial-branch review of a nonjudicial-branch decision.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

Douglas J. Peterson, Attorney General, and David A. Lopez for appellants.

Robert E. McEwen and Sarah C. Helvey, of Nebraska Appleseed Center for Law in the Public Interest, for appellee.

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

Funke, J.

The Nebraska Department of Health and Human Services and two of the department's officers, in their official capacities (collectively DHHS), appeal the district court for Lancaster County's determinations in favor of Azar Webb. After DHHS ended Webb's Medicaid benefits and denied his petition for reinstatement, Webb filed a claim in district court under the Administrative Procedure Act (APA)[1] for unlawful termination

[1] See Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2014, Cum. Supp. 2016, & Supp. 2017).

of Medicaid eligibility. Webb's district court pleading added, along with his administrative appeal, a claim of violation of federal rights under 42 U.S.C. § 1983 (2012).

The court reversed DHHS' decision and ordered reinstatement of Webb's coverage and reimbursement of medical expenses which should have been covered. The court also found in Webb's favor on the merits of his § 1983 claim and enjoined DHHS officials from denying Webb Medicaid eligibility. The court denied Webb's request for attorney fees under state law; granted his request for attorney fees pursuant to 42 U.S.C. § 1988 (2012); provided Webb 10 days to submit evidence of his fees; and, following a hearing, awarded Webb attorney fees pursuant to § 1988. DHHS filed a notice of appeal within 30 days of the order regarding attorney fees. DHHS' sole argument on appeal is that the district court lacked subject matter jurisdiction to consider Webb's § 1983 claim in the same lawsuit in which the court considered an appeal from a contested case under the APA and that, as a result, the court lacked the authority to award Webb attorney fees.

We conclude that both the court's judgment on the merits and its order for attorney fees are final and appealable. We have appellate jurisdiction to consider DHHS' appeal, because DHHS timely appealed from the attorney fees order and DHHS' challenge goes to the district court's authority to grant relief under §§ 1983 and 1988.

We find that the district court is a court of general, original jurisdiction with authority to consider a § 1983 claim and that the APA does not include any provisions limiting a district court's general jurisdiction with respect to claims independent of the APA. It falls to the Legislature, and not to this court, to limit a district court's authority to consider a § 1983 claim in conjunction with an APA claim. As a result, once the district court separately and independently resolved Webb's APA claim, the court had the authority to grant Webb relief under §§ 1983 and 1988. We therefore affirm.

BACKGROUND

Webb was a participant in the bridge to independence program, a Medicaid program provided under the Young Adult Bridge to Independence Act, Neb. Rev. Stat. §§ 43-4501 to 43-4514 (Reissue 2016). In July 2015, the separate juvenile court of Douglas County made a determination that participating in the program was in Webb's best interests. Webb entered into a "Voluntary Placement Agreement" with the State of Nebraska and was placed under the care and responsibility of DHHS. When Webb turned 21 years of age, DHHS determined that Webb was no longer eligible for Medicaid and discharged him from the program. Webb appealed and argued that pursuant to title XIX of the Social Security Act, he was Medicaid eligible until the age of 26 under 42 U.S.C. § 1396a(a)(10)(A)(i)(IX) (Supp. V 2017). DHHS affirmed its decision to terminate Webb's coverage on the basis that it was not certain that Webb's participation in the bridge to independence program constituted "foster care" under the responsibility of the State, one of the four statutory requirements for eligibility under 42 U.S.C. § 1396a(a)(10)(A)(i)(IX). DHHS acknowledged that Webb had met the other statutory criteria.

Webb filed a petition in district court which asserted two grounds for relief against DHHS. Webb's first claim for relief was for judicial review under the APA. Webb alleged that the court had jurisdiction over his APA claim pursuant to § 84-917. In addition, Webb asserted a claim for deprivation of federal rights under § 1983. Webb's petition alleged that jurisdiction over the § 1983 claim was proper pursuant to Neb. Rev. Stat. § 24-302 (Reissue 2016), which provides that "[t]he district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided." Webb's petition alleged that he had significant healthcare needs which were urgent and ongoing.

DHHS moved to dismiss the § 1983 claim pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). Webb responded by moving for

summary judgment on the § 1983 claim. The court held a hearing on these motions and Webb's APA claim.

On May 10, 2017, regarding Webb's APA claim, the court issued an order which determined that Webb was in "foster care" through his participation in the bridge to independence program. The court ruled that because Webb had entered into a "Voluntary Placement Agreement" with DHHS, he was under the jurisdiction of the juvenile court, he was under DHHS' placement and care, DHHS was responsible for supervising and managing his services, and he was placed in a supervised independent living setting. As a result, the court found that Webb had met all eligibility requirements of 42 U.S.C. § 1396a(a)(10)(A)(i)(IX) and concluded that Medicaid coverage for Webb was mandatory until he is 26 years of age. The court reversed DHHS' decision and remanded the cause with directions to reinstate Webb's Medicaid coverage and to reimburse him for medical expenses which should have been covered.

Once the court determined the merits of Webb's APA claim, in the same written order, the court considered the parties' motions concerning the § 1983 claim. In regard to the motion to dismiss, the court considered whether it had jurisdiction to adjudicate a claim for judicial review under the APA and a § 1983 claim in the same proceeding. The court found that it did based on our decision in *Maldonado v. Nebraska Dept. of Pub. Welfare*,[2] which cited the U.S. Supreme Court's decision in *Maine v. Thiboutot*[3] for the proposition that "a claim under § 1983 may be brought in a state court in the procedural context of a state court's reviewing the actions of a state administrative agency, and attorney fees may be awarded under § 1988 in such a case."[4]

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[2] See *Maldonado v. Nebraska Dept. of Pub. Welfare*, 223 Neb. 485, 391 N.W.2d 105 (1986).

[3] See *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980).

[4] *Maldonado, supra* note 2, 223 Neb. at 490, 391 N.W.2d at 109.

The court granted in part DHHS' motion to dismiss the § 1983 claim, finding that Webb's § 1983 claim could not be pursued against DHHS. The court denied the remainder of the motion and found the claim was properly brought against the official capacity defendants based on their unlawful termination of Webb's Medicaid eligibility. The court then sustained Webb's motion for summary judgment on his § 1983 claim, because there was no genuine issue of material fact that (1) Webb was an intended beneficiary of 42 U.S.C. § 1396a(a)(10)(A)(i)(IX), (2) the rights Webb sought to be enforced were specific and enumerated, and (3) the obligation imposed on the State was unambiguous and binding. The court granted Webb's request for injunctive relief in the form of enjoining the official capacity defendants from denying Webb Medicaid eligibility.

The court's May 10, 2017, order denied Webb's request for attorney fees under state law, Neb. Rev. Stat. § 25-1803 (Reissue 2016), but granted Webb's request for attorney fees under § 1988 and provided Webb 10 days to submit evidence in support of a fee award. The court held a hearing on the amount of attorney fees to be awarded and, on August 7, issued an order which determined that Webb was a prevailing party under § 1988(b) and awarded him attorney fees in the amount of $27,815 against the individual defendants in their official capacities.

On August 30, 2017, DHHS filed a notice of appeal. The notice sought to appeal the district court's May 10 and August 7 orders. Webb filed motions for summary dismissal, arguing that the court's May 10 order was a final, appealable order and had not been appealed within 30 days. The Nebraska Court of Appeals overruled Webb's motions without prejudice, and we granted DHHS' motion to bypass the Court of Appeals under our statutory authority to regulate the caseloads of the appellate courts of this State.[5]

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

ASSIGNMENTS OF ERROR

DHHS claims, restated, that the district court lacked subject matter jurisdiction to (1) consider Webb's § 1983 claim in the same proceeding in which it reviewed Webb's claim for judicial review under the APA and (2) award Webb attorney fees pursuant to § 1988.

STANDARD OF REVIEW

[1-3] A jurisdictional question which does not involve a factual dispute presents a question of law.[6] Statutory interpretation presents a question of law.[7] Appellate courts independently review questions of law decided by a lower court.[8]

ANALYSIS

DHHS asserts that the district court lacked subject matter jurisdiction to consider Webb's § 1983 claim, because Webb "added [his § 1983 claim] to his petition for judicial review under the APA."[9] DHHS contends, "Nebraska's APA statutes do not confer authority on a district court sitting in review of an administrative agency decision to consider a freestanding 42 U.S.C. § 1983 claim in combination with the APA appeal."[10] DHHS "does not contend that Webb is barred from bringing a § 1983 claim or even from bringing such a claim in state court. But he must have done so in a separate civil action and not simply as an extra cause of action in an APA appeal."[11] DHHS argues that because the court lacked subject matter jurisdiction to consider Webb's § 1983 claim, the court necessarily lacked jurisdiction to consider an award of attorney fees under § 1988.

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

[7] See *id.*

[8] *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[9] Brief for appellant at 2.

[10] *Id.* at 7.

[11] *Id.*

Webb's primary argument in response is that this court lacks appellate jurisdiction to consider DHHS' subject matter jurisdiction argument, because DHHS did not appeal within 30 days of the court's order on the merits. Webb contends that even though a request for attorney fees was outstanding, based on our rules governing the finality of the disposition of § 1983 claims, the court's judgment on the merits was a final, appealable order.[12] Webb contends that DHHS timely appealed only the court's order awarding attorney fees and that DHHS' argument is collaterally attacking the judgment on the merits.

No Independent Appellate Jurisdiction Over May 10, 2017, Order

[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.[13] DHHS seeks to appeal both the district court's judgment on the merits and the court's attorney fees order. Because DHHS did not file a notice of appeal within 30 days of the court's judgment on the merits, we are confronted with the issue of whether we have appellate jurisdiction to review DHHS' challenge to the district court's May 10, 2017, order.

[5] Appellate jurisdiction is the power and authority conferred upon a superior court to reexamine and redetermine causes tried in inferior courts.[14] The Nebraska Constitution confers the Nebraska Supreme Court with only "such appellate jurisdiction as may be provided by law."[15] In order for this court to have jurisdiction over an appeal, appellate

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

[13] *E.D. v. Bellevue Pub. Sch. Dist.*, 299 Neb. 621, 909 N.W.2d 652 (2018).

[14] *In re Application of Burlington Northern RR. Co.*, 249 Neb. 821, 545 N.W.2d 749 (1996).

[15] Neb. Const. art. V, § 2. Accord *Boyd v. Cook*, 298 Neb. 819, 906 N.W.2d 31 (2018).

jurisdiction must be specifically provided by the Legislature.[16] An appellate court acquires no jurisdiction unless the appellant has satisfied the statutory requirements for appellate jurisdiction.[17]

[6,7] When an appeal presents the two distinct jurisdictional issues of appellate jurisdiction and the trial court's lack of subject matter jurisdiction, the first step is to determine the existence of appellate jurisdiction by determining whether the lower court's order was final and appealable.[18] For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.[19] The Legislature has defined a "judgment" as "the final determination of the rights of the parties in an action."[20] Conversely, every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.[21]

[8] The three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.[22] To be a final order under the first category of § 25-1902, the order must dispose of the whole merits of the case and leave nothing for the court's further consideration.[23]

If a lower court has issued a final, appealable order, the next step is to determine whether an appellant has satisfied

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

[17] *Id*.

[18] See *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[19] *E.D., supra* note 13.

[20] Neb. Rev. Stat. § 25-1301 (Reissue 2016).

[21] Neb. Rev. Stat. § 25-914 (Reissue 2016).

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

[23] *Big John's Billiards*, *supra* note 18. See *Ginger Cove Common Area Co. v. Wiekhorst*, 296 Neb. 416, 893 N.W.2d 467 (2017).

the statutory requirements necessary for this court to obtain appellate jurisdiction over the order. Under Neb. Rev. Stat. § 25-1912 (Supp. 2017), to vest an appellate court with jurisdiction, a party must timely file a notice of appeal.[24] A party must file a notice of appeal within 30 days of the judgment, decree, or final order from which the party is appealing.[25]

For the reasons set forth below, we find that the May 10, 2017, order was final and appealable and that because DHHS did not appeal that order within 30 days, DHHS did not satisfy the statutory requirements to obtain appellate review of that order.

The court's May 10, 2017, order meets the statutory definition of "judgment" provided under § 25-1301. The order was a comprehensive decision on the merits of all of Webb's claims. The order resolved the APA claim and granted Webb's motion for summary judgment on his § 1983 claim. The merits order also addressed Webb's request for attorney fees. The order denied Webb's request for attorney fees pursuant to state law, granted Webb's request for reasonable attorney fees under § 1988, and gave Webb 10 days to submit evidence to determine the amount of fees to award.

The court's May 10, 2017, order has both state and federal law components, and we must analyze both components to determine whether the order is final. We first address the state law component. The court's decision on Webb's APA claim was final, and the order entirely resolved Webb's APA claim without leaving anything for consideration. The order would have been immediately appealable had the order solely encompassed a decision on Webb's APA claim.

Webb's request for attorney fees under § 25-1803 could have impacted the finality of the state law component of the May 10, 2017, order. Our jurisprudence on the issue of an unresolved request for attorney fees made pursuant to state law is familiar.

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[24] *Clarke, supra* note 8.

[25] § 25-1912(1).

We have explained that attorney fees are generally treated as an element of court costs and that an award of costs in a judgment is considered a part of the judgment.[26] We have stated the requirement that a party seeking statutorily authorized fees must make a request for such fees prior to a judgment in the cause.[27] And, critically, we have held that a judgment does not become final and appealable until the trial court has ruled upon a pending statutory request for attorney fees.[28] Here, Webb requested attorney fees pursuant to state law in his petition and the court denied the request. Thus, there was no outstanding request for fees that prevented the state law component of the court's order from becoming final when the order was issued on May 10.

We next consider the federal law component of the May 10, 2017, order. In that portion of the order, the court granted Webb's motion for summary judgment on his § 1983 claim. Orders which fully dispose of a case on summary judgment are final and appealable.[29] The court also found that DHHS was liable for fees under § 1988, but did not determine the amount of fees to award. The question is whether the lack of a final determination on the fee award prevented the federal component of the judgment on the merits—the court's decision on Webb's § 1983 claim—from becoming final and appealable.

[9] As stressed by Webb, we addressed this issue in *Gillpatrick v. Sabatka-Rine*,[30] where we held that a court's decision on the merits of a § 1983 action is an appealable

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[26] See *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

[27] *Id.*

[28] *Id.*; *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009); *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003).

[29] See, *Big John's Billiards, supra* note 18; *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988).

[30] *Gillpatrick, supra* note 12.

order. We found that our jurisprudence which treated orders disposing of state law actions as nonfinal where a request for attorney fees is outstanding did not apply to orders resolving the merits of § 1983 actions.[31] For example, we said that in a § 1983 action, a party is not required to separately move for attorney fees until after the trial court enters a final order or judgment on the merits.[32]

Our decision in *Gillpatrick* drew from *White v. New Hampshire Dept. of Empl. Sec.*,[33] in which the U.S. Supreme Court held that a request for attorney fees under § 1988 is not a motion to alter or amend the judgment within the meaning of Fed. R. Civ. P. 59(e), because the fee request does not seek "reconsideration of matters properly encompassed in a decision on the merits."[34] The Court in *White* reasoned that a request for attorney fees under § 1988 raises legal issues collateral to and separate from the decision on the merits, and observed in dicta that "the collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as 'final' and 'appealable.'"[35]

Following *White*, the prevailing rule in federal circuits was that a judgment on the merits is final for purposes of appeal even if the amount of attorney fees to award pursuant to § 1988 has not been determined.[36] According to these same principles, a judgment on the merits is appealable even when

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[31] *Id*. See *Kilgore, supra* note 28.

[32] *Gillpatrick, supra* note 12.

[33] *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982).

[34] *Id*., 455 U.S. at 451.

[35] *Id.*, 455 U.S. at 452-53 n.14.

[36] See, *Morgan v. Union Metal Mfg.*, 757 F.2d 792 (6th Cir. 1985); *Abrams v. Interco Inc.*, 719 F.2d 23 (2d Cir. 1983); *American Re-Insurance v. Insurance Com'r, Etc.*, 696 F.2d 1267 (9th Cir. 1983); *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982); *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 628 (3d Cir. 1982).

the judgment also includes a determination that the prevailing party is entitled to an award of fees under § 1988, but leaves open the amount of fees to be awarded.[37] In this situation, the party who fails to timely appeal from the merits and fee liability judgment forfeits the right to an appellate review of the merits.[38]

The U.S. Supreme Court then held in *Budinich v. Becton Dickinson & Co.*[39] that a decision on the merits is a final decision under federal law for purposes of appeal even if the award or amount of attorney fees for the litigation remains to be determined. Similar to the Court's decision in *White*, the Court in *Budinich* found that the pendency of a decision on an award of attorney fees is an issue collateral to a decision on the merits, because "a claim for attorney's fees is not part of the merits of the action to which the fees pertain,"[40] and that therefore, the lack of finality of a collateral issue would not prevent the finality of a judgment on the merits.

In this case, the May 10, 2017, order ended the litigation on the § 1983 claim by granting summary judgment. The court awarded injunctive relief and no damages. Independent of that judgment, the court found DHHS liable for an undetermined amount of attorney fees under § 1988, a statutory right separate from § 1983. As the U.S. Supreme Court recognized in *White*, Webb's request for fees under § 1988 is not effective as a motion to alter or amend the district court's May 10 merits judgment, because fees are not part of that judgment and the court's later decision on the amount of fees to award would

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[37] See, *Exchange Nat. Bank of Chicago v. Daniels*, 763 F.2d 286 (7th Cir. 1985); *Morgan, supra* note 36.

[38] *Id.*

[39] *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988). See, also, *Ray Haluch Gravel Co. v. Central Pension Fund of Operating Engineers and Participating Employers*, 571 U.S. 177, 134 S. Ct. 773, 187 L. Ed. 2d 669 (2014).

[40] *Budinich, supra* note 39, 486 U.S. at 200.

not change the outcome on the merits regarding DHHS' violation of Webb's constitutional rights.

The same situation was presented in *Crossman v. Maccoccio*,[41] which held that a notice of appeal filed more than 30 days after entry of final judgment on the merits of the litigation, but within 30 days after the subsequent order granting § 1988 attorney fees, was timely as to appeal the fee award order but untimely as to the merits judgment, and that the merits judgment became final even though the statutory attorney fees issue remained unresolved. Accordingly, here, the court's merits and fees determinations were independent final determinations and required independent appeals.

In the instant matter, the merits determinations in the May 10, 2017, order were appealable, but the determination in the same order that DHHS was liable for fees under § 1988 was not appealable at that time. An order awarding but not quantifying attorney fees is not final under federal law.[42] A finding that a party is liable for attorney fees is an interlocutory determination,[43] analogous to a summary judgment determination on liability but leaving the issue of damages unresolved. An award of attorney fees entered after a final disposition on the merits is a final, appealable decision.[44]

[10] Having analyzed both the state and federal law components of the court's May 10, 2017, order and concluding that the order was appealable, it becomes clear that DHHS' notice of appeal was not timely filed to provide an independent basis for appellate review of that order. Although DHHS did not have the benefit of our decision in *Gillpatrick*, the matter of acquiring jurisdiction by an appellate court is

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[41] *Crossman v. Maccoccio*, 792 F.2d 1 (1st Cir. 1986).

[42] See, *Com. of Pa. v. Flaherty*, 983 F.2d 1267 (3d Cir. 1993); *Saber v. FinanceAmerica Credit Corp.*, 843 F.2d 697 (3d Cir. 1988); *Phelps v. Washburn University of Topeka*, 807 F.2d 153 (10th Cir. 1986).

[43] See *Forsyth v. Barr*, 19 F.3d 1527 (5th Cir. 1994).

[44] *Blum v. Stenson*, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).

indeed a technical matter and one over which courts have no discretion.[45]

However, DHHS has also asserted a challenge to the district court's subject matter jurisdiction by arguing that the court could not award attorney fees if the court lacked the authority to consider Webb's § 1983 claim. It is undisputed that the district court's order awarding Webb attorney fees was a final order and that DHHS timely appealed from that order. It is also undisputed that the court's award of fees pursuant to § 1988 was based on the determination that Webb had prevailed on his § 1983 claim. Therefore, our review of the attorney fees order includes the issue of whether the court had subject matter jurisdiction over Webb's § 1983 claim. As a result, we are required to consider whether the district court had subject matter jurisdiction to consider Webb's § 1983 claim.

Court Had Subject Matter Jurisdiction Over § 1983 Claim

DHHS contends that the court lacked subject matter jurisdiction to decide Webb's § 1983 claim and therefore also lacked jurisdiction to award Webb fees under § 1988. DHHS does not challenge the amount of fees awarded but only Webb's entitlement to a fee award. Webb contends that the district court properly considered Webb's § 1983 claim pursuant to its general jurisdiction.

DHHS concedes that a district court has the authority to adjudicate an APA appeal and a § 1983 claim, but asserts that the claims must be brought in separate lawsuits. DHHS argues that the Legislature has conferred jurisdiction upon district courts to hear appeals from contested cases before administrative agencies under the APA and that this court has found jurisdictional defects where judicial review of the agency's

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[45] *In re Covault Freeholder Petition*, 218 Neb. 763, 359 N.W.2d 349 (1984).

decision under the APA is not sought in the mode and manner provided by statute.[46]

DHHS further argues the APA statutes do not specifically provide for the addition of an original claim such as a § 1983 claim to a petition for judicial review under the APA and that once the district court had jurisdiction over the APA claim, the court could not simultaneously exercise its general, original jurisdiction to consider a § 1983 claim in the same case.

All of DHHS' arguments are framed in terms of a lack of subject matter jurisdiction. DHHS makes no argument that, for example, the APA claim and the § 1983 claim were improperly joined under Neb. Rev. Stat. § 25-701 (Reissue 2016) or that the district court should have bifurcated the matters. As those issues are not before us, we express no view on them.

In response, Webb argues that we should affirm the district court's reliance on *Maldonado v. Nebraska Dept. of Pub. Welfare*[47] and conclude that a § 1983 claim may be brought in the procedural context of an APA appeal. DHHS acknowledges that *Maldonado* forecloses its position on appeal, but argues that the pronouncement in *Maldonado* relied upon by Webb and the district court was made in error and that we should overrule *Maldonado*.

In *Maldonado*, we considered whether the district court appropriately awarded attorney fees pursuant to § 1988 after the plaintiffs succeeded in their APA appeal based on the denial of dependent child benefits. The defendants argued that the award of fees was erroneous, because the petition had not requested relief under § 1983. We found the plaintiffs were not required to allege their specific theory of recovery and that the facts alleged had sufficiently stated a claim under § 1983.[48]

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[46] See, e.g., *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017); *J.S., supra* note 6.

[47] *Maldonado, supra* note 2.

[48] *Id.*

We held that based on the U.S. Supreme Court's decision in *Maine v. Thiboutot*[49] the attorney fees were recoverable. We stated that in *Thiboutot*, "[t]he Supreme Court held that a claim under § 1983 may be brought in a state court in the procedural context of a state court's reviewing the actions of a state administrative agency, and attorney fees may be awarded under § 1988 in such a case."[50]

In *Thiboutot*, the U.S. Supreme Court interpreted the language of § 1983, which provides in pertinent part:

> "Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution *and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added.)[51]

The Court concluded that the phrase "'and laws'" within § 1983 includes claims solely based on statutory violations of federal law and found that "the plain language of [§ 1983] undoubtedly embraces [the] claim that petitioners violated the Social Security Act."[52]

We agree with DHHS that the issue in *Thiboutot* was whether § 1983 encompasses statutory claims and that neither *Thiboutot* nor *Maldonado* squarely presented the issue of whether a § 1983 claim is properly brought in the context of a state court's review of an administrative appeal. Therefore, our statement in *Maldonado* that "[t]he Supreme Court held that a claim under § 1983 may be brought in a state court in the procedural context of a state court's reviewing the actions of a state administrative agency . . ."[53] misreads *Thiboutot* and

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[49] *Thiboutot, supra* note 3.

[50] *Maldonado, supra* note 2, 223 Neb. at 490, 391 N.W.2d at 109.

[51] *Thiboutot, supra* note 3, 448 U.S. at 4, quoting 42 U.S.C. § 1983.

[52] *Id.*

[53] *Maldonado, supra* note 2, 223 Neb. at 490, 391 N.W.2d at 109.

states a conclusion without analyzing the jurisdictional framework specific to Nebraska law. For these reasons, *Maldonado* is disapproved.

Even though we disapprove of authority contrary to DHHS' position, DHHS' position lacks merit because there is an absence of affirmative authority to support the outcome that DHHS proposes. DHHS relies upon *Kozal v. Nebraska Liquor Control Comm.*[54] for the proposition that "[w]here a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute." However, *Kozal* concerned the issue of whether an appeal of a contested case under the APA had been perfected in order to achieve judicial review in district court. There is no dispute in this case that the district court had jurisdiction over the APA appeal. DHHS also relies upon *Betterman v. Department of Motor Vehicles*,[55] in which we held the APA does not authorize a district court reviewing the decision of an administrative agency to receive additional evidence, whether by judicial notice or other means. But here, the district court made clear in its order that in reviewing Webb's appeal, it considered only evidence that was made part of the record in the agency proceeding. Moreover, DHHS does not contest the district court's decision on the APA claim.

[11] DHHS' lack of authority for its position indicates that its argument is one of policy. DHHS' argument therefore uses the term "jurisdiction" too loosely. DHHS argues that the practice of allowing a party to bring a § 1983 claim in the same case as an APA claim "should be disallowed," in part based on "policy consequences."[56] This argument raises concerns

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[54] *Kozal, supra* note 46, 297 Neb. at 945, 902 N.W.2d at 154.

[55] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

[56] Reply brief for appellant at 14.

distinct from the issue of whether a district court has certain jurisdictional authority. "'[T]he term "jurisdictional" properly applies only to "prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction)" implicating that authority.'"[57] Here, the district court had authority to consider the § 1983 claim.

[12] The Nebraska Constitution provides that "district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide."[58] Section 24-302 provides that "[t]he district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, *except where otherwise provided*." (Emphasis supplied.) In a court of general jurisdiction, jurisdiction may be presumed absent a record showing the contrary.[59] The absence of jurisdiction of the district court will not be presumed, but must affirmatively appear from the face of the record itself.[60]

DHHS admits to some extent that it is relying on case law only by way of analogy and that "this is an issue of *Nebraska* law that should be analyzed solely on the jurisdictional language of *Nebraska's* APA statute."[61] Therefore, for DHHS' argument to succeed, DHHS must point to a statute which removes the district court's general, original jurisdiction once an APA proceeding has been initiated. Such a jurisdiction-limiting provision must be specific to a claim such as a § 1983 claim, because the Legislature cannot limit or control the

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[57] *State v. Ryan*, 287 Neb. 938, 941-42, 845 N.W.2d 287, 291 (2014), *disapproved on other grounds, State v. Allen, ante* p. 560, 919 N.W.2d 500 (2018), quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010).

[58] Neb. Const. art. V, § 9.

[59] See *Myers v. Hall County*, 130 Neb. 13, 263 N.W. 486 (1935).

[60] See, *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946); *Myers, supra* note 59; *Barker v. State*, 54 Neb. 53, 74 N.W. 427 (1898).

[61] Brief for appellant at 15 (emphasis in original).

common law and equity jurisdiction granted to the district court by the constitution.[62] DHHS has not shown that the APA contains any exclusions in this regard.

Section 84-917(1), the APA's jurisdictional provision, states:

> Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the [APA]. *Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law*.

(Emphasis supplied.) This section indicates that the APA statutes do not limit a district court's general original jurisdiction. Because the constitution vests in the Legislature the power to provide jurisdiction to the district court, other than that conferred by the constitution, and the Legislature has granted the district court original jurisdiction in all matters except where otherwise provided, there is no basis for this court to conclude that a district court lacks the authority to consider a § 1983 claim in conjunction with an APA claim.

We conclude that the district court had the authority to consider Webb's § 1983 claim and subsequently award attorney fees under § 1988 pursuant to its general original jurisdiction; that the district court was not required to rely on authorization from the APA in order to discharge its duties as a court of general original jurisdiction; and that the APA, as written, does not limit a court's general original jurisdiction.

Even if we had the authority to adopt DHHS' position, we are not persuaded by the policy concerns DHHS has articulated. DHHS argues that Webb should be required to file two separate lawsuits, because his claims (1) are evaluated based on different evidence, (2) apply to different parties, and (3) are reviewed under different evidentiary standards. Though the Legislature could fashion a scheme with these concerns in mind, these arguments are unconvincing under the present

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[62] *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985).

structure and do not do justice to an experienced district court's ability to engage in separate and independent analyses.

DHHS' arguments presume the district court performed only a singular analysis in resolving Webb's two claims, but that is not an accurate reflection of the district court's order. It is true that different rules apply to each claim, and the district court recognized this in its evaluation of each claim. It does not appear that the court's analysis of each claim would have been any different had Webb been required to file a separate lawsuit. Indeed, none of DHHS' policy arguments are based on the facts of this case.

DHHS argues that APA appeals are limited to the "record of the agency"[63] and that the State might want to put on additional evidence to resist the § 1983 claim. Because the claims are evaluated separately, nothing prevented DHHS from utilizing all of the tools available under the rules of civil procedure in order to adduce evidence outside of the agency record to defend against § 1983 liability, including completion of discovery, availing itself of other pretrial motions, and proceeding to trial. However, the only exhibits offered at the hearing on Webb's motion for summary judgment other than the agency record were a copy of federal Medicaid regulations and the federal child welfare policy manual. DHHS joined in the request to have the district court consider these exhibits for purposes of the summary judgment motion.

This case provides an example that the evidence supporting an APA claim and a § 1983 claim are not necessarily contradictory. Here, the facts for both claims were identical. The only issue in dispute was a question of law as to whether Webb was in foster care. Once the court found in Webb's favor on that issue, it followed that Webb prevailed on both of his claims, because a denial of Medicaid benefits is a deprivation of a federal statutory right. Had the court found in DHHS' favor on the legal issue, DHHS would have prevailed on both

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[63] § 84-917(5)(a).

claims. But DHHS does not challenge the court's determination that Webb had a meritorious APA claim based on the definition of "foster care" within the meaning of the bridge to independence program, and does not argue that the court erred in its decision that no genuine issue of material fact existed with respect to Webb's motion for summary judgment on his § 1983 claim.

Where a party is confronted with a multiclaim suit that is unmanageable, that party can raise those concerns through a motion to bifurcate the claims. 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.[64] Whether claims should be joined for purposes of trial is within the discretion of the district court.[65] Bifurcation of a trial may be appropriate where separate proceedings will do justice, avoid prejudice, and further the convenience of the parties and the court.[66]

[13] We have said that an APA proceeding in district court for review of a decision by an administrative agency is not an "'appeal'" in the strict sense of the term, meaning "'the power and authority conferred upon a superior court to reexamine and redetermine causes tried in inferior courts,'" but, rather, is "'the institution of a suit to obtain judicial-branch review of a nonjudicial-branch decision.'"[67] In at least one case, we have stated that the standard governing motions for a separate trial in criminal cases—that such motions are addressed to the discretion of the trial court and rulings on such motions will not be reversed unless there is an abuse of discretion—should also be

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[64] *Jordan v. LSF8 Master Participation Trust*, 300 Neb. 523, 915 N.W.2d 399 (2018).

[65] *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[66] *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

[67] *Kozal, supra* note 46, 297 at 945, 902 N.W.2d at 153, citing *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995).

applied to appeals from administrative agency decisions.[68] Here, DHHS did not move to bifurcate the claims and does not argue the court abused its discretion in consolidating its evaluation of Webb's claims.

CONCLUSION

The district court's jurisdiction here over the § 1983 claim flows from the Legislature's grant of general jurisdiction to that court, over and above the district court's jurisdiction conferred by the constitution. Thus, it falls to the Legislature, and not to this court, to exclude a § 1983 claim from the district court's purview in conjunction with an APA claim. We conclude that the APA does not limit the district court's original jurisdiction and that the district court does not lack the subject matter jurisdiction to consider an APA claim and a § 1983 claim in the same lawsuit.

Affirmed.

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[68] See *Olson v. City of Omaha*, 232 Neb. 428, 441 N.W.2d 149 (1989).

Mutual of Omaha Bank, appellee, v. Robert W. Watson, appellant, and Shona Rae Watson, appellee, formerly husband and wife, and Community Bank of Lincoln, Trustee and beneficiary, et al., appellees.

920 N.W.2d 284

Filed December 7, 2018. No. S-17-1332.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
2. **Judgments: Words and Phrases.** A judgment is the final determination of the rights of the parties in an action.
3. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
4. **Final Orders: Words and Phrases.** A substantial right is an essential legal right.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Appeal dismissed.

Robert Watson, pro se.

Eric H. Lindquist, P.C., L.L.O., for appellee Mutual of Omaha Bank.

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

Papik, J.

Robert W. Watson appeals from an order of the district court denying his request for a stay of an order of sale in a judicial foreclosure action. Watson claims he was entitled to such a stay under Neb. Rev. Stat. § 25-1506 (Reissue 2016). We conclude that the order denying the request for a stay was not appealable and therefore dismiss the appeal.

BACKGROUND

This is not the first time this matter has come before this court. After the district court determined that Watson and his former spouse owed Mutual of Omaha Bank (Mutual) $533,459.36, ordered an execution sale, and foreclosed Watson and his former spouse from asserting any interest in the relevant property, Watson perfected a timely appeal. We affirmed. See *Mutual of Omaha Bank v. Watson*, 297 Neb. 479, 900 N.W.2d 545 (2017).

After our opinion was issued, Mutual applied to the district court for and received a supplemental decree. In the supplemental decree, the court stated that Mutual paid sums connected to the mortgaged property that were not included in the initial decree and ordered that those amounts be added to the amount due Mutual. Watson requested a stay of the order of sale. The district court issued an order denying Watson's request for a stay. Watson appeals from this order.

ASSIGNMENT OF ERROR

Watson assigns one error on appeal: The district court erred by denying his request for a stay of the order of sale.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court

independently decides. *In re Interest of Tyrone K.*, 295 Neb. 193, 887 N.W.2d 489 (2016).

ANALYSIS

Mutual contends that this appeal should be dismissed for lack of appellate jurisdiction. For reasons set forth below, we agree.

[2] Neb. Rev. Stat. § 25-1911 (Reissue 2016) gives appellate courts jurisdiction to review "[a] judgment rendered or final order made by the district court . . . for errors appearing on the record." For purposes of appellate jurisdiction, "[a] judgment is the final determination of the rights of the parties in an action." Neb. Rev. Stat. § 25-1301(1) (Reissue 2016). As there is no question that the district court's order denying Watson's request for a stay did not finally determine the rights of the parties in an action, that order is not a judgment and thus is only appealable if it qualifies as a final order.

[3] 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. *Cullinane v. Beverly Enters. - Neb.*, 300 Neb. 210, 912 N.W.2d 774 (2018). Because all three types of reviewable final orders affect a substantial right in the action, it is not necessary to evaluate each of the three categories individually in cases in which the order from which an appeal is taken does not affect a substantial right. See, e.g., *Deines v. Essex Corp.*, 293 Neb. 577, 581, 879 N.W.2d 30, 33 (2016) ("in this appeal, it is not necessary to decide whether the order [at issue] fits into any of the three categories, because the dispositive issue here is whether the order affects a substantial right in the action"). This is such a case.

Watson contends that he had a substantial right to a stay under § 25-1506 and that the district court's order denying his request for a stay affected that right. The relevant portion of § 25-1506 provides as follows: "The order of sale on all decrees for the sale of mortgaged premises shall be stayed . . . after the entry of such decree, whenever the defendant shall, within twenty days after the entry of such decree, file with the clerk of the court a written request for the same."

A decree was issued in the foreclosure action in September 2016. Watson did not seek a stay within 20 days after the entry of that decree. He instead filed his first appeal. Watson acknowledges that he would ordinarily not be entitled to a stay at this point given his failure to ask for a stay within 20 days of the decree. He contends that he is nonetheless entitled to a stay in this case, because the district court entered a *supplemental decree* after his appeal was decided and he requested a stay within 20 days of its entry.

Watson's argument, however, is inconsistent with our precedent. In *Prudential Ins. Co. v. Nethaway*, 127 Neb. 330, 255 N.W. 26 (1934), after a foreclosure decree was issued and a defendant requested and received a stay, the plaintiff sought and obtained a supplemental decree. Like the supplemental decree in this case, the supplemental decree only had the effect of increasing the amount the plaintiff owed the defendant. The defendant responded by requesting another stay. We held that the defendant was not entitled to a stay following the supplemental decree. We explained that "[t]he modification of the decree merely increased the personal liability of the defendants" and "did not affect the decree of foreclosure of the mortgaged property." *Id.* at 331, 255 N.W. at 27.

Watson contends that *Nethaway* merely stands for the proposition that once a party has requested and obtained one stay, they may not obtain a second stay following the entry of a supplemental decree. We do not believe this is a correct reading of *Nethaway*. Our rationale for holding that the defendant

in *Nethaway* was not entitled to a stay had nothing to do with the fact that the defendant had already received one stay. Rather, our decision rested on the nature of the supplemental decree, specifically that it was not a new decree but a modification of the existing one. For that reason, we understand *Nethaway* to hold that the issuance of a supplemental decree that merely increases the amount due from a defendant does not give rise to a right to seek a statutory stay.

[4] A substantial right is an essential legal right. *Shawn E. on behalf of Grace E. v. Diane S.*, 300 Neb. 289, 912 N.W.2d 920 (2018). Because a supplemental decree like the one at issue in this case does not give rise to a right to seek a statutory stay, we find that the district court's order denying Watson's request for a stay did not affect any right, much less an essential legal right. The order is therefore not final, and we lack jurisdiction to decide the appeal.

CONCLUSION

The district court's order denying Watson's request for a stay was not an appealable order. Lacking appellate jurisdiction, we are obligated to dismiss the appeal.

Appeal dismissed.

Donna G., as mother and next friend of Eric S., a minor child, appellant, v. Nebraska Department of Health and Human Services and Calder A. Lynch, director, Division of Medicaid and Long-Term Care, appellees.

920 N.W.2d 668

Filed December 14, 2018. No. S-17-712.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Trusts: Intent.** Whether a testamentary trust amended by a probate court order pursuant to Neb. Rev. Stat. §§ 30-24,123 and 30-24,124 (Reissue 2016) remains a testamentary trust is a question of law.
5. **Trusts: Medical Assistance: Intent.** When a testamentary trust is modified by a court-approved compromise agreement, the question whether it retains its testamentary character for purposes of determining a beneficiary's Medicaid eligibility will depend on both the nature of the parties' agreement and the court's order approving it.
6. ____: ____: ____. When analyzing the terms of a testamentary trust to determine if the trust corpus is "available" for purposes of Medicaid eligibility, courts look to whether the trust is a support trust or a discretionary trust.

7. **Trusts: Medical Assistance.** When a testamentary support trust allows a beneficiary to compel distributions of income, principal, or both, for expenses necessary for the beneficiary's support, the trust may be considered as an available asset when evaluating Medicaid eligibility.
8. ____: ____. When a testamentary trust grants the trustee uncontrolled discretion over payments to the beneficiary, it is considered a discretionary trust for purposes of Medicaid eligibility. Because the beneficiary of a discretionary trust does not have the ability to compel distributions from the trust, only those distributions of income, principal, or both actually made by the trustee may be considered as available assets when evaluating Medicaid eligibility.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Reversed and remanded with directions.

Randy Fair, of Dudden & Fair, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Ryan C. Gilbride for appellees.

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

Stacy, J.

The Nebraska Department of Health and Human Services (DHHS) terminated the Medicaid benefits of Eric S., and the district court affirmed. Eric's court-appointed guardian and conservator appeals. The primary issue on appeal is whether the corpus of a trust is available to Eric for purposes of determining his Medicaid eligibility. For the reasons set forth below, we reverse, and remand with directions.

I. BACKGROUND

Eric is a young man with cerebral palsy. Before July 1, 2016, he was receiving "Aid to the Aged, Blind or Disabled" Medicaid waiver services.[1] The date Eric began receiving such services is not clear from the record.

[1] See Neb. Rev. Stat. §§ 68-1002 to 68-1005 (Reissue 2009).

In 2012, Eric's grandmother, Lois Branting, executed her last will and testament. Branting's will devised all of her property, in equal shares, to her grandchildren living at the time of her death. The will further provided that "should any of my grandchildren be under the age of thirty (30) years at the date of my death, then all of my property shall instead be distributed to my Trustee to be held pursuant to the provisions of paragraph 5 below." Paragraph 5 of the will was titled "Grandchildren's Trust" and provided in pertinent part:

> 5.1 My trustee shall hold all property devised to my trustee for the benefit of my grandchildren who shall survive me and of the then living issue of any of my grandchildren who shall not survive me, upon the following terms and conditions:
>
> 5.2 During the term of this trust, my trustee shall apply such part of the net income and principal of this trust as shall from time to time be necessary or appropriate to the support, care, maintenance, medical expense, educational expense and general welfare of my trust beneficiaries in such amounts and proportions as my trustee, in the sole and uncontrolled discretion of my trustee, shall deem advisable, and shall accumulate and add to principal any net income not used for such purposes.
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> 5.3 At such time as my youngest living grandchild shall reach the age of thirty (30) years, this trust shall terminate and all principal and accumulated income, after the payment of closing expenses, shall be distributed in equal shares, to my then living grandchildren and the then living issue of any grandchild of mine who shall then be deceased, so that there shall be one such equal share for each living grandchild of mine and one such equal share for the then living issue of any grandchild of mine who shall then be deceased to be shared by said issue by right of representation.

When Branting died on November 29, 2014, she was survived by four grandchildren, all of whom were minors.

In December 2015, the parents of Branting's grandchildren entered into a written agreement with Branting's personal representative to split the Grandchildren's Trust into two separate trusts: one solely for the benefit of Eric (Eric's Trust), and another for the benefit of the remaining three grandchildren. That agreement recited in part:

> [T]he four grandchildren . . . who are the beneficiaries of the . . . Grandchildren's Trust . . . are in very different situations and will have very different needs in the future. [The parents] have further determined that it would be best for the grandchildren . . . if the [Grandchildren's Trust] was separated into one Trust for the benefit of [Eric] and another separate Trust for the benefit of [the other three grandchildren]. Specifically, [Eric] would be best benefitted if his separate Trust had special needs provisions which would enable for him to receive property from the [Branting Estate] without significantly reducing the benefits which he receives from various government agencies as a result of his physical and mental disabilities. They have further determined that it would be best for the beneficiaries of the two new Trusts if the Trust for the Benefit of [Eric] were to receive the 25% of the Estate to which he is entitled in cash to the fullest extent possible, and the Trust for [the other three grandchildren] would receive the Real Estate still owned by the Estate which includes the residence in which they have been and will be raised together with any remaining assets together totaling 75% of whatever assets remain in the Estate on the date of distribution.

Beyond referencing "special needs provisions" for Eric, the agreement did not include additional trust terms for the split trusts, but merely recited the pertinent provisions of Branting's will, including the sections establishing and setting out the terms of the Grandchildren's Trust.

After the agreement was reached, Branting's personal representative petitioned the probate court, pursuant to Neb. Rev.

Stat. § 30-24,124 (Reissue 2016), to approve the agreement and split the Grandchildren's Trust. The probate court did so in an order entered December 28, 2015, which provided:

> Pursuant to the provisions of Neb. Rev. Stat. §30-24, 124 the Court finds that the effect of the provisions of the Agreement upon the interests of the interested persons is just and reasonable and therefore the Agreement is . . . approved, and the Petitioner as Personal Representative of the Estate shall make all further disposition of the Estate in accordance with the terms of the Agreement.

After the probate court's order was entered, the separate trusts were funded in accordance with the agreement and separate trustees were appointed for the two trusts. The probate court's order was not appealed, and no party to the instant appeal has questioned the provisions of the probate order or the procedure followed in the probate court.

The balance of Eric's Trust was $512,380.39 as of May 16, 2016. DHHS regulations establish that the maximum available resources one may own and still be considered eligible for Medicaid is $4,000.[2] Eric's mother, Donna G., serves as his court-appointed guardian and conservator.

In April 2016, Donna informed DHHS that Eric had what she referred to as a "Special Needs Trust." One month later, DHHS determined that the entire corpus of Eric's Trust was an available resource for purposes of determining his Medicaid eligibility. In June, DHHS mailed a notice of action advising that Eric's Medicaid coverage and Medicaid waiver services would end effective July 1, 2016, because he was ineligible for Medicaid due to excess resources.

In response to the notice of action, Donna requested and was given an administrative hearing, after which DHHS affirmed its decision terminating benefits. Donna timely filed a petition for judicial review in the Lancaster County

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[2] See 477 Neb. Admin. Code, ch. 21, § 001.17 (2014).

District Court, challenging DHHS' decision pursuant to the Administrative Procedure Act.[3]

The district court affirmed DHHS' decision to terminate benefits, finding that the entire corpus of Eric's Trust was an available resource for purposes of determining his Medicaid eligibility. The court first considered the nature of Eric's Trust. The court concluded it was not a testamentary trust, reasoning it was the product of action taken in the probate court. And it concluded Eric's Trust was not a special needs trust, because it lacked the necessary special needs provisions. Thus, by process of elimination, the court found Eric's Trust was properly characterized as an "irrevocable trust created after August 11, 1993."[4]

The court next considered the DHHS regulation governing treatment of such a trust, which provides:

> If there are any circumstances under which payment from the trust corpus could be made to or for the benefit of the client . . . the portion of the corpus from which payment to or for the benefit of the client . . . could be made must be considered a resource available to the client.[5]

Applying this standard, the district court found there were circumstances under which the trust corpus could be paid to Eric, and thus concluded the corpus was an available resource for purposes of determining his Medicaid eligibility.[6]

Alternatively, the district court reasoned that even if Eric's Trust was a testamentary trust, it would still be considered an available resource for purposes of determining his Medicaid eligibility.[7] The court noted the language of Eric's Trust had elements of both a support trust and a discretionary trust, and concluded it was the type of hybrid "'discretionary support

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[3] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2014).

[4] See 477 Neb. Admin. Code, ch. 21, § 001.15A13b (2014).

[5] § 001.15A13b(1)2.

[6] See § 001.15A13b(1) and (2).

[7] See 477 Neb. Admin. Code, ch. 21, § 001.15A12 (2014).

trust'" this court discussed in *Smith v. Smith*.[8] In *Smith*, we held that "the trustee of a discretionary support trust can be compelled to carry out the purposes of the trust in good faith."[9] Applying this principle, the court reasoned that if Eric could compel his trustee to carry out the purpose of Eric's Trust in good faith, he could also compel the trustee to make distributions from it for his medical expenses. Thus, the court concluded that even if Eric's Trust was considered testamentary, the entire corpus was still an available resource for purposes of determining his Medicaid eligibility.

Donna timely appealed the district court's judgment, and we moved the case to our docket on our own motion.[10]

II. ASSIGNMENTS OF ERROR

Donna assigns, restated, that the district court erred when it included Eric's Trust as an available resource for purposes of determining his Medicaid eligibility, because (1) the trust is testamentary and (2) the trust is discretionary.

III. STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified for errors appearing on the record.[11]

[2] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[12]

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[8] *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994).

[9] *Id.* at 198, 517 N.W.2d at 398.

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

[11] § 84-918; *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

[12] *J.S., supra* note 11.

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.[13]

IV. ANALYSIS

We begin with an overview of the regulatory framework that governs our analysis. Medicaid is a joint federal and state funding program that provides medical care for individuals whose resources are insufficient to meet the cost of necessary medical care.[14] The program provides federal financial assistance to states that choose to reimburse certain costs of medical treatment for needy persons.[15] A state is not obligated to participate in the Medicaid program; however, once a state has elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.[16]

Nebraska adopted the federal Medicaid scheme in the Medical Assistance Act.[17] Eligibility for Medicaid is set out in § 68-915, and it includes persons who qualify for assistance under Nebraska's program for assistance to the aged, blind, or disabled.[18]

DHHS is tasked with administering Nebraska's Medicaid program for the aged, blind, or disabled,[19] and has been given the authority to promulgate regulations for the program.[20] DHHS regulations establish $4,000 as the maximum

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[13] *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006).

[14] *In re Estate of Vollmann*, 296 Neb. 659, 896 N.W.2d 576 (2017).

[15] *Id.*

[16] *Id.*

[17] See Neb. Rev. Stat. §§ 68-901 to 68-991 (Reissue 2009, Cum. Supp. 2016 & Supp. 2017).

[18] See §§ 68-915(2) and 68-1002 through 68-1005.

[19] See § 68-1001.

[20] See § 68-1001.01.

available resources one may own and still be considered eligible for Medicaid.[21] As stated, the balance of Eric's Trust was $512,380.39 in May 2016. Eric's Medicaid benefits were properly terminated only if Eric's Trust is considered an "available resource" for purposes of determining his Medicaid eligibility. DHHS regulations define "available resources" as "cash or other liquid assets or any type of real or personal property or interest in property that the client owns and may convert into cash to be used for support and maintenance."[22] Generally speaking, DHHS regulations treat trust assets as "[l]iquid resources," which regulations define as "assets that are in cash or financial instruments which are convertible to cash."[23]

1. Nature of Eric's Trust

When determining which trust assets are "available resources" for purposes of Medicaid eligibility, DHHS regulations treat trust assets differently depending on the nature of the trust. Consequently, the nature of Eric's Trust must be determined as a threshold matter.

As relevant here, DHHS regulations differentiate between testamentary trusts,[24] revocable trusts,[25] and irrevocable trusts created after August 11, 1993.[26] The parties agree that Eric's Trust is not a revocable trust, so we limit our analysis to whether it is properly characterized as either a testamentary trust or an irrevocable trust created after August 11, 1993.

(a) Testamentary Trusts

A Nebraska statute defines a testamentary trust as "a trust created by devising or bequeathing property in trust in a

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[21] See § 001.17.

[22] 477 Neb. Admin. Code, ch. 21, § 001.03 (2014).

[23] 477 Neb. Admin. Code, ch. 21, § 001.15A (2014).

[24] See § 001.15A12.

[25] See 477 Neb. Admin. Code, ch. 21, § 001.15A10 (2014).

[26] See § 001.15A13b.

will as such terms are used in the Nebraska Probate Code."[27] Under DHHS regulations, if a trust is testamentary, it may be excluded as a resource "depending on the availability of the funds to the individual or his/her spouse as specified in the terms of the trust."[28]

(b) Irrevocable Trusts

DHHS regulations provide that an irrevocable trust is one created by an individual "who establishes a trust, who is a beneficiary of a trust, and who is an applicant or recipient of Medicaid."[29] Individuals are considered to have established such a trust if the individual's assets "were used to form a part or the entire corpus of the trust *other than by will*."[30] Under this regulatory definition, irrevocable trusts can be established by the individual, his or her spouse, or by "any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse."[31]

If an irrevocable trust is properly classified as one established on or after August 11, 1993, DHHS regulations provide the trust corpus will generally be included in the individual's resources for purposes of determining Medicaid eligibility if the "any circumstances" test is met.[32] That test provides:

> If there are any circumstances under which payment from the trust corpus could be made to or for the benefit of the client . . . the portion of the corpus from which payment to or for the benefit of the client . . . could be made must be considered a resource available to the client.[33]

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[27] Neb. Rev. Stat. § 76-1514 (Reissue 2009).

[28] § 001.15A12.

[29] § 001.15A13b.

[30] *Id*. (emphasis supplied).

[31] § 001.15A13b4.

[32] See § 001.15A13b(1) and (2).

[33] § 001.15A13b(1)2.

For the sake of completeness, we note the "any circumstances" test does not apply if an irrevocable trust is also either a special needs trust or a pooled trust as defined by DHHS regulations,[34] nor does it apply if denial of Medicaid would "cause undue hardship."[35] But here, no party contends that Eric's Trust is a special needs or a pooled trust, nor has an undue hardship waiver been claimed, so we limit our analysis accordingly.

(c) Eric's Trust Is Testamentary

It is undisputed that the original Grandchildren's Trust created by Branting's will was a testamentary trust. The parties dispute whether the subsequent agreement to split the testamentary trust, and the probate court's approval of that agreement, changed the fundamental nature of the trust for purposes of Medicaid eligibility. DHHS argues that Eric's Trust was created by the probate court's using the procedures of Neb. Rev. Stat. § 30-24,123 (Reissue 2016) and § 30-24,124, and thus became either a self-settled or court-settled irrevocable trust. Eric's guardian and conservator argues the testamentary nature of the trust was unchanged by the probate proceedings.

[4] Whether a testamentary trust amended by a probate court order pursuant to §§ 30-24,123 and 30-24,124 remains a testamentary trust is a question of law.[36] When reviewing questions of law, an appellate court reaches a conclusion independent of the determination reached by the court below.[37]

It is true Eric's Trust would not exist as a separate trust without the probate order approving the agreement to split the trust, but we are unpersuaded by DHHS' contention that Eric's Trust lost its testamentary character by virtue of the probate court proceedings. We find such a contention difficult

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[34] See § 001.15A13b(1)(a).

[35] § 001.15A13b(3).

[36] See *In re Trust Created by Hansen*, 274 Neb. 199, 208, 739 N.W.2d 170, 178 (2007) ("the type of trust . . . created is a question of law").

[37] See *In re Estate of Psota*, 297 Neb. 570, 900 N.W.2d 790 (2017).

to reconcile with either the facts of this case or the statutes on which the Branting grandchildren and the probate court relied to split the original testamentary trust.

Prior to the Legislature's adoption of §§ 30-24,123 and 30-24,124 in 1974, agreements to modify testamentary trusts were generally not allowed, pursuant to the common-law rule that although a compromise "'may provide for disbursement of the estate of testator in a manner at variance with his will, a valid, unexecuted testamentary trust cannot thus be modified or destroyed.'"[38] The rationale for this rule was that "[w]hen an act or agreement of the parties disappoints the purpose of the settlor by divesting the property from the purposes named, such act or agreement is void ab initio."[39]

The Legislature changed this common-law rule when it adopted §§ 30-24,123 and 30-24,124, which expressly allow for testamentary trusts to be affected by compromises. Specifically, § 30-24,123 states that "[a]n approved compromise is binding even though it may affect a trust or an inalienable interest."

The intent of the Legislature is expressed by omission as well as by inclusion,[40] and we see nothing in the statutory language indicating that testamentary trusts affected by an approved compromise necessarily lose their fundamental character. This conclusion is supported by the plain language of § 30-24,123, which recognizes that a "compromise does not impair the rights of creditors or of taxing authorities who are not parties to it."

[5] The question here is whether a testamentary trust which is modified by a court-approved compromise agreement retains its testamentary character for purposes of determining a beneficiary's Medicaid eligibility. The answer to that question will depend on both the nature of the parties' agreement and the

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[38] *Cahill v. Armatys*, 185 Neb. 539, 544, 177 N.W.2d 277, 280 (1970), quoting *In re Estate of Mowinkel*, 130 Neb. 10, 263 N.W. 488 (1935).

[39] *Id.*

[40] *E.D. v. Bellevue Pub. Sch. Dist.*, 299 Neb. 621, 909 N.W.2d 652 (2018).

court's order approving it. But on this record, we conclude that neither the agreement to split the trust nor the court's order approving that agreement changed the nature of Eric's Trust from a testamentary trust into a self-settled or court-settled irrevocable trust.

The original Grandchildren's Trust was created by Branting's will, and even after that trust was split, the essential terms of the split trusts were derived from Branting's will—there is no separate trust document. The trust terms in Branting's will were recited verbatim in the agreement to split the testamentary trust, and when the probate court approved that agreement, it did not add or eliminate the trust terms. Moreover, the entire corpus of Eric's Trust was funded by Branting's estate pursuant to her will; none of Eric's assets were used to fund the trust.

Because the Grandchildren's Trust was established by Branting's will, the administration of Eric's Trust is still controlled by the language of that will, and the trust was funded exclusively from Branting's estate pursuant to the terms of her will, we conclude as a matter of law that Eric's Trust retained its character as a testamentary trust for purposes of determining Medicaid eligibility.[41]

2. Eric's Trust Is Not Available Asset

Having determined that Eric's Trust is properly characterized as a testamentary trust, we next consider the extent to which the trust corpus is "available" to him for purposes of determining his Medicaid eligibility. Here, DHHS argues the entire corpus of Eric's Trust is available for purposes of

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[41] Accord *Pohlmann, supra* note 13, 271 Neb. at 278, 710 N.W.2d at 644 ("the plain meaning of the phrase 'other than by will' in [42 U.S.C.] § 1396p(d)(2)(A) [(2000)] and the corresponding Nebraska regulation make it clear that a Medicaid applicant cannot be considered to have established a trust for purposes of the restrictions imposed by § 1396p(d) if the trust was established by will").

determining his Medicaid eligibility. Under the regulations, an asset is "available" if it "may [be] convert[ed] into cash to be used for support and maintenance."[42] The central question then is whether, given the terms of Eric's Trust, he can compel the trustee to distribute the entire corpus of the trust for his support and maintenance.

[6] This court considered whether the corpus of a trust was available to a beneficiary for purposes of Medicaid eligibility in *Pohlmann v. Nebraska Dept. of Health & Human Servs*.[43] In that case, we recognized that when analyzing the terms of a testamentary trust to determine if the trust corpus is "available" for purposes of Medicaid eligibility, "courts have looked to whether the trust is a support trust or a discretionary trust."[44] We recited the basic difference between "support" trusts and "discretionary" trusts:

> "A support trust essentially provides the trustee 'shall pay or apply only so much of the income and principal or either as is necessary for the education or support of a beneficiary.' . . . A support trust allows a beneficiary to compel distributions of income, principal, or both, for expenses necessary for the beneficiary's support, and [the agency administering Medicaid] may consider the support trust as an available asset when evaluating eligibility for assistance. . . .
>
> "Conversely, a discretionary trust grants the trustee 'uncontrolled discretion over payment to the beneficiary' and may reference the 'general welfare' of the beneficiary. . . . Because the beneficiary of a discretionary trust does not have the ability to compel distributions from the trust, only those distributions of income, principal, or both, actually made by the trustee may be considered by

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[42] § 001.03.

[43] *Pohlmann, supra* note 13.

[44] *Id.* at 279, 710 N.W.2d at 645.

> [the agency administering Medicaid] as available assets when evaluating eligibility for assistance."[45]

The trust in *Pohlmann* provided the trustee was to pay "'all of the accumulative income from the individual funds *and such portion of the principal as it may, from time to time, deem appropriate for* [*the beneficiary's*] *health, education, support or maintenance*.'"[46] *Pohlmann* found the "key" provision in this trust language was the discretion afforded the trustee, and concluded that because the trustee could not be compelled to distribute the entire corpus, the trust was not an available asset for purposes of determining Medicaid eligibility.

We pause here to acknowledge that our analysis in *Pohlmann* contemplates a binary choice between "support" and "discretionary" trust provisions for purposes of determining Medicaid eligibility. In that regard, the approach adopted in *Pohlmann* is different than our treatment of similar trust terms in cases where the question is one of general trust administration or interpretation, and not Medicaid eligibility. An example of this is *Smith v. Smith*.[47]

In *Smith*, a former wife sought to compel a trustee to pay her former husband's child support arrearages from the assets of a trust which stated its purpose was for the "'health, support, care and maintenance'" of the husband and his issue.[48] The trust further provided that the trustee "'shall have full, absolute and uncontrolled discretionary power and authority to exercise or fail to exercise any and all of the powers . . . provided . . . .'"[49] *Smith* recognized that because the trust had attributes of both a discretionary trust and a support trust, it

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[45] *Id*. at 280, 710 N.W.2d at 645, quoting *Eckes v. Richland Cty. Soc. Ser*., 621 N.W.2d 851 (N.D. 2001).

[46] *Id*. at 280, 710 N.W.2d at 645 (emphasis in original).

[47] *Smith, supra* note 8.

[48] *Id.* at 195, 517 N.W.2d at 397.

[49] *Id.*

should be construed as a hybrid of the two—a "discretionary support trust."[50] In *Smith* and other cases construing discretionary support trusts in a non-Medicaid eligibility context, we have rejected the suggestion that either the discretionary terms or the support terms must be given operative effect to the exclusion of the other, and instead, we attempt to ascertain the intention of the testator and interpret the trust in a way that gives effect to all its terms.[51] Because support terms and discretionary terms are often in direct conflict with one another in a discretionary support trust, we have reconciled that tension by recognizing that although beneficiaries of such a trust cannot always compel the trustee to make payments for their benefit, "the trustee of a discretionary support trust can be compelled to carry out the purpose of the trust in good faith."[52] In *Smith*, we applied that "good faith" rule and concluded that payment of the child support arrearage would not further the purpose of the trust, because the husband's issue had become emancipated. As such, we held the trustee could not be compelled to distribute trust assets from the discretionary support trust to satisfy the child support arrearage.

Here, presumably because Eric's Trust contains both support terms and discretionary terms, DHHS urged application of the analysis from *Smith* governing the administration of discretionary support trusts, rather than the rule articulated in *Pohlmann*. If the instant case involved a dispute over the proper administration of Eric's Trust, we would agree it is a discretionary support trust, and would proceed to apply the

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[50] *Id.* at 198, 517 N.W.2d at 398.

[51] See, e.g., *Smith, supra* note 8; *In re Will of Sullivan*, 144 Neb. 36, 12 N.W.2d 148 (1943). See, also, Restatement (Third) of Trusts § 60, Reporter's Notes, comment *a.* (2003) (rejecting historical distinction between discretionary trusts and support trusts as unnecessary because there is continuum of discretionary trusts with variety of support standards).

[52] See *Smith, supra* note 8, 246 Neb. at 198, 517 N.W.2d at 398. Accord *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000).

general rules of construction applicable to such trusts. But the analysis of *Smith* and *Pohlmann* is not interchangeable, because the legal questions are not the same. In Medicaid eligibility cases involving testamentary trusts, the question is whether the beneficiary can compel a distribution of the entire corpus of the trust, not whether the trustee is carrying out the purpose of the trust in good faith.

Here, the district court's classification of Eric's Trust as a discretionary support trust necessarily took its analysis outside the framework of *Pohlmann*, and consequently the analysis did not conform with the applicable law governing Medicaid eligibility. Even though Eric's Trust contained both discretionary and support terms, the proper framework to apply when determining Medicaid eligibility is that set out in *Pohlmann*. Applying *Pohlmann* to the language of Eric's Trust, we conclude the trust is discretionary and, as such, it is not an available asset.

The relevant trust language provides:

> 5.2 During the term of this trust, my trustee shall apply such part of the net income and principal of this trust as shall from time to time be necessary or appropriate to the support, care, maintenance, medical expense, educational expense and general welfare of my trust beneficiaries *in such amounts and proportions as my trustee, in the sole and uncontrolled discretion of my trustee, shall deem advisable*, and shall accumulate and add to principal any net income not used for such purposes.

[7,8] *Pohlmann* instructs that when a testamentary support trust allows a beneficiary to compel distributions of income, principal, or both, for expenses necessary for the beneficiary's support, the trust may be considered as an available asset when evaluating Medicaid eligibility. But when a testamentary trust grants the trustee uncontrolled discretion over payments to the beneficiary, it is considered a discretionary trust for purposes of Medicaid eligibility. Because the beneficiary of a discretionary trust does not have the ability to compel distributions from

the trust, only those distributions of income, principal, or both actually made by the trustee may be considered as available assets when evaluating Medicaid eligibility.

Considering the terms of Eric's Trust under the *Pohlmann* framework, we conclude the discretion afforded the trustee here is even broader than that considered in *Pohlmann.* On this record, we conclude Eric lacks the ability to compel distribution of the corpus, and it thus is not an available asset for purposes of determining his Medicaid eligibility. As such, while any distributions actually made by the trustee can be considered as available assets when evaluating Eric's eligibility for Medicaid,[53] it was error to find the entire trust corpus was an available resource.

V. CONCLUSION

Eric's Trust is properly characterized as a testamentary trust, and DHHS regulations provide that testamentary trusts may be excluded as resources "depending on the availability of the funds to the individual or his/her spouse as specified in the terms of the trust."[54] Under *Pohlmann*, courts determine whether testamentary trusts are "available" for purposes of Medicaid eligibility by determining whether the trust is properly classified as either a support trust or a discretionary trust. Applying *Pohlmann* here, we conclude Eric's Trust is a discretionary trust and he does not have the ability to compel distribution of the entire corpus. As such, we reverse the judgment of the district court and remand the matter to the district court for further consideration in accordance with this opinion.

Reversed and remanded with directions.

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[53] See *Pohlmann, supra* note 13.

[54] § 001.15A12.

State of Nebraska, appellee, v. Carlos A. Tucker, appellant.

920 N.W.2d 680

Filed December 14, 2018. No. S-17-926.

1. **Rules of Evidence: Appeal and Error.** An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on relevance, whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, and the sufficiency of a party's foundation for admitting evidence.
2. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
3. **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.
4. **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.
5. **Evidence: Words and Phrases.** Evidence is relevant if it tends in any degree to alter the probability of a material fact.
6. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
7. **Evidence.** Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party.
8. **Evidence: Words and Phrases.** Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.

9. ____: ____. Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.
10. **Witnesses: Juries: Appeal and Error.** The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review.
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 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.
12. **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.
13. ____. 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.
14. ____. Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, and, on brief, Sarah E. Marfisi for appellee.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

Carlos A. Tucker appeals his convictions and sentences for one count of first degree sexual assault of a child and two

counts of incest, related to an incident with his girlfriend's children. Evidence at trial showed that Tucker engaged in sex acts with M.T., age 11, and that M.T. and her two brothers, E.T., age 12, and R.T., age 10, engaged in sex acts upon Tucker's instructions. The main issue presented by this appeal is whether the district court abused its discretion in admitting "Y-STR" DNA evidence over Tucker's objections. We conclude that it did not. We further reject Tucker's contentions that the evidence was insufficient to support his convictions and that the district court imposed excessive sentences. Finding no error, we affirm.

BACKGROUND

Charges Against Tucker.

The State charged Tucker with one count of first degree sexual assault of a child in violation of Neb. Rev. Stat. § 28-319.01(2) (Reissue 2016) and two counts of incest with a person under 18 years of age in violation of Neb. Rev. Stat. § 28-703 (Reissue 2008). The charges arose out of allegations by M.T., E.T., and R.T. that Tucker, their mother's live-in boyfriend, had engaged in sex acts with M.T. and that M.T. had engaged in sex acts with E.T. and R.T. after being instructed to do so by Tucker.

Pretrial Proceedings.

Prior to trial, Tucker filed a motion in limine seeking to exclude all evidence of Y-STR DNA testing pursuant to *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) (*Daubert/Schafersman*). He also alleged that such evidence would confuse the jury and that its prejudicial effect would outweigh its probative value.

At a pretrial hearing on the motion, the district court heard expert testimony by Shannen Bishop, a DNA analyst at the University of Nebraska Medical Center (UNMC). Bishop testified concerning the Y-STR DNA analysis she conducted on

DNA found on the interior of the shorts M.T. wore on the day of the alleged assault. Bishop also explained the origins, mechanics, and limitations of Y-STR DNA testing, as well as the extent to which it is accepted in the scientific community. Bishop testified that Y-STR DNA testing looks only at the male chromosome portion of DNA, while autosomal DNA testing looks at all 23 chromosomes inherited by each person. She dismissed as irrelevant several journal articles submitted by Tucker purporting to discredit the application of Y-STR DNA testing to small ethnic populations. Bishop explained that the articles examined very small, specific sample sizes and that Y-STR DNA science has improved since the articles were published in the early 2000's. She further pointed out that the U.S. Y-STR database, which she used in her analysis, was not even established when most of the articles were written.

Following the hearing, the district court denied Tucker's motion in limine. It applied the *Daubert*/*Schafersman* analytical framework and determined the reasoning and methodology behind Bishop's opinions and Y-STR DNA testing to be valid and reliable. The district court further rejected Tucker's argument that the prejudicial effect of Y-STR DNA evidence outweighed its probative value.

Evidence at Trial.

At the jury trial, M.T., E.T., and R.T. testified that on the day at issue, their mother was at work and Tucker was home with them. The children testified that Tucker, then age 31, invited them to play a series of games in which he would give the winner candy. The games began innocuously enough with the children competing to be the last to laugh, but they progressed to include the children undressing. In one game, the children undressed and Tucker hid their clothes. In another, Tucker instructed the children to switch clothing with one another.

The children testified that after a series of these games, Tucker directed them to the living room. Tucker instructed the children to disrobe completely, and he played pornography

on the television. The boys testified that Tucker told them to masturbate. All three children testified that at some point while they were in the living room, Tucker licked M.T.'s vagina, and E.T. and R.T. testified that they followed Tucker's instructions to do the same. The three children testified that Tucker also directed M.T. to put her mouth on his penis while, M.T. testified, he used his hand to move her head. All three children also testified that M.T. complied with Tucker's instructions to put her mouth on E.T.'s and R.T.'s penises as well, with R.T. specifying that M.T. "suck[ed]" on their penises. There was also testimony that Tucker placed an electric toothbrush on M.T.'s vagina. The children testified that they saw "white stuff" or "clear stuff" come out of Tucker's penis, which he wiped off with a tissue or napkin. R.T. observed some of the fluid from Tucker's penis fall onto the carpet. M.T. and E.T. testified that Tucker referred to their activities as "sex ed."

During cross-examination, which referenced previous interviews, it was revealed that the children's testimony contained some inconsistencies on such matters as the sequence of the games, the objects of the games, their relative stages of undress during portions of the games, who won each game, the content of the pornography, the sequence of the sex acts, and whether sex acts occurred involving M.T.'s breasts or two persons performing sex acts with M.T. at the same time. However, each child testified that on the day in question, M.T. performed fellatio on Tucker and both brothers upon Tucker's instructions and that Tucker performed cunnilingus on M.T.

Contrary to Tucker's instructions to the children not to disclose what happened, the children informed their mother. After law enforcement was alerted, police conducted a search of the residence the children shared with their mother and Tucker. They found candy wrappers for the same type of candy the children reported Tucker had given to them. A stain found on the living room rug tested positive for semen. DNA testing showed that the semen had the same genetic profile as Tucker and that the probability of randomly selecting an unrelated

individual with a DNA profile matching the sample was 1 in 752.4 quintillion. The State also introduced Y-STR DNA evidence found on the shorts M.T. wore on the day of the alleged offenses. This evidence is discussed in more detail in the section below.

Tucker testified in his own behalf. He denied engaging in any sex acts with the children.

Y-STR DNA Evidence.

The State called Bishop to testify regarding Y-STR DNA testing. Tucker's counsel made a continuing objection to the Y-STR DNA testing and any opinions derived from such testing based on *Daubert*/*Schafersman*, because such evidence was "inherently unreliable and unfairly prejudicial and otherwise not relevant." The district court overruled the continuing objection.

Bishop testified that she is a forensic science DNA analyst at UNMC and that she had performed Y-STR DNA testing on extractions from the interior of M.T.'s shorts. Bishop stated that Y-STR DNA testing was a method of looking only at the male Y-chromosome. Bishop explained Y-STR DNA testing is often used in sexual assault cases because it can identify a male's contribution to a sample, such as a vaginal swab, that may have many more cells from a female contributor than a male contributor. Bishop testified that UNMC has performed Y-STR DNA analysis since the early 2000's and that UNMC has used the particular Y-STR DNA kit used in this case since 2012. Bishop stated that Y-STR DNA analysis is an accepted forensic tool in the forensic analysis community that has been available since the early 2000's.

Bishop explained that the Y-STR DNA testing process is essentially the same as autosomal DNA testing, but admitted that there is a great deal of difference between the discriminatory power of autosomal DNA testing versus Y-STR DNA testing. She testified that autosomal DNA testing can produce results showing that a particular profile is extremely rare in the

population, but because the same Y-STR DNA profile is passed to all males in the same lineage and additionally may be present in unrelated members of the general population, Y-STR DNA testing results will not show that a particular profile is as rare. She acknowledged that a coincidental random match might occur one in several quintillion times with autosomal DNA testing but one in a few thousand times with Y-STR DNA testing.

Bishop testified that Y-STR DNA testing identified Y-STR DNA present on the interior of M.T.'s shorts and that it consisted of a mixture of at least two male individuals. Bishop testified that she could not determine what type of cell contributed the Y-STR DNA profile to M.T.'s shorts or how it was deposited there. However, she stated that the major Y-STR DNA profile she found on the shorts matched Tucker at all of the loci obtained and that, consequently, Tucker was not excluded as a potential major source of the DNA tested.

Bishop testified that to calculate the frequency of Tucker's Y-STR DNA profile within the population, it was necessary to consult a database. Bishop testified and her report reflected that according to the U.S. Y-STR database, the probability of randomly selecting a second individual with the same Y-STR DNA profile, given that Tucker expresses such a profile, was 1 in 1,842 for African Americans. Tucker does not dispute the he is African American.

Bishop's report reflected that the U.S. Y-STR database was maintained by a national institute in the forensic science field. Bishop admitted that the U.S. Y-STR database had changed since her analysis because it is always gaining contributors. She further admitted that it was possible that the more individuals that contribute, the better the database will be at discerning the likelihood of a particular profile appearing in the general population.

A forensic scientist with the Nebraska State Patrol Crime Laboratory's biology unit also explained the statistical limitations arising from the patrilineal recurrence of Y-STR DNA

and the possible occurrence in the general population, consistent with Bishop's testimony.

Jury Verdict and Sentencing.

The jury returned a verdict finding Tucker guilty on all charges. The district court ordered a presentence investigation report (PSR). The PSR reflected that Tucker, then age 33, had a traumatic childhood. Tucker's father was not involved in his life, and he reported that he and his 10 siblings all have different fathers. Tucker grew up in an area where gang crime and drugs were prevalent. He reported that his mother was a drug user and that he "'had to find ways to eat and live.'" As a child, he witnessed his mother shoot her boyfriend, and he developed post-traumatic stress disorder as a result. He has also been diagnosed with paranoid schizophrenia, bipolar disorder, and manic depression.

Tucker has been involved in criminal activity since his youth. His criminal history includes a term of probation and incarceration for forgery and escape and other jail terms of considerable length for theft. His other offenses include a number of drug charges, false information, false reporting, failure to appear, attempted tampering with a witness, and various traffic offenses.

Tucker had completed an associate degree in theology and anthropology, and he wanted to continue his education. At the time of the present offenses, he was an owner-employee of an aquatic pet store. In the past, Tucker had worked as a dishwasher, cook, and telemarketer. When he was not employed, he supported himself by selling marijuana.

The PSR noted that Tucker had refused to take responsibility for the crimes charged, consistently maintaining that he had not committed them and declining to participate in risk assessment for sex offenses. The PSR also included a victim impact letter from the children's mother. She stated that Tucker's crimes had led to a deterioration of her relationships with her children and behavior issues.

At the sentencing hearing, the district court stated that it had considered the evidence at trial and the PSR in their entirety, particularly Tucker's pattern of criminal behavior and failure to take responsibility for his actions or empathize with the victims in this case. The district court noted that its sentencing took into account the nature and circumstances of the crimes and Tucker's history, character, and condition.

The district court sentenced Tucker to 30 to 50 years' imprisonment for first degree sexual assault of a child and 10 to 20 years' imprisonment for each of the two counts of incest, with all sentences to be served consecutively.

Tucker now appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Tucker assigns, rephrased, (1) that the district court erred in admitting unreliable Y-STR DNA evidence, causing undue prejudice; (2) that the evidence was insufficient to prove the crimes charged; and (3) that the district court abused its discretion in imposing excessive sentences.

STANDARD OF REVIEW

[1] An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on relevance, whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, and the sufficiency of a party's foundation for admitting evidence. *State v. Trotter*, 299 Neb. 392, 908 N.W.2d 656 (2018).

[2] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. Oliveira-Coutinho*, 291 Neb. 294, 865 N.W.2d 740 (2015).

[3] 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. Wells*, 300 Neb. 296, 912 N.W.2d 896 (2018).

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

ANALYSIS

Admissibility of Y-STR DNA Evidence.

Tucker challenges the admission of the Y-STR DNA testing and any opinions derived from such testing. His brief contends that the probative value of this evidence was outweighed by its prejudicial effect because the evidence is unreliable. We understand Tucker to be making two basic arguments against the admissibility of the Y-STR DNA evidence. The primary argument is a contention that the inherent nature of Y-STR DNA evidence makes its admission unfairly prejudicial in any case. The second challenges the reliability of the conclusions regarding the Y-STR DNA evidence reached in this case. We take up each of these contentions in turn.

[5-9] We first address Tucker's arguments that the Y-STR DNA evidence was unfairly prejudicial. Evidence is relevant if it tends in any degree to alter the probability of a material fact. *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016). Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Grant, supra.* Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party. *State v. Chauncey*, 295 Neb. 453, 890 N.W.2d 453 (2017). Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. *Id*. It speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis. *Id*.

Tucker's primary argument against the admission of the Y-STR DNA evidence is that juries will inevitably base their decision on an improper basis by incorrectly perceiving the Y-STR DNA "match" testimony as conclusively connecting the defendant to the sample. Tucker asserts that jurors are inclined to think of any evidence of a DNA "match" of having an extremely small probability of being the result of coincidence. But, as he correctly points out, the Y-STR DNA testing in this case led to a 1-in-1,842 chance of a coincidental match. According to Tucker, this relatively greater chance of a random match renders the evidence "completely unreliable." Brief for appellant at 37.

We have previously recognized a risk that a jury might give undue weight to DNA evidence if it is introduced without proper context. See *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015). In *Johnson*, we observed that "'[b]ecause the potential precision of DNA testing is so well known, a jury might assume that any DNA profile match is extremely unlikely and therefore extremely probative'—even when this is not true." 290 Neb. at 883, 862 N.W.2d at 774, quoting *Peters v. State*, 18 P.3d 1224 (Alaska App. 2001). We have not, however, concluded that the appropriate measure to prevent a jury from making such an assumption is the wholesale exclusion of DNA evidence falling below a certain threshold of precision. Rather, we have emphasized the need for evidence of DNA testing to be accompanied by evidence of the statistical significance of the findings if it is to be admitted. *Johnson, supra.*

In this case, Tucker cannot contend that the State sought to introduce the Y-STR DNA evidence without the necessary statistical context. As we have noted, the State introduced much evidence regarding the statistical context for the Y-STR DNA evidence. The jury heard explanations of the relative probative value of Y-STR DNA testing and autosomal DNA testing. Both forensic scientists testified that males share the same Y-STR DNA profile with other males in the same paternal lineage,

as well as others in the general population. Their testimony clearly illustrated that due to this recurrence, Y-STR DNA testing results are not as probative as autosomal DNA testing results. They both explained that Y-STR DNA statistical analysis would not render coincidental random match probabilities such as one in several hundred quintillions, showing a particular profile is extremely rare in the population. Instead, Bishop testified, Y-STR DNA testing might produce a random match probability of one in a few thousand, as it did in this case, where Y-STR DNA statistical analysis revealed a 1-in-1,842 probability for African-American contributors that a random Y-STR DNA profile unrelated to this case would match the profile found on M.T.'s shorts. Because the Y-STR DNA testing results were accompanied by the required statistical context, its admission was consistent with the principles we set forth in *Johnson*.

Moreover, we do not believe that Y-STR DNA evidence is so unique that something other than the principles of *Johnson* should govern its admissibility. The probabilities of a coincidental match may be exponentially greater with Y-STR DNA evidence than with autosomal DNA evidence, but, if those differences are explained to the jury, we see no reason why jurors would be incapable of grasping the difference. We have previously rejected claims that jurors would not be capable of assigning appropriate weight to "the statistical analysis that accompanies DNA evidence," *State v. Bauldwin*, 283 Neb. 678, 703, 811 N.W.2d 267, 288 (2012), and reject any suggestion that would be the case with Y-STR DNA evidence.

Y-STR DNA evidence may be less probative than other DNA evidence, but if we were to find it inherently prejudicial, as Tucker urges, we would be treating such evidence differently from other types of evidence that have similar probative value and that are introduced for the same purpose. As the district court and other courts have observed, Y-STR DNA evidence can be used in much the same manner as shoe imprint evidence. Shoe imprint evidence is routinely admitted to show

that an imprint at a crime scene matches shoes owned by a defendant even though any number of individuals may own shoes identical to the defendant's.

> The coincidence that [a Y-STR DNA] profile matches that of defendant is probative of his guilt in the same manner as if he had owned shoes that matched a foot imprint found at the crime scene. It is up to the jury to weigh the probative value of that evidence in light of the fact that a significant number of other individuals may possess the same profile.

State v. Calleia, 414 N.J. Super. 125, 152, 997 A.2d 1051, 1067 (2010), *reversed on other grounds* 206 N.J. 274, 20 A.3d 402 (2011). See, also, *People v. Stevey*, 209 Cal. App. 4th 1400, 148 Cal. Rptr. 3d 1 (2012).

Finally, we note that our conclusion that the Y-STR DNA evidence introduced in this case was not unfairly prejudicial is not a novel conclusion. Courts in a number of other states have reached the same conclusion. See, e.g., *State v. Escalante-Orozco*, 241 Ariz. 254, 386 P.3d 798 (2017), *abrogated on other grounds, State v. Escalante*, 245 Ariz. 135, 425 P.3d 1078 (2018) (Y-STR profile evidence is not misleading, nor is its probative value outweighed by risk of unfair prejudice; jury is capable of understanding limited probative value of this evidence and giving it whatever weight it deserves); *State v. Jones*, 345 P.3d 1195 (Utah 2015) (Y-STR DNA evidence properly explained to jury such that risk of unfair prejudice through confusing or misleading jury did not substantially outweigh probative value of evidence); *People v. Wood*, 307 Mich. App. 485, 862 N.W.2d 7 (2014), *vacated in part on other grounds* 498 Mich. 914, 871 N.W.2d 154 (2015) (limitations of Y-STR DNA testing were presented to jury such that there was no danger of confusion or other unfair prejudice that would substantially outweigh probative value).

Having rejected Tucker's argument that Y-STR DNA evidence is inherently unfairly prejudicial, we move to Tucker's

assertion that the testimony offered regarding the Y-STR DNA evidence in this case was unreliable. Here, Tucker claims that the database used by Bishop to arrive at her statistical conclusions may not be representative of the population in a given area and that therefore, there is a risk that Tucker's Y-STR DNA is even more common than Bishop acknowledged and thus there is an even greater chance of a coincidental match. This seems to be an attempt at a *Daubert*/*Schafersman* challenge, even though Tucker's brief does not cite to *Daubert*/*Schafersman* or address its framework. But even if we liberally construed Tucker's brief as having framed his argument as a *Daubert*/*Schafersman* issue, the argument fails.

Tucker's argument is premised in part on contentions about the U.S. Y-STR database made in articles published in 2003. Bishop, however, testified at the *Daubert*/*Schafersman* hearing that she was familiar with the articles Tucker relies upon. She explained that she found these articles to be irrelevant, because they were about very small sample sizes and Y-STR DNA science has improved since their publication. In fact, she testified that the U.S. Y-STR database upon which she relied was not even established at the time the articles upon which Tucker bases his challenge were written. The remaining article Tucker cites to support this argument was not presented to the district court and is not in the record before us for consideration. See *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014) (party's brief may not expand evidentiary record). Given Bishop's testimony concerning the articles Tucker offered to the district court, we see no abuse of discretion in the admission of the Y-STR DNA evidence.

In sum, we conclude that the Y-STR DNA evidence in this case did not suggest a decision based on an improper basis and that thus, its prejudicial effect did not outweigh its probative value. Moreover, Tucker's *Daubert*/*Schafersman* arguments also fail. Therefore, the district court did not abuse its discretion in admitting such evidence at trial.

Sufficiency of Evidence.

We next address Tucker's argument that the evidence was not sufficient to support his convictions. The relevant question when such a challenge is made 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. McCurdy, ante* p. 343, 351, 918 N.W.2d 292, 298 (2018). Tucker, however, does not contend that there was no evidence of the essential elements of either first degree sexual assault of a child or incest. And, given the testimony at trial that Tucker penetrated M.T.'s mouth with his penis when M.T. was 11 years old and Tucker was 31 years old; that Tucker performed cunnilingus on M.T.; that Tucker placed an electric toothbrush on M.T.'s vagina; and that upon Tucker's instructions, M.T. performed fellatio on E.T. and R.T., and E.T. and R.T. performed cunnilingus on M.T., such an argument is not available to him.

Instead, Tucker argues that because the children "did not testify to a cohesive story either individually or collectively," brief for appellant at 43, no rational juror could have found Tucker guilty beyond a reasonable doubt. In other words, Tucker is asking us to reweigh the evidence and find that the testimony of the children was not credible. "But that is not the role of an appellate court." *State v. Jones*, 296 Neb. 494, 499, 894 N.W.2d 303, 307 (2017).

[10] The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). Our task is limited to determining whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that Tucker committed the charged offenses. See *id.* Based on the evidence summarized above, we conclude it could.

Excessive Sentences.

Finally, we address Tucker's claim that he received excessive sentences. Tucker does not dispute that the sentences imposed were within statutory limits. Rather, he argues only that the district court did not meaningfully consider his childhood trauma, mental condition, and need for rehabilitation. We conclude that the district court did not abuse its discretion in sentencing Tucker.

[11-14] 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. Steele*, 300 Neb. 617, 915 N.W.2d 560 (2018). And generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively. *State v. Leahy, ante* p. 228, 917 N.W.2d 895 (2018).

Our review of the record demonstrates that the district court properly considered and applied the necessary sentencing factors. The PSR shows that Tucker exhibited mental illness after having grown up in an environment of poverty, crime, drug use, instability, and trauma. Certainly, these disadvantages were relevant to the sentencing calculus, but the district court stated that it considered the PSR in its entirety, and we have

no reason to believe the district court did not weigh those disadvantages against other factors. Those other factors, however, would include Tucker's significant pattern of criminal behavior and the nature of the offenses at issue. On this point, the record shows that Tucker's crimes against the children in this case were particularly serious. Tucker used games and candy to systematically lure children in his care into participating in acts that will have a lasting negative impact on their lives. And as the district court emphasized, Tucker has not taken responsibility for his actions.

Having reviewed the record and the district court's remarks in light of the familiar sentencing factors set forth above, we conclude that the district court did not abuse its discretion in sentencing Tucker within statutory limits.

CONCLUSION

We conclude that the district court did not abuse its discretion in admitting Y-STR DNA evidence at trial. We further determine that the evidence presented at trial was sufficient to support Tucker's convictions and that the district court did not abuse its discretion in sentencing him. Consequently, we affirm.

Affirmed.

Miller-Lerman, J., not participating.

State of Nebraska, appellee, v. Courtney J. Savage, appellant.

920 N.W.2d 692

Filed December 14, 2018. No. S-17-1166.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence, it does not matter 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 finders of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
5. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
6. **Pleadings: Evidence: Appeal and Error.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury, but is not an appealable order. The purpose of a motion in limine is to produce, when appropriate, an advance ruling on anticipated objectionable material, and the denial of the motion cannot, in and of itself, constitute reversible error.

7. **Rules of Evidence: Proof.** A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.
8. **Rules of Evidence.** Generally, the foundation for the admissibility of text messages has two components: (1) whether the text messages were accurately transcribed and (2) who actually sent the text messages.
9. **Rules of Evidence: Proof.** The proponent of text messages is not required to conclusively prove who authored the messages. The possibility of an alteration or misuse by another generally goes to weight, not admissibility.
10. **Rules of Evidence: Hearsay: Proof.** The State must prove by a greater weight of the evidence that a defendant authored or made a statement in order to establish preliminary admissibility as nonhearsay under Neb. Rev. Stat. § 27-801(4)(b)(i) (Reissue 2016).
11. **Rules of Evidence: Proof.** Under what is commonly and incorrectly referred to as the "best evidence rule," in order to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required.
12. ____: ____. The "original writings rule" applies only if the party offering the evidence is seeking to prove the contents of a writing, recording, or photograph.
13. **Rules of Evidence.** The rule of completeness allows a party to admit the entirety of an act, declaration, conversation, or writing when the other party admits a part and when the entirety is necessary to make it fully understood.
14. ____. The rule of completeness is concerned with the danger of admitting a statement out of context, but when this danger is not present, it is not an abuse of discretion to refuse to require the production of the remainder or, if it cannot be produced, to exclude all the evidence.
15. **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.
16. **Directed Verdict: Appeal and Error.** When a defendant makes a motion at the close of the State's case in chief and again at the conclusion of all the evidence, it is proper to assign as error that the defendant's motion to dismiss made at the conclusion of all the evidence should have been sustained.
17. **Convictions: Evidence: Appeal and Error.** A conviction will be affirmed in the absence of prejudicial error if the properly admitted

evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

18. **Convictions: Corroboration: Witnesses: Testimony.** When the law requires corroboration of a witness to support a conviction, a witness' testimony must be accompanied by evidence other than that from the witness.
19. **Convictions: Corroboration: Witnesses: Testimony: Controlled Substances.** Under the Uniform Controlled Substances Act, corroboration is sufficient to satisfy the requirement that a conviction not be based solely upon uncorroborated testimony of an individual cooperating with the prosecution if the witness' testimony is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.
20. **Criminal Law: Corroboration: Testimony.** Testimony of a cooperating individual need not be corroborated on every element of a crime.
21. **Convictions: Controlled Substances: Evidence: Proof.** Evidence that a defendant had constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession and to sustain a conviction for unlawful possession.
22. **Controlled Substances: Evidence: Proof.** Constructive possession may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance.
23. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

Darik J. Von Loh, of Hernandez Frantz, Von Loh, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Freudenberg, J.

I. NATURE OF CASE

Courtney J. Savage was arrested and charged with possession of a controlled substance with intent to deliver, in violation of Neb. Rev. Stat. § 28-416(2)(a) (Reissue 2016), a Class II felony. He was further alleged to be a habitual criminal pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 2016). During trial, the State produced evidence of text messages from what was purported to be Savage's cell phone, which indicated that Savage was selling the illegal drug methamphetamine. Savage objected to the offer of the text messages on foundation and hearsay grounds, primarily arguing that the identity of the message author was unclear. The district court overruled his objections, and after trial, a jury found Savage guilty. The district court determined that Savage was a habitual criminal and ordered him to serve 10 to 18 years in prison. Savage appeals from his conviction.

II. BACKGROUND

Savage was arrested and charged with possession of a controlled substance with intent to deliver, in violation of § 28-416. Further, he was alleged to be a habitual criminal pursuant to § 29-2221. Following trial, he was convicted and found to be a habitual criminal. Savage was subsequently sentenced to a term of 10 to 18 years' incarceration. The facts of his arrest and trial leading to his conviction follow.

1. February 16 and 17, 2017, Arrest

During the night of February 16, 2017, and the early morning hours of February 17, Lincoln Police Department officers Anthony Gratz and Andrew Barksdale arrested Michael Dryden for possession of methamphetamine with intent to deliver. After being brought to the police station to be interviewed, Dryden received several text messages from an individual referred to as "Pint" seeking to sell Dryden methamphetamine. Later, through a review of the Lincoln Police Department's records management system, it was learned that "Pint" was a nickname for Savage.

With Dryden's permission, the officers borrowed Dryden's cell phone and continued to communicate with Savage, hoping to find him and arrest him for his potential illegal methamphetamine sale to Dryden. After multiple text messages were exchanged, a meeting to purchase methamphetamine was arranged to occur at an agreed-upon location in Lincoln, Nebraska. When the officers arrived at that location, they parked in a nearby alleyway, began surveillance, and continued the text conversation.

The officers received a message from Savage's cell phone indicating that he was at the agreed-upon location. Seeing no one arrive, the officers drove around the block. The officers then saw a blue two-door Toyota. The police cruiser and the Toyota were the only vehicles in the area. Almost immediately after the police saw the Toyota drive by, Dryden's cell phone received a text message stating: "Police [are] outside."

The officers concluded that Savage was in the passing Toyota. The officers followed the Toyota and observed it fail to properly signal a turn. The officers initiated a traffic stop of the Toyota.

During the stop, one of the officers approached the driver's side of the Toyota while the other officer approached the passenger's side. Gratz made contact with the driver, Johnathon Addleman, and asked for his license and registration. When Addleman failed to produce the requested documentation, Gratz asked him to exit the Toyota. Savage was sitting in the passenger seat of the Toyota and appeared to be using his cell phone. Another passenger, Christine Tannehill, was in the back seat.

While Gratz was questioning Addleman, Barksdale attempted to make contact with Savage in the passenger seat. However, Savage would not acknowledge Barksdale and maintained eye contact with his cell phone. After some time, Savage opened the door to speak with Barksdale. At that point, Barksdale observed that Savage's zipper was undone and a part of his pants was pulled through the zipper opening.

Addleman later explained to Gratz that as the officers were pulling the Toyota over, Savage was "wrestling around in the groin area of . . . his pants" and threw a bag at Tannehill, instructing her to "put it in [her] pussy." Tannehill was questioned by the officers, at which time she admitted to having methamphetamine on her person and turned it over to the officers. At trial, several of the State's witnesses, including Gratz and Barksdale, testified that it was common for individuals possessing drugs to hide them in or near their genitalia.

Within the surrendered bag, there were three smaller individual bags, each of which pretested positive for amphetamine. Later, a laboratory test confirmed that the substance was methamphetamine. The three bags, collectively, contained in excess of 7.6 grams of the substance. In addition to the bags of methamphetamine, an officer collected each person's cell phone. Later, the cell phones were analyzed and data was extracted for investigative purposes.

2. Motion in Limine

Prior to trial, Savage filed a motion in limine to exclude evidence of various text messages contained on Savage's and Dryden's cell phones. Savage argued that the State would be unable to authenticate the text messages because, although the messages were being sent from Savage's cell phone, there was no way to prove that Savage was the one texting Dryden at the relevant time. Savage further argued that the text messages would be hearsay and overly prejudicial. The State responded that it could produce the foundation for admission of the text messages into evidence by (1) proving that the cell phone in question was Savage's, (2) proving that the cell phone was in Savage's possession at the time of his arrest, and (3) presenting witness testimony that Savage was sending the messages at issue. The district court overruled Savage's motion in limine.

3. Trial

At trial, the State had several witnesses testify as to the events of February 16 and 17, 2017, including Gratz, Barksdale,

Dryden, Addleman, and Tannehill. Gratz and Barksdale specifically testified that a typical "personal use amount" of methamphetamine was about 0.2 grams, thereby indicating that the amount in this case was a "dealer quantity."

(a) Exhibit 6

During Gratz' testimony, the State offered exhibit 6, photographs of the text conversation between the officers and Savage's cell phone, into evidence. Savage objected to this on foundation and hearsay grounds, asserting that the State did not prove that Savage authored those text messages. The State claimed that it had met its burden regarding foundation and authentication, insofar as Gratz testified that he saw Savage using Savage's cell phone at the time of the arrest. The district court overruled Savage's objection.

(b) Exhibits 8 and 23

The State also offered into evidence exhibits 8 and 23, portions of extractions from Savage's and Dryden's cell phones containing text messages and cell phone logs from the relevant time period. A police officer testified that he extracted and analyzed the data from Savage's cell phone using a program called Cellbrite. The officer stated that he found that Savage's cell phone's wireless network tethering service, or access point, had "Savage 11" as the password associated with it. Another police officer testified that he extracted and analyzed the data from Dryden's cell phone also using the Cellbrite program.

Savage objected to both exhibits 8 and 23 on hearsay, foundation, best evidence, and completeness grounds. Savage elaborated that exhibit 23 was inadmissible because (1) the State did not prove that Savage authored the relevant messages and (2) it was only a portion of the Cellbrite report. The district court overruled the objections.

(c) Dryden

Both Dryden and Addleman testified in the State's case in chief pursuant to cooperation agreements. Dryden testified

that as a dealer of methamphetamine, he purchased that drug from Savage, whom he knew only by the name "Pint," on a few occasions. However, Dryden stated that he communicated with Savage only through a family member of Savage's and never spoke to Savage on the cell phone directly. In fact, Savage was not listed as a contact in Dryden's cell phone. Dryden also testified that Tannehill was always present during these sales and that she appeared to be "overseeing" the operation.

(d) Addleman

Addleman testified that he met Savage and Tannehill at a house in Lincoln and agreed to give them a ride to another location where they were allegedly going to drop off a large amount of methamphetamine. Addleman stated that Tannehill was giving directions to the address while appearing to use Savage's cell phone.

Addleman asserted that after the arrest, Savage devised a plan to implicate Tannehill. Addleman agreed with Savage's request that he sign a notarized statement implicating Tannehill. In his testimony, he claimed that Savage had him rewrite the statement approximately four times. Addleman asserted that he agreed to write the statement only because he wanted to avoid being labeled a "snitch" while at the jail. After he was released from jail, Addleman immediately contacted the public defender's office and the police department to advise them of Savage's plan and the falsity of his notarized statement.

(e) Christina Krueger

Savage called Christina Krueger to testify on his behalf. Krueger was employed with the Lancaster County jail as a correctional officer. She testified that in the course of her employment, she regularly watched the inmates and often interacted with them. She stated that during Savage and Addleman's time in jail, she became familiar with Savage and Addleman and had interacted with them. Krueger testified that she was aware of Savage and Addleman's interaction regarding Addleman's

notarized letter. She testified that, though she did not actually see the contents of the letter, Addleman did not seem under duress; nor did she notice any strange behaviors. Krueger testified that Addleman stated that he was signing freely and voluntarily before the notary. She noted the existence of certain procedures for inmates to request "protective custody" if they are being harassed by another inmate. On cross-examination, Krueger testified that Savage was the one who initiated the notarization process.

(f) Tannehill

Tannehill stated that her primary reason for testifying was because she was subpoenaed and wanted to ensure that Savage was held accountable for his actions on the night of February 16, 2017. She did not testify pursuant to a cooperation agreement, as she had already pled guilty to her charges. Tannehill stated that she was a user of methamphetamine and that she had previously purchased that drug from Savage, whom she knew only by the name "Pint" until the night of their arrest.

Tannehill further testified that Savage came over to her house on the evening of February 16, 2017, and asked her to drive him to Lincoln. She agreed, and the pair eventually arrived at a Lincoln house where there were several people, including Addleman. Tannehill admitted to smoking methamphetamine given to her by Savage and observing Savage weighing the drug while at the house.

Tannehill testified that Addleman later agreed to give Savage and Tannehill a ride to a subsequent location, where the pair were allegedly going to drop off "quite a big amount" of methamphetamine. Tannehill testified that while in the car, Savage gave her his cell phone to check the address of the location. She testified that she did not send or receive any text messages while on his cell phone, but simply utilized a map application thereon. Shortly after the police began following Addleman's Toyota, Savage took the drugs out of his pants and instructed Tannehill to put them in her vagina.

4. Verdict

At the close of the State's evidence, Savage moved for the court to dismiss the case, alleging that the State had not met its burden of proof beyond a reasonable doubt. The district court overruled his motion. Savage renewed the motion for a directed verdict at the close of all the evidence, which motion the district court again denied. After deliberations, the jury found Savage guilty and the district court accepted the jury's verdict.

5. Posttrial and Sentencing

The court held an enhancement hearing where Savage was determined to be a habitual criminal under § 29-2221. Subsequently, at the sentencing hearing, the district court sentenced Savage to a term of not less than a mandatory minimum of 10 years' and not more than 18 years' imprisonment.

III. ASSIGNMENTS OF ERROR

Savage assigns, rephrased and renumbered, that the district court erred in (1) overruling Savage's motion in limine; (2) overruling Savage's motion to dismiss at the close of the State's case; (3) allowing the case to go to a jury without sufficient evidence to support a verdict; (4) allowing evidence of text messages from Savage's and Dryden's cell phones over hearsay, foundation, completeness, and best evidence objections; and (5) abusing its discretion by imposing an excessive sentence.

IV. STANDARD OF REVIEW

[1,2] When reviewing a criminal conviction for sufficiency of the evidence, it does not matter whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finders of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt.[1] Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[2]

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[3] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[4]

[5] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[5]

V. ANALYSIS

1. Admissibility of Text Messages and Cellbrite Reports

[6] In his first assignment of error, Savage assigns that the district court erred in overruling his motion in limine to prevent the State from entering into evidence the text messages and Cellbrite extraction reports. We have held that a motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury, but is not an appealable order.[6] The purpose of a motion in limine is to produce, when appropriate, an advance ruling on anticipated objectionable material, and the

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[1] *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). See, also, *State v. Hill*, 298 Neb. 675, 905 N.W.2d 668 (2018).

[2] *State v. Dixon, supra* note 1.

[3] *State v. Hill, supra* note 1.

[4] *Id.*

[5] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[6] See *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983).

denial of the motion cannot, in and of itself, constitute reversible error.[7] However, because Savage preserved his objections during trial and assigns the respective rulings thereon as errors in this appeal, we address the admissibility of the text messages and Cellbrite extraction reports.

The evidence at issue is found in exhibits 6, 8, and 23. Exhibit 6 contains photographs of Dryden's cell phone with the text messages between Savage's cell phone and Dryden's cell phone on the screen. Exhibits 8 and 23 are portions of the forensic data extractions of Savage's and Dryden's cell phones containing the same text messages, as well as other messages and call logs occurring around the same time.

(a) Authentication

Savage first contends that the district court erred in allowing exhibits 6, 8, and 23 into evidence, because the text messages contained therein were not properly authenticated. A court's ruling on authentication is reviewed for an abuse of discretion.[8]

[7] Under the Nebraska Rules of Evidence, the 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.[9] We have noted that this rule does not impose a high hurdle for authentication or identification.[10] A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.[11]

[8] Generally, the foundation for the admissibility of text messages has two components: (1) whether the text messages

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[7] See *id*.

[8] *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016); *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[9] Neb. Rev. Stat. § 27-901(1) (Reissue 2016).

[10] *State v. Elseman*, 287 Neb. 134, 841 N.W.2d 225 (2014).

[11] *Id.*

were accurately transcribed and (2) who actually sent the text messages.[12] Savage does not challenge the first prong of this test, but, rather, argues that the State failed to prove that Savage was the author of the text messages.

[9] The State met its burden for authentication regarding the text messages in exhibits 6, 8, and 23. The State need show only by a greater weight of the evidence that the text messages were authored by Savage—in other words, that the text messages were more likely than not authored by Savage. The proponent of the text messages is not required to conclusively prove who authored the messages.[13] The possibility of an alteration or misuse by another generally goes to weight, not admissibility.[14] Thus, the district court did not abuse its discretion in overruling Savage's foundation and authentication objections to the text messages found within exhibits 6, 8, and 23.

Also respecting the authentication of text messages, Savage argues that the current test, as analyzed above, should be replaced with a test used in a Nevada case, *Rodriguez v. State*.[15] In *Rodriguez*, the Nevada Supreme Court found the following rule to establish the authentication of text messages from cell phones:

> [W]hen there has been an objection to admissibility of a text message, . . . the proponent of the evidence must explain the purpose for which the text message is being offered and provide sufficient direct or circumstantial corroborating evidence of authorship in order to authenticate the text message as a condition precedent to its admission . . . .[16]

Although he claims that the State in the current case would have failed both tests, he asserts that the *Rodriguez* standard

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[12] *State v. Henry, supra* note 8.

[13] *Id.*

[14] *Id.*

[15] *Rodriguez v. State*, 128 Nev. 155, 273 P.3d 845 (2012).

[16] *Id.* at 162, 273 P.3d at 849.

for the authentication of text messages "firmly attains the tenet established in the rules of evidence."[17] We fail to see how the adoption of the *Rodriguez* test would ease the analysis for the authentication of text messages or provide additional clarity for such purposes in practice. Neither do we see how an application of the *Rodriguez* test would result in a finding that the text messages were not properly authenticated in this case. We find no reason to adopt a new standard for the authentication of text messages.

(b) Hearsay

Next, Savage contends that the text message evidence in exhibits 6, 8, and 23 is hearsay and that the State failed to prove that the evidence fit within the statement-by-a-party-opponent hearsay exception. Generally, hearsay evidence, as defined by Neb. Rev. Stat. § 27-801 (Reissue 2016), is not admissible unless it fits within an exception to the rule against hearsay.[18] But, pursuant to § 27-801(4)(b)(i), a statement is not hearsay if it is offered against a party and is his own statement.[19] Therefore, whether the text messages were authored by Savage is a threshold matter of admissibility and a preliminary question for the district court.[20] While we earlier determined that the State met its burden of proving that the text messages were authored by Savage by a greater weight of the evidence for the purpose of authentication, at issue is whether the same standard applies for proving whether a statement falls under a hearsay exception. In other words, the question is whether the finding of authenticity under § 27-901 is sufficient to render the text messages admissible as statements by a party opponent.

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[17] Brief for appellant at 23.

[18] See *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[19] *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012); *State v. Draganescu, supra* note 8.

[20] See Neb. Rev. Stat. § 27-104(1) (Reissue 2016). See, also, *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987).

Although we never specifically addressed the standard of proof for the admissibility of authenticated written statements as statements by a party opponent, hearsay determinations are often treated as preliminary questions under Fed. R. Evid. 104(b), which requires "evidence sufficient to support a finding."[21] Based on our authentication analysis regarding the standard of proof involving Fed. R. Evid. 104, this would implicate a greater weight of the evidence standard. In addition, federal courts, when determining whether statements were properly admitted as statements by a party opponent, have held that the government, as the proponent of the text messages, must show by a greater weight of the evidence that the defendant made the statement.[22] Even further, we, alongside the Court of Appeals, have held that properly authenticated text messages allegedly written by a defendant are nonhearsay as statements by a party opponent, without doing an additional standard of proof analysis for the nonhearsay determination.[23]

[10] We hold that the State must prove by a greater weight of the evidence that a defendant authored or made a statement in order to establish preliminary admissibility as nonhearsay under § 27-801(4)(b)(i). In the instant case, the district court implicitly found that Savage authored the text messages in question. And, based on the above-mentioned evidence regarding authentication, we find that the State's evidence authenticating the text messages satisfied the greater weight of the evidence standard for a preliminary determination on hearsay.

Applying the appropriate standard of review for clear error regarding the factual findings underpinning a trial court's

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[21] See 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 1:28 (4th ed. 2013). See, also, *U.S. v. Harvey*, 117 F.3d 1044 (1997).

[22] *U.S. v. Benford*, No. CR-14-321-D, 2015 WL 631089 (W.D. Okla. Feb. 12, 2015). See, also, *U.S. v. Brinson*, 772 F.3d 1314 (10th Cir. 2014).

[23] See, e.g., *State v. Henry, supra* note 8; *State v. Wynne*, 24 Neb. App. 377, 887 N.W.2d 515 (2016).

hearsay ruling and de novo regarding the court's ultimate determination to admit evidence over a hearsay objection,[24] we conclude that the district court did not err in overruling Savage's hearsay objections.

(c) Best Evidence and Completeness

Last, concerning the admissibility of evidence, Savage assigns that the district court erred in overruling his best evidence and completeness objections to exhibits 8 and 23. Savage argues that because exhibits 8 and 23 were only redacted portions of the Cellbrite cell phone data extraction reports, the exhibits did not meet the "best evidence rule as to completeness."[25] The State responds that (1) the exhibits were by definition "original[s]" under Neb. Rev. Stat. § 27-1001 (Reissue 2016) and (2) the reports did not present a danger of admitting a statement out of context, as the redactions sought to include only the relevant information necessary to avoid jury confusion. We agree with the State.

[11,12] Under what is commonly and incorrectly referred to as the "best evidence rule," in order to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required.[26] This "'original writings' rule" applies only if the party offering the evidence is seeking to prove the contents of a writing, recording, or photograph.[27] Under § 27-1001(3), defining an original under the rule, "[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original." Here, exhibits 8 and 23 are, by definition, originals. They are printouts of exact data contained on Savage's and Dryden's cell phones. In sum, because exhibits 8

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[24] *State v. Draganescu, supra* note 8.

[25] Brief for appellant at 33.

[26] Neb. Rev. Stat. § 27-1002 (Reissue 2016); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

[27] *State v. Decker, supra* note 26, 261 Neb. at 389, 622 N.W.2d at 911.

and 23 are "original[s]" under the definition in § 27-1001(3), the district court did not err in overruling Savage's best evidence objections.

[13,14] With regard to the completeness objections, Savage argues that if exhibits 8 and 23 were to be admitted, they should have been admissible only in their complete form, not in a redacted version. This argument lacks merit. The rule of completeness allows a party to admit the entirety of an act, declaration, conversation, or writing when the other party admits a part and when the entirety is necessary to make it fully understood.[28] Under § 27-106(2), a judge in his or her discretion may either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it or permit another party to do so at that time. The rule of completeness is concerned with the danger of admitting a statement out of context, but when this danger is not present, it is not an abuse of discretion to refuse to require the production of the remainder or, if it cannot be produced, to exclude all the evidence.[29]

Savage did not offer into evidence the entirety of the Cellbrite reports. Nor does Savage allege how the remainder of the reports was necessary to make those documents fully understood. He merely alleges that the admission of the redacted portions was prejudicial, without explaining how the redactions created a danger of admitting a statement out of context or elaborating how the entirety of the Cellbrite reports would have alleviated this danger. Based on the record before us, there is nothing to suggest that exhibits 8 and 23, in their redacted form, were misleading or prejudicial. Consequently, the district court did not abuse its discretion when it overruled Savage's rule of completeness objections and declined to require the State to offer the entirety of the Cellbrite reports.

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[28] *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017). See Neb. Rev. Stat. § 27-106 (Reissue 2016).

[29] *State v. Manchester*, 213 Neb. 670, 331 N.W.2d 776 (1983).

2. Sufficiency of Evidence

[15] Savage next assigns as error that because the State failed to meet its burden of proof, the district court erred in overruling his motion to dismiss at the close of the State's case. 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.[30] Because Savage proceeded with trial after his motion to dismiss at the close of the State's case in chief, he waived his claim that the district court erred in overruling his initial motion to dismiss.[31]

[16] But when a defendant makes a motion at the close of the State's case in chief and again at the conclusion of all the evidence, it is proper to assign as error that the defendant's motion to dismiss made at the conclusion of all the evidence should have been sustained.[32] Savage made such a motion at the close of all the evidence. As such, we proceed on Savage's third assignment of error, as it is essentially a sufficiency of the evidence argument.[33]

Savage argues that the evidence was insufficient to support a guilty verdict because there was no corroborating testimony of Savage's guilt as required by Neb. Rev. Stat. § 28-1439.01 (Reissue 2016) and possession thus could not be proved beyond a reasonable doubt. We find no merit in these arguments.

[17] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in

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[30] *State v. Gray*, 239 Neb. 1024, 479 N.W.2d 796 (1992).

[31] See *id*.

[32] *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996).

[33] See, *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017); *State v. Severin, supra* note 32; *State v. Malone*, 26 Neb. App. 121, 917 N.W.2d 164 (2018).

reviewing a criminal conviction, 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.[34] A conviction will be affirmed in the absence of prejudicial error if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.[35]

[18-20] Nebraska law provides, "No conviction for an offense punishable under any provision of the Uniform Controlled Substances Act shall be based solely upon the uncorroborated testimony of a cooperating individual."[36] When the law requires corroboration of a witness to support a conviction, a witness' testimony must be accompanied by evidence other than that from the witness.[37] Under the Uniform Controlled Substances Act, corroboration is sufficient to satisfy the requirement that a conviction not be based solely upon uncorroborated testimony of an individual cooperating with the prosecution if the witness' testimony is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.[38] Testimony of a cooperating individual need not be corroborated on every element of a crime.[39]

Savage claims that there was insufficient evidence to allow the case to go to a jury because there were no corroborating details regarding Savage's alleged drug dealing as required under § 28-1439.01 and because there was not sufficient evidence to prove that Savage possessed methamphetamine. The State provided evidence of his drug dealing in the form of both

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[34] *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

[35] *Id.*

[36] § 28-1439.01.

[37] *State v. Goodro*, 251 Neb. 311, 556 N.W.2d 630 (1996).

[38] *Id.*

[39] *State v. Kramer*, 238 Neb. 252, 469 N.W.2d 785 (1991); *State v. Taylor*, 221 Neb. 114, 375 N.W.2d 610 (1985); *State v. Kuta*, 12 Neb. App. 847, 686 N.W.2d 374 (2004).

testimony and physical evidence. Though some of the testimony was elicited from two cooperating individuals, Dryden and Addleman, it cannot be said that Savage's conviction was based *solely* upon uncorroborated testimony of *a cooperating individual*. The State provided evidence of text messages that indicated that Savage was selling methamphetamine, as well as witness testimony from five other noncooperating individuals who generally corroborated the cooperating individuals' testimony. Savage's § 28-1439.01 argument has no merit.

[21,22] We likewise find no merit to Savage's argument that the evidence was insufficient to find that Savage possessed methamphetamine. During trial, the State relied on a theory of constructive possession to convict Savage. Evidence that a defendant had constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession and to sustain a conviction for unlawful possession.[40] Constructive possession may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance.[41]

Both Addleman and Tannehill testified that Savage removed a bag of methamphetamine from his groin area and threw it to Tannehill to put into her vagina upon being pulled over by the police officers. The arresting police officers testified that Savage's zipper was unusually unzipped at the time of the traffic stop, which corroborates Addleman's and Tannehill's testimony. In further support of Addleman's and Tannehill's testimony, the evidence of the text messages between Savage's and Dryden's cell phones demonstrates that Savage knew that he had drugs on or at least near his person because he was attempting to sell them. This evidence was sufficient to prove the element of possession of methamphetamine.

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[40] *State v. Garcia*, 216 Neb. 769, 345 N.W.2d 826 (1984).

[41] *Id.*

Viewing the evidence in the light most favorable to the State, we conclude that there was sufficient evidence to support Savage's conviction.

3. Excessive Sentence

Finally, Savage assigns that the district court abused its discretion by imposing an excessive sentence. We disagree.

When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown.[42] Here, Savage's sentence was enhanced per Nebraska's habitual criminal statute, § 29-2221. Under Nebraska law, the mandatory minimum Savage could have been sentenced to was a term of 10 years' imprisonment and the maximum term was not more than 60 years' imprisonment.[43] Savage was sentenced to imprisonment for the mandatory minimum of 10 years, but no more than 18 years.

[23] 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.[44] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[45] 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.[46]

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[42] *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[43] § 29-2221.

[44] *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016).

[45] *State v. Huff, supra* note 42.

[46] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

In this case, the district court considered the nature and circumstances of the crime and the history, character, and condition of Savage. In its sentencing order, the court noted that Savage has "a demonstrated history of criminal activity, disregard for the law, and an unwillingness to comport his conduct to comply with the law." Savage's sentence is on the lower end of the spectrum that could have been imposed under § 29-2221. Based on the record before us, the sentencing court did not consider any inappropriate or unreasonable factors in determining the sentence. We find that the court did not abuse its discretion in its imposition of Savage's sentence.

VI. CONCLUSION

For the foregoing reasons, we affirm the district court's decision on this matter.

Affirmed.

State of Nebraska, appellee, v. Charles M. McGuire, appellant.

921 N.W.2d 77

Filed December 14, 2018. No. S-17-1181.

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. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Search and Seizure: Appeal and Error.** The denial of a motion for return of seized property is reviewed for an abuse of discretion.
4. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
5. **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.
6. ____: ____. 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.
7. **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.
8. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
9. ____: ____: ____. In order for a court to inquire into a statute's legislative history, that statute in question must be open to construction, and a

statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.

10. **Courts: Jurisdiction: Search and Seizure: Property.** The court in which a criminal charge was filed has exclusive jurisdiction to determine the rights to seized property, and the property's disposition.
11. **Search and Seizure: Property: Proof.** Seizure of property from someone is prima facie evidence of that person's right to possession of the property, and unless another party presents evidence of superior title, the person from whom the property was taken need not present additional evidence of ownership.

Appeal from the District Court for Washington County: John E. Samson, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Michael J. Tasset, of Johnson & Mock, P.C., L.L.O., for appellant.

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

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

Cassel, J.

INTRODUCTION

Pursuant to a search warrant, law enforcement officers seized personal property from a residence occupied by several persons, including Charles M. McGuire. He eventually pled no contest to attempted possession of a controlled substance and later moved for return of some seized property. The district court partially denied his motion, and he appeals. The State disputes the district court's jurisdiction, upon which our jurisdiction depends. We conclude Neb. Rev. Stat. § 29-818 (Reissue 2016) granted exclusive jurisdiction to the district court to determine the property's disposition. Because the court's partial denial of McGuire's motion was apparently premised on an understandable, yet incorrect, reading of our case

law, we reverse that part of the court's order and remand the cause for further proceedings consistent with this opinion.

BACKGROUND

Prosecution and Motion for Return

In August 2015, law enforcement officers, including a criminal investigator with the Washington County sheriff's office, executed a warrant search of McGuire's home. They seized several items of personal property, including firearms and ammunition. The State charged McGuire with numerous offenses in the district court for Washington County, but the charges were ultimately reduced to a single count of attempted possession of a controlled substance, a Class I misdemeanor. The third amended information, to which McGuire pled no contest, did not include any allegation of an intent to manufacture, distribute, deliver, or dispense the substance—in effect, it alleged only attempted simple possession.

After sentencing, McGuire filed a motion in the district court for return of seized property. Claiming that Neb. Rev. Stat. § 29-820 (Reissue 2016) divested the district court of jurisdiction over disposition of the disputed items, the State moved to dismiss the motion. The district court conducted a hearing on both motions.

Hearing on Motion for Return

Regarding the State's motion to dismiss, it argued that § 29-820 divested the court of jurisdiction to determine the disposition of firearms and ammunition used in the commission of crime. The State contended the firearms and ammunition should be destroyed by law enforcement because one of the weapons was allegedly used in a crime.

Regarding McGuire's motion for return of personal property, McGuire first testified that the allegations of his motion (which stated that he was the lawful and rightful owner of the property and that the property had not been used in the commission of a crime, was not contraband, and was no longer

required as evidence) were true. McGuire's counsel then stated that he had "nothing else." The State did not cross-examine McGuire.

In response to McGuire's testimony, the State adduced testimonial and documentary evidence. Notably, the State did not present any evidence regarding the other occupants of the residence. Other than one name appearing on the inventory from the search, the record is entirely silent regarding the identities of those persons and their interests, if any, in the seized property. Rather, the State's evidence seemed to be offered in support of three arguments regarding disposition of the property.

First, the criminal investigator testified that in his opinion, the firearms seized were used in the commission of drug manufacturing and selling. He specified, "we believed that they were manufacturing enhanced marijuana." The investigator explained that in his training and experience, drug dealers use firearms to protect "their assets for illegal activities." But when asked whether he had any reason to believe McGuire was manufacturing any sort of controlled substance, he responded, "No more than that I don't know that he wasn't." He also replied "[c]orrect" when asked, "You think [McGuire] might have been [manufacturing a controlled substance], but you don't know?"

Second, the State contended that McGuire was not the owner of three of the firearms, because his name was not the listed owner on the Bureau of Alcohol, Tobacco, Firearms and Explosives "eTrace" background checks. The investigator acknowledged that there was nothing about the guns making them illegal per se. He also admitted that subsequent private-party sales from the bureau's registered owner would not show up on an eTrace search. But there was no evidence connecting any of the three persons named in the eTrace evidence to the residence from which the items were seized and no indication that the State had made any effort to notify those persons of the property it was holding.

Third, during the State's case, McGuire adduced evidence regarding the locations within the house and garage where the items of property were located when they were seized. Exhibit 15 was an inventory made at the time of execution of the search warrant. It cataloged every item seized and where in the house it was found. Eight items were seized from the east bedroom occupied by McGuire. Four items were taken from the northwest bedroom. Four other items were taken from, respectively, the dining room, the kitchen, the basement stairway, and the attached garage. The investigator testified that McGuire lived with four or five roommates and that property was seized in common areas used by all roommates. But nothing else was presented regarding any of these roommates.

District Court's Order

After taking both motions under advisement, the court disposed of them in a single order. Without elaboration, the court denied the State's motion to dismiss. The court partially granted McGuire's motion for return of personal property. The court acknowledged a presumption that McGuire had an ownership interest in the property, but found McGuire did not have exclusive possession of the property seized outside his bedroom. Of the 16 items seized, the court ordered the return of the 8 items seized from the east bedroom. In effect, the order denied return of the other items, which were seized from the other locations.

McGuire filed a timely appeal, which we moved to our docket.[1]

ASSIGNMENT OF ERROR

McGuire assigns that the district court erred by overruling in part McGuire's motion for return of personal property. On appeal, the State raises the same jurisdictional argument asserted below.

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

STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2] Statutory interpretation presents a question of law.[3] An appellate court independently reviews questions of law decided by a lower court.[4]

[3,4] The denial of a motion for return of seized property is reviewed for an abuse of discretion.[5] An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.[6]

ANALYSIS

Jurisdiction

[5] We must first consider the State's jurisdictional argument. 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] So we begin by examining our jurisdiction.

[6] The State contends that the district court lacked jurisdiction of McGuire's motion and that consequently, this court also lacks jurisdiction. 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.[8] Thus,

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[2] *Priesner v. Starry*, 300 Neb. 81, 912 N.W.2d 249 (2018).

[3] *In re Guardianship of Luis J.*, 300 Neb. 659, 915 N.W.2d 589 (2018).

[4] See *Synergy4 Enters. v. Pinnacle Bank*, 290 Neb. 241, 859 N.W.2d 552 (2015).

[5] *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017).

[6] *Id*.

[7] *Guardian Tax Partners v. Skrupa Invest. Co.*, 295 Neb. 639, 889 N.W.2d 825 (2017).

[8] *In re Guardianship of S.T.*, 300 Neb. 72, 912 N.W.2d 262 (2018).

the existence of our jurisdiction depends upon whether the district court had jurisdiction.

The State argues that § 29-820 divested the district court of jurisdiction to dispose of firearms seized or held and that it did so by vesting sole authority over disposition of these items in the law enforcement agency holding them. McGuire responds that § 29-820 must be read together with § 29-818 and that doing so defeats the State's argument. We agree with McGuire's statutory argument.

[7,8] Two basic principles of statutory interpretation control. First, 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.[9] Second, 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]

[9] Ordinarily, we look no further than the text. In order for a court to inquire into a statute's legislative history, that statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.[11] So we begin with the text of the two statutes.

Section 29-818 establishes the basic framework for dealing with seized property. It states:

> Except for animals as provided in section 28-1012.01, property seized under a search warrant or validly seized without a warrant shall be safely kept by the officer seizing the same, unless otherwise directed by the judge or magistrate, and shall be so kept so long as necessary for

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[9] *Synergy4 Enters., supra* note 4.

[10] *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018).

[11] *Cookson v. Ramge*, 299 Neb. 128, 907 N.W.2d 296 (2018).

> the purpose of being produced as evidence in any trial. Property seized may not be taken from the officer having it in custody by replevin or other writ so long as it is or may be required as evidence in any trial, nor may it be so taken in any event where a complaint has been filed in connection with which the property was or may be used as evidence, and the court in which such complaint was filed shall have exclusive jurisdiction for disposition of the property or funds and to determine rights therein, including questions respecting the title, possession, control, and disposition thereof. This section shall not preempt, and shall not be construed to preempt, any ordinance of a city of the metropolitan or primary class.[12]

Several important principles follow from this statutory framework, including a jurisdictional precept. First, an officer seizing property pursuant to a warrant must safely keep the seized property, unless otherwise directed by a judge or magistrate. Second, the seized property is to be kept so long as necessary to make it available as evidence in any trial. Third, so long as the seized property may be required as evidence in a trial, it may not be taken from the officer by means of a writ of replevin. Fourth, where a complaint has been filed asserting a charge where the property was or may be used as evidence, a writ of replevin would not lie to take the property, even if the property was no longer required in evidence. And most important to the case before us, a court where a complaint has been filed and where seized property was or may be used as evidence has "exclusive jurisdiction for disposition of the property or funds and to determine rights therein, including questions respecting the title, possession, control, and disposition thereof."[13]

It is only in the light of these principles that § 29-820 authorizes law enforcement to dispose of certain property

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[12] § 29-818.

[13] *Id.*

seized or held and no longer required as evidence. Two subsections are pertinent to this appeal—subsections (1)(e) and (1)(f). Section 29-820(1)(e) states, "[f]irearms, ammunition, explosives, bombs, and like devices which have been used in the commission of crime shall be destroyed[.]" Section 29-820(1)(f) allows law enforcement to return firearms to owners that "(i) have not been used in the commission of crime, (ii) have not been defaced or altered in any manner that violates any state or federal law, (iii) may have a lawful use and be lawfully possessed, and (iv) [were not seized in a domestic assault]."

The State reads the introductory language of § 29-820 to confer exclusive authority upon the law enforcement agency over the items covered by subsections (1)(e) and (1)(f). It relies upon language stating that "when property seized or held is no longer required as evidence, it shall be disposed of by the law enforcement agency on such showing as the law enforcement agency may deem adequate."[14]

But that language is conditioned. Section 29-820(1) begins this authorization stating, "Unless other disposition is specifically provided by law . . . ." Reading §§ 29-818 and 29-820 together, § 29-820 applies only where the exclusive jurisdiction of a court under § 29-818 has not been invoked. The State does not contend that no charge was brought against McGuire—undeniably, the State filed charges against McGuire in the district court.

[10] As we have said before, the court in which a criminal charge was filed has exclusive jurisdiction to determine the rights to seized property, and the property's disposition.[15] In the situation before us, the State filed charges in the district court against McGuire relating to the seized property. Therefore, that court had the exclusive jurisdiction to determine the rights to and disposition of the seized property. Because it did not

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[14] § 29-820(1).

[15] *State v. Agee*, 274 Neb. 445, 741 N.W.2d 161 (2007).

lack jurisdiction, neither do we. This disposes of the State's jurisdictional argument.

McGuire also argues that the State's interpretation would "endorse[] an obviously unconstitutional system whereby the citizens it represents may be summarily deprived of their valuable property by unreviewable executive action."[16] Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner such that it is consistent with the constitution.[17] Here, we need not resort to this rule of construction.

Although we do not rely upon the legislative history, we summarize it for interested readers. The Nebraska Legislature added §§ 29-818 and 29-820 in 1963,[18] in reaction to the then-recent U.S. Supreme Court decision in *Mapp v. Ohio*.[19] When first enacted, these sections empowered only a court to dispose of seized or held property.[20] The Legislature amended these statutes several times, but the most significant amendments occurred in 1986 and 2012 to § 29-820. In the 1986 amendment to § 29-820, the Legislature supplemented the courts' authority by authorizing law enforcement agencies to dispose of stolen property, unlawful gambling money, unclaimed property, contraband, firearms, ammunition, explosives, and like devices used in the commission of crime.[21] The intent of the amendment was to "allow the court, if they wish to give a court order, but at the same time . . . allow [law enforcement] to use a common sense approach

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[16] Reply brief for appellant at 1.

[17] *Schumacher v. Johanns*, 272 Neb. 346, 722 N.W.2d 37 (2006).

[18] 1963 Neb. Laws, ch. 161, §§ 7 and 9, pp. 573-74.

[19] *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). See Committee Statement, L.B. 276, Committee on Judiciary, 73d Sess. Leg. (Feb. 28, 1963).

[20] See §§ 29-818 and 29-820 (Reissue 1964).

[21] 1986 Neb. Laws, L.B. 543.

along with the bill to give people's property back to them as quickly as possible."[22] In the 2012 amendment to § 29-820, the Legislature enhanced this authority to return firearms that were voluntarily surrendered, safekept, or not used in the commission of crime.[23] The introducer explained, "When criminal charges are filed, the court decides what happens to the guns. But if no charges are filed or even considered, there is inconsistency in how law enforcement agencies throughout the state apply [§ 29-820]."[24] During the floor debate, the introducer reiterated this purpose.[25] But, as we have said, the plain language is clear. So, we turn to McGuire's quarrel with the court's order.

Return of Seized Property

McGuire argues that the district court erred in partially denying his motion for return of property. Specifically, he contends that where no evidence was presented by the State to rebut his presumption of ownership, the court erred in finding he did not have exclusive possession of all the property.

We note that on appeal, the State has apparently acquiesced in the district court's implicit rejection of two arguments below—that the seized property was used in the commission of a crime and that the eTrace evidence established superior title in another person. In this court, the State does not rely upon either of those arguments. Rather, the State argues only that because the residence was occupied by several people and some items were found outside of McGuire's bedroom, he "was not in exclusive possession of the [unsuccessfully

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[22] Judiciary Committee Hearing, L.B. 543, 89th Leg., 2d Sess. 31 (Feb. 4, 1985).

[23] Floor Debate, L.B. 807, 102d Leg., 2d Sess. 56-57 (Apr. 5, 2012).

[24] Statement of Intent, L.B. 538, Committee on Judiciary, 102d Leg. 1st Sess. (Feb. 16, 2011). See, also, Judiciary Committee Hearing, L.B. 538, 102d Leg., 1st Sess. 1-2 (Feb. 16, 2011).

[25] Floor Debate, L.B. 807, *supra* note 23.

sought] items and thus was not entitled to a presumption of ownership."[26]

Nor does the State argue on appeal that any of the items sought were contraband, subject to forfeiture, or of any continuing interest to the State. Accordingly, we focus only on the district court's reasoning, which the State supports on appeal—that because some of the items were taken from locations where other residents had access to them, McGuire was not entitled to their return.

Both parties argue principles deriving from our seminal decision in *State v. Agee*.[27] We begin by quoting from *Agee* at some length:

> [T]he general rule is well established that upon the termination of criminal proceedings, seized property, other than contraband, should be returned to the rightful owner unless the government has a continuing interest in the property. . . . While the government is permitted to seize evidence for use in investigation and trial, such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture. . . . Thus, a motion for the return of property is properly denied only if the claimant is not entitled to lawful possession of the property, the property is contraband or subject to forfeiture, or the government has some other continuing interest in the property.
>
> . . . When criminal proceedings have terminated, the person from whom property was seized is presumed to have a right to its return, and the burden is on the government to show that it has a legitimate reason to retain the property. *It is long established that a presumption of ownership is created by exclusive possession of personal property and that evidence must be offered to overcome that presumption*. One in possession of property has the

[26] Brief for appellee at 12.

[27] *Agee, supra* note 15.

> right to keep it against all but those with better title, and the "mere fact of seizure" does not require that "entitlement be established anew." Seizure of property from someone is prima facie evidence of that person's right to possession of the property, and unless another party presents evidence of superior title, the person from whom the property was taken need not present additional evidence of ownership.[28]

Obviously, in all but one instance, we spoke of a party "in possession" or one "from whom the property was taken," or similar wording.[29] In only one instance did we refer to "exclusive possession."[30] Here, we have evidence that several persons occupied this residence. We also have evidence that McGuire occupied the east bedroom. From this evidence, the district court could reasonably infer that other persons shared access to the locations outside the east bedroom. And the court apparently reasoned that because of that inference, McGuire's possession was not "exclusive."

Thus, the question becomes whether this inference was sufficient to prevent the presumption of ownership from arising or, if the presumption arose, whether the inference was sufficient to rebut the presumption. Neither party cites any particularly helpful authority. And surprisingly, we have found very little authority on this question. Of course, we recognize that the State reads the decision of the Nebraska Court of Appeals in *State v. Dubray*[31] to require a showing of exclusive possession before a presumption of ownership arises regarding seized property. But that court relied upon our language in *Agee*. And as our quotation from the *Agee* opinion shows, we did not speak with perfect clarity. Indeed,

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[28] *Id*. at 449-51, 741 N.W.2d at 166-67 (emphasis supplied).

[29] See *id.* at 450-51, 741 N.W.2d at 166.

[30] See *id.* at 450, 741 N.W.2d at 166.

[31] *State v. Dubray*, 24 Neb. App. 67, 883 N.W.2d 399 (2016).

even the cases we cited in *Agee* for that particular sentence provide little help.

None of the cases we cited for the "exclusive possession" principle arose in the context of returning seized property. The principal case cited was *In re Estate of Severns*.[32] But that case involved a grandfather's clock which had been in the decedent's sole possession for nearly 28 years. This provides no help. *In re Estate of Severns*, in turn, cited two decisions. In one ancient decision, two parties disputed possession of a red cow, the plaintiff claiming by purchase from a married woman and the defendant pursuant to a chattel mortgage from the woman's husband.[33] Several witnesses testified that when the mortgage was given, the cow belonged to the married woman. There was no evidence that the husband ever had title. Consequently, we affirmed a judgment for the plaintiff. The other decision underlying *In re Estate of Severns* involved replevin of an automobile.[34] A creditor under a conditional sales contract sued to recover the automobile from the borrower/buyer. Later, the buyer obtained a replacement motor from others, who retained possession because they had not been paid. This court determined that the motor suppliers were not in exclusive possession and had constructive notice of the creditor's right to possession. Consequently, their claim to possession failed. Neither of the cases cited in *In re Estate of Severns* assists us here.

More helpful is another case we cited in *Agee*, where a defendant convicted of burglary but acquitted of larceny allegedly committed during the burglary sought return of jewelry seized from him when he was arrested.[35] There, the government had satisfied itself that the jewelry was not taken from the burglary or a nearby similar event involving the defendant, but

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[32] *In re Estate of Severns*, 217 Neb. 803, 352 N.W.2d 865 (1984).

[33] *Booknau v. Clark*, 58 Neb. 610, 79 N.W. 159 (1899).

[34] *Allied Inv. Co. v. Shaneyfelt*, 161 Neb. 840, 74 N.W.2d 723 (1956).

[35] *Government of Virgin Islands v. Edwards*, 903 F.2d 267 (3d Cir. 1990).

it still resisted returning the jewelry. The court stated that the government had had "ample opportunity to locate any persons who contend that they are the rightful owners" and that the government was "still unable to posit anyone, other than [the defendant], to whom the property belonged."[36] The appellate court reversed the order denying the motion and instructed the trial court to order the government to return the property. At the time of arrest, the defendant had "tried to give the jewelry to his girlfriend,"[37] but the appellate court did not consider that significant. Thus, the girlfriend's potential claim to the property did not justify the government in retaining it. Although the defendant's possession may not have been exclusive of his girlfriend, he was entitled to return of the property.

From the cases addressing return of seized property, a common theme emerges—when the government's interests have ended, it must return the property. The "whole thrust" is that "when property is seized from a person, the court must return it to that person."[38] A court is "obligated to restore the *status quo ante*."[39] Lawful seizure of property may affect the timing of return, but never the owner's right to eventual return.[40] The government may not keep seized property purely for the sake of keeping it or because it is hopeful it may be relevant to some future investigation.[41] "Unless there are serious reasons (presented by the government or adverse claimants) to doubt a person's right to the property seized from him, he need not come forward with additional evidence of ownership" and "the court must return [the property] to that person when it is no longer needed by the government."[42]

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[36] *Id.* at 274.

[37] *Id.* at 272.

[38] *United States v. Wright*, 610 F.2d 930, 939 (D.C. Cir. 1979).

[39] *Id.*

[40] *State v. Card*, 48 Wash. App. 781, 741 P.2d 65 (1987).

[41] *DeLoge v. State*, 156 P.3d 1004 (Wyo. 2007).

[42] *United States v. Wright, supra* note 36, 610 F.2d at 939.

Recalling our extended quotation above from our *Agee* opinion, we believe that inserting the property law principle regarding "exclusive possession" led to the confusion here.[43] McGuire's initial showing certainly made no reference to any roommates. So, clearly, at that point, there was nothing from which the court could draw any inference adverse to McGuire.

[11] Thus, the burden shifted to the State. "'The burden on the government is heavy because there is a presumption that the person from whom the property was taken has a right to its return.'"[44] As we ultimately said in *Agee*, seizure of property from someone is prima facie evidence of that person's right to possession of the property, and unless another party presents evidence of superior title, the person from whom the property was taken need not present additional evidence of ownership.[45] The State does not argue that McGuire was not a person from whom the property was seized.

If the State had a serious concern that one or more of McGuire's roommates had superior title to the property, it failed to make any such concern apparent in our record. It seems inconceivable that the State's investigation in connection with execution of the search warrant did not uncover the names of McGuire's roommates. But the State presented no evidence of their names or of any claims of ownership on their behalf. The record contains no indication that the State made any effort to notify any of them of McGuire's motion. The State's concerns were directed elsewhere.

But most important, the burden on the State was not merely to raise the possibility of other claimants; it was required to establish that another party had superior title to the property. It failed to meet that burden.

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[43] *State v. Agee, supra* note 15, 274 Neb. at 450, 741 N.W.2d at 166.

[44] *DeLoge v. State, supra* note 41, 156 P.3d at 1011 (quoting *U.S. v. Albinson*, 356 F.3d 278 (3d Cir. 2004)).

[45] *State v. Agee, supra* note 15.

The confusion below may have flowed from an incorrect, but understandable, reading of *Agee*. To the extent that the court's ruling was based upon an incorrect understanding of the law, it is not possible for us to review it for an abuse of discretion.[46] Therefore, we have crafted a disposition to enable the parties to conclude the proceeding utilizing a correct legal framework. Our aim is to return the proceedings to the point at which the incorrect understanding introduced error. McGuire made a sufficient showing to establish a presumption of ownership. The State failed to establish that the seized property is contraband or subject to forfeiture, or that the State has some other continuing interest in the property. Thus, on remand, the issue will be limited to any claim of superior title which may be asserted by the State on behalf of any of McGuire's roommates or by any other third-party claimant adverse to McGuire.

CONCLUSION

The State filed charges in the district court against McGuire relating to the seized property. Therefore, that court had the exclusive jurisdiction to determine the rights to and disposition of the seized property. Because the district court had jurisdiction of McGuire's motion, we have jurisdiction of this appeal.

The portion of the district court's order requiring the State to return items to McGuire is affirmed. The portion of the order denying return of other items is reversed, and the cause is remanded for further proceedings consistent with this opinion. In carrying out our mandate, the district court may permit the record to be opened for additional evidence on the limited issue set forth above. If additional evidence is allowed, those claiming superior title adverse to McGuire shall have the burden of first going forward and McGuire shall be entitled to offer evidence in rebuttal.

Affirmed in part, and in part reversed and remanded for further proceedings.

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[46] See *State v. Myers, ante* p. 756, 919 N.W.2d 893 (2018).

State of Nebraska, appellee, v. Alejandro Garcia, appellant.

920 N.W.2d 708

Filed December 14, 2018. No. S-17-1217.

1. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Statutes: Intent.** When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context.
4. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
5. **Pleas: Proof.** To withdraw a plea under Neb. Rev. Stat. § 29-1819.02 (Reissue 2016), all a defendant must show is (1) that the court failed to give all or part of the advisement and (2) that the defendant faces an immigration consequence which was not included in the advisement given.

Appeal from the District Court for Platte County, Robert R. Steinke, Judge, on appeal thereto from the County Court for Platte County, Frank J. Skorupa, Judge. Judgment of District Court affirmed.

Jamie L. Arango, of Arango Law, L.L.C., for appellant.

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

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

Papik, J.

Like many other states, Nebraska requires trial judges, prior to accepting a guilty or no contest plea, to advise the defendant on the record that a conviction may have certain immigration consequences. The same statute provides that if the court fails to give the required advisement and the defendant faces the immigration consequences about which he or she was not advised, the defendant has a right to have the judgment vacated, to withdraw the plea, and to enter a plea of not guilty.

In this case, Alejandro Garcia seeks to withdraw a no contest plea he entered years ago pursuant to that statute. Garcia concedes, however, that prior to accepting his plea, the trial court properly recited the advisement. Even so, Garcia contends that he is entitled to withdraw his plea, because an interpreter translated a word improperly when she recited the court's advisement to Garcia in Spanish. The county court overruled Garcia's motion, and the district court, sitting as an intermediate appellate court, affirmed. Because we conclude that the advisement statute does not authorize the withdrawal of pleas based on inadequate translation, we affirm.

BACKGROUND

Garcia's Plea of No Contest.

On August 23, 2011, the State filed a criminal complaint in the county court for Platte County, charging Garcia with third degree domestic assault, false reporting, and obstructing government operations. During a group arraignment on August 29, the court advised Garcia of various statutory and constitutional rights relating to those charges. In particular, the court stated the following: "If you are not a United States citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of removal from the United States or denial of naturalization

pursuant to the laws of the United States." With the exception of the use of the singular form of the word "consequence," the foregoing is a verbatim recitation of the statutory advisement courts are required to administer prior to the acceptance of a guilty or no contest plea under Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2016).

An interpreter provided a Spanish translation of the court's advisement to Garcia of his various constitutional and statutory rights, including the advisement required by § 29-1819.02(1). Garcia told the court that he heard and understood those rights. In response to questions from the court, Garcia said that he did not have an attorney, but would like an attorney to represent him. The court stated it would appoint a public defender to represent Garcia.

On September 12, 2011, Garcia was present for a second group arraignment, this time represented by counsel. The court again advised Garcia regarding his various constitutional and statutory rights, including the advisement required by § 29-1819.02(1). Again, Garcia said that he understood his rights. Pursuant to a plea agreement, Garcia entered a plea of no contest to the third degree domestic violence charge, and the other charges were dismissed. The county court later sentenced Garcia to 60 days' jail time with credit for 58 days already served.

Initial Motion to Withdraw Plea.

Over 4 years later, Garcia filed a motion in the county court to withdraw his plea of no contest. Garcia alleged both that he received ineffective assistance of counsel and that he did not receive the immigration advisement required by § 29-1819.02(1) prior to entering his plea. The county court issued an order stating that it gave the immigration advisement to Garcia prior to the entry of his plea and denied the motion.

Several weeks later, Garcia filed a motion to reconsider. In it, he acknowledged that the county court properly gave the

immigration advisement required by § 29-1819.02(1) prior to the entry of his plea, but alleged that the Spanish interpreter incorrectly translated one of the words in the advisement. Garcia asserted that the Spanish translator used the Spanish word for "expatriate" when she should have used the Spanish word for "removal."

The county court overruled the motion to reconsider, because Garcia had brought no evidence in support of his motion. Garcia appealed the denial of his motion to reconsider to the district court, but the district court dismissed the appeal as untimely.

Second Motion to Withdraw Plea.

On February 22, 2017, Garcia filed a "Motion to Vacate" in the county court. Like the motion to reconsider, it acknowledged that the court gave the advisement required by § 29-1819.02 immediately prior to the entry of Garcia's plea, but alleged that the Spanish translation was not accurate because of the improper translation of the word "removal."

At a hearing on the motion, Garcia offered and the court received a document prepared by Janeth Murillo, a certified court interpreter. In the document, Murillo set forth a transcription of the words of the county court judge at the September 12, 2011, hearing; the court interpreter's Spanish translation of the judge's words; Murillo's translation of the court interpreter's Spanish interpretation back into English; and an alternative Spanish translation showing how Murillo would have interpreted the court's words. This document showed that, according to Murillo, the court interpreter used the Spanish word for "expatriate" instead of "removal" in giving the advisement. Garcia argued that "expatriate" means to "live in a country other than the one where you were born" and that because he was born in Cuba, he was not advised that a conviction could result in his removal from the United States.

The county court overruled this motion, stating that this claim was the same as the one Garcia had brought in 2015

and that Garcia had not brought any "materially and substantially different facts that would require reconsideration of this particular issue." Garcia appealed to the district court, which affirmed, citing the law-of-the-case doctrine. Garcia timely appealed, and we removed the case to our docket on our own motion under Neb. Rev. Stat. § 24-1106(3) (Supp. 2017).

ASSIGNMENT OF ERROR

While Garcia assigns various errors committed by the district court, they can be consolidated into one: that the district court erred in affirming the county court's order overruling Garcia's motion to vacate on law-of-the-case grounds.

STANDARD OF REVIEW

[1,2] The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *State v. Gach*, 297 Neb. 96, 898 N.W.2d 360 (2017). Resolution of this appeal requires that we determine the scope and extent of the statutory remedy Garcia seeks to employ. To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Medina-Liborio*, 285 Neb. 626, 829 N.W.2d 96 (2013).

ANALYSIS

Statutory Background.

As alluded to above, § 29-1819.02(1) directs trial courts to administer the following advisement to a defendant prior to accepting a plea of guilty or no contest "to any offense punishable as a crime under state law, except offenses designated as infractions under state law": "IF YOU ARE NOT A UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF

REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES."

Section 29-1819.02(2), in turn, provides a statutory remedy by which a defendant may withdraw a guilty or no contest plea in certain circumstances, providing:

> If, on or after July 20, 2002, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

In this case, Garcia asked to withdraw his guilty plea under § 29-1819.02(2) after he had already served his sentence for the conviction associated with that guilty plea. We begin our analysis by considering whether a trial court has authority to entertain a motion brought under § 29-1819.02(2) in these circumstances.

Did County Court Have Authority to Consider Garcia's Motion?

On the question of whether § 29-1819.02(2) permits a trial court to consider a motion to withdraw a guilty plea after the defendant has completed his or her sentence, we do not write on a blank slate. Just over 4 years ago, in *State v. Rodriguez*, 288 Neb. 714, 726, 850 N.W.2d 788, 796 (2014), we held that § 29-1819.02(2) gives a court authority "to consider a motion to withdraw such plea or vacate the judgment regardless of whether a defendant has completed his or her sentence." Our

concurring colleague would prefer to overrule *Rodriguez*, but for reasons explained below, we decline to do so.

The concurrence contends that several years before *Rodriguez*, we held in *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008), that courts do not have authority to consider a motion brought under § 29-1819.02(2) once the defendant's sentence has been served. The concurrence asserts that the Legislature did not amend § 29-1819.02(2) after *Rodriguez-Torres* and that, in *Rodriguez*, this court ignored the Legislature's inaction and "create[d] [a] missing procedure through a revised interpretation." Respectfully, we do not believe this is a correct reading of *Rodriguez-Torres* or *Rodriguez*.

Rodriguez-Torres does contain some language, highlighted by the concurrence, stating that a trial court lacks authority to grant relief when a party's sentence has already been served and observing that the Legislature has not created a procedure for the withdrawal of a plea in such circumstances. It is important to note, however, that the guilty pleas the defendant in *Rodriguez-Torres* sought to withdraw were accepted *before* July 20, 2002.

The date of the pleas at issue in *Rodriguez-Torres* is important, because § 29-1819.02 treats defendants whose pleas were entered after that date differently from those whose pleas were accepted before it. It is only defendants whose pleas are accepted after July 20, 2002, that have a right to withdraw their plea under the terms of § 29-1819.02(2). Conversely, a defendant whose plea was accepted before July 20, 2002, cannot invoke § 29-1819.02(2) and thus must identify some other statutory procedure for the withdrawal of the plea. Read in the context of *Rodriguez-Torres*, wherein the defendant's guilty pleas were accepted before July 20, 2002, the language from *Rodriguez-Torres* the concurrence relies upon reflects a conclusion that there was no statutory procedure authorizing a defendant whose plea was accepted before July 20, 2002, to withdraw it after the sentence had been served. See, also,

State v. Yos-Chiguil, 278 Neb. 591, 772 N.W.2d 574 (2009) (concluding that holding of *Rodriguez-Torres* pertained to pleas entered before July 20, 2002).

Given the limited scope of the holding in *Rodriguez-Torres*, we do not agree with the concurrence that this court ignored legislative inaction following *Rodriguez-Torres* and "create[d] [a] missing procedure" in *Rodriguez*. The plea the defendant in *Rodriguez* sought to withdraw was entered *after* July 20, 2002, and thus was subject to § 29-1819.02(2), a subsection that was not at issue or analyzed in *Rodriguez-Torres*. In fact, the opinion in *Rodriguez-Torres* quotes the rest of § 29-1819.02, but omits § 29-1819.02(2).

Because *Rodriguez-Torres* did not concern § 29-1819.02(2), its conclusion was not relevant to the question presented in *Rodriguez*. The question for this court in *Rodriguez* was thus not whether to create a procedure the Legislature had declined to create; § 29-1819.02(2) explicitly spells out a procedure that is commenced "on the defendant's motion." See, also, *State v. Yos-Chiguil*, 278 Neb. at 596, 772 N.W.2d at 579 ("[b]ut as to such pleas entered after July 20, 2002, § 29-1819.02(2) establishes a statutory procedure whereby a convicted person may file a motion to have the criminal judgment vacated and the plea withdrawn . . ."). Rather, the question was whether the fact that the defendant's sentence had been completely served precluded the withdrawal of a plea when the procedure created by § 29-1819.02(2) was invoked. Finding no language limiting the relief offered by the statute in this manner, we held that it did not. Now 4 years later, the Legislature has not amended § 29-1819.02(2), and we still see no statutory language limiting its relief to individuals still serving their sentences.

Our conclusions regarding the statutory language should not be understood to dispute the concurrence's point that difficult questions can arise if relief can be granted under § 29-1819.02(2) when the defendant's sentence has been completely served. We do not, however, see anything that would

prevent these same difficult questions from arising in cases in which an individual obtains relief under § 29-1819.02(2) after serving *part* of his or her sentence, and no one disputes that § 29-1819.02(2) allows these defendants to withdraw their plea if they make the requisite showing under the statute. These questions might bear on whether, as a matter of policy, there *should* be a point at which it is simply too late to withdraw a plea, but in our view, such a policy question is for the Legislature. And because we see no indication that the Legislature limited the relief authorized by § 29-1819.02(2) to those still serving their sentences, we continue to hold that trial courts have the authority to consider motions brought under § 29-1819.02(2) "regardless of whether a defendant has completed his or her sentence." *State v. Rodriguez*, 288 Neb. 714, 726, 850 N.W.2d 788, 796 (2014).

Does § 29-1819.02(2) Authorize Withdrawal of Garcia's Plea?

Because we find that the county court had jurisdiction of Garcia's motion to withdraw his plea, we proceed to consider the merits of his appeal. While Garcia primarily argues on appeal that the district court's analysis of the law-of-the-case doctrine was incorrect, his appeal presents a more foundational issue: whether § 29-1819.02(2) allows a defendant to withdraw a guilty or no contest plea if the trial court correctly provided the advisement, but the defendant contends there was some error in the translation of the advisement. We turn to that question now.

In a number of cases in which we have interpreted and applied § 29-1819.02(2), we have held that a defendant must demonstrate two facts in order to withdraw a guilty or no contest plea under the statute: (1) that the trial court failed to give all or part of the advisement contained in § 29-1819.02(1) and (2) that the defendant faces an immigration consequence that was not included in the advisement given. See, e.g., *State v. Gach*, 297 Neb. 96, 898 N.W.2d 360 (2017); *Rodriguez,*

supra; *State v. Medina-Liborio*, 285 Neb. 626, 829 N.W.2d 96 (2013); *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010); *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

Here, by acknowledging that the trial court gave the required advisement properly, Garcia has effectively conceded that he cannot demonstrate the first fact that we have said a defendant must demonstrate to withdraw a plea under the statute. Garcia's motion is thus premised on § 29-1819.02(2)'s providing an alternative avenue for defendants to withdraw pleas of guilty or no contest.

[3,4] Resolving the issue of whether § 29-1819.02(2) provides an alternative means of withdrawing a plea requires us to interpret § 29-1819.02(2). When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context. *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017). Statutory language is to be given its plain and ordinary meaning. *Medina-Liborio, supra*.

A review of the language of § 29-1819.02(2) reveals why we have repeatedly held that a defendant must show that the trial court failed to give all or part of the advisement to withdraw a plea under the statute. Section 29-1819.02(2) explicitly conditions the relief described on the court's "fail[ing] to advise the defendant as required by this section." Notably absent from the statute, however, is any reference to a right to withdraw a plea based on inadequacies with the translation of the advisement or even a more general misunderstanding of the advisement on the part of the defendant.

In other cases in which we interpreted this statute to determine what a defendant must show in order to withdraw a plea, we have adhered closely to the statutory text. For example, in *Mena-Rivera, supra*, we rejected an argument that a person seeking to withdraw a plea under the section must demonstrate prejudice. We pointed out that we had previously interpreted the statute to require a defendant seeking to withdraw a plea to

show only two things and that prejudice was not one of them. Later, in *Medina-Liborio, supra*, we rejected an argument that a defendant could not withdraw his plea under this section if the defendant already knew he would be deported because of his plea-based conviction. Citing the principle of statutory interpretation that we will not read a meaning into a statute that is not there, we explained that the "proposed limitation on the statutory mandate requiring a court to permit withdrawal of a plea in the specified circumstances is nowhere to be found in the language of § 29-1819.02." *Medina-Liborio*, 285 Neb. at 631, 829 N.W.2d at 100. And finally, as discussed above, in *State v. Rodriguez*, 288 Neb. 714, 850 N.W.2d 788 (2014), we rejected the argument that the relief offered by § 29-1819.02(2) was not available to individuals who had completed their sentences. Again, we relied on the absence of any language in the statute indicating that the relief was to be limited in the manner urged.

As the discussion of the preceding cases indicates, an interpretation that the remedy set forth in § 29-1819.02(2) extends to a circumstance not mentioned in the statute would be anomalous. The only way we could hold that a defendant may withdraw his plea because of a translation error would be to read meaning into the statute that is not reflected in its text. We have not done so when we have previously interpreted § 29-1819.02(2), and we do not interpret statutes in that manner generally. See *State v. Medina-Liborio*, 285 Neb. 626, 829 N.W.2d 96 (2013).

Indeed, if we were to find that § 29-1819.02(2) allows for the withdrawal of a plea based on inadequate translation, we would have to read *substantial* content into the statute that does not appear in its text. Were we to hold that the statute extends to translation inadequacies, subsidiary questions such as when is translation required, by what standards are alleged translation errors to be evaluated, and by what evidence are they to be proved would inevitably follow. There is nothing in the text of the statute that addresses those questions, and we

are neither well-equipped nor authorized to develop answers to them on our own. See, Neb. Const. art. II, § 1; *Heckman v. Marchio*, 296 Neb. 458, 466, 894 N.W.2d 296, 302 (2017) (explaining that "'judicial legislation'" violates article II, § 1, of the Nebraska Constitution).

[5] For these reasons, we reiterate what we have said previously: To withdraw a plea under § 29-1819.02, all a defendant must show is (1) that the court failed to give all or part of the advisement and (2) that the defendant faces an immigration consequence which was not included in the advisement given. *Medina-Liborio, supra*; *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010). Because Garcia cannot show that the trial court failed to give all or part of the advisement, we find that he was not entitled to withdraw his plea under § 29-1819.02(2).

Garcia's Motion Does Not Assert Constitutional Claim.

At oral argument, Garcia's counsel contended that Garcia should be allowed to withdraw his plea under § 29-1819.02(2) and because the alleged translation errors resulted in a violation of Garcia's constitutional right to due process. This court has said that a defendant's inability to comprehend criminal proceedings or communicate in English at such proceedings can result in a violation of the defendant's due process and Sixth Amendment rights. See *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017). But we have also recognized that not every translation inadequacy amounts to a due process violation. See *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 27, 793 N.W.2d 319, 328 (2011) (explaining that "there is no constitutional right to a 'flawless' interpretation"; that "'[c]ourtroom interpretation is a demanding and inexact art'"; that "'the languages involved may not have precise equivalents for particular words or concepts'"; and that "[m]inor or isolated inaccuracies, omissions, interruptions, or other defects in translation are inevitable and do not warrant

relief where the translation is on the whole reasonably timely, complete, and accurate, and the defects do not render the proceeding fundamentally unfair"). Further complicating any potential due process claim in this case is our observation that "the failure of a trial court to warn a defendant of immigration consequences does not implicate a constitutional right." *State v. Yos-Chiguil*, 281 Neb. 618, 626, 798 N.W.2d 832, 840 (2011) (citing *Smith v. State*, 287 Ga. 391, 697 S.E.2d 177 (2010)).

In the end, we need not resolve the question of whether Garcia's due process rights were violated. Garcia's motion to vacate did not allege that his due process rights were violated or seek to withdraw his plea on this basis. As a result, that question is not before us. See *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014) (appellate court will not consider theory not presented by pleadings).

The sole question raised by Garcia's motion was whether he was entitled to withdraw his no contest plea under § 29-1819.02(2). Because we have determined that he was not, we find no error in the overruling of his motion.

CONCLUSION

Section 29-1819.02(2) allows for withdrawal of a guilty or no contest plea only if the trial court fails to give all or part of the required advisement and the defendant faces an immigration consequence that was not included in the advisement given. Because Garcia did not demonstrate that the trial court failed to give all or part of the required advisement, we conclude that Garcia was not entitled to withdraw his plea. Accordingly, we affirm.

Affirmed.

Freudenberg, J., concurring.

While concurring in the result of the majority opinion, I respectfully disagree that the county court had statutory authority to hear the matter. Neb. Rev. Stat. § 29-1819.02

(Reissue 2016) does not create a remedy for a person to withdraw his or her guilty or no contest plea after the person has fully served the sentence associated with the entry of their plea.

Adopted in 2002, § 29-1819.02 provides in relevant part:

> (1) Prior to acceptance of a plea of guilty . . . to any offense punishable as a crime under state law, except . . . infractions . . . , the court shall administer the following advisement on the record to the defendant:
>
> IF YOU ARE NOT A UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES.
>
> (2) . . . If, on or after July 20, 2002, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty . . . may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty . . . and enter a plea of not guilty.

In *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008), this court addressed the application of the remedy created by this statute for a person who has completed his or her sentence. The court directly stated:

> In § 29-1819.02, the Legislature gives a court discretion to vacate a judgment or withdraw a plea where a court has failed to provide the advisement required for pleas made on or after July 20, 2002. *It does not, however, convey upon a court jurisdiction to do so where a*

> *party has already completed his or her sentence.* Nor has the Legislature in any other statute allowed for a specific procedure whereby a person who has been convicted of a crime and has already served his or her sentence may later bring a motion to withdraw his or her plea and vacate the judgment.
>
> . . . .
>
> . . . Years after having served his sentence, [the defendant] now seeks to have his pleas withdrawn and convictions vacated. However, no legislatively authorized procedure exists which allows him to do so. Absent such a legislative procedure, there is no present recourse for [the defendant] to withdraw his pleas and vacate the judgments years after having completed his sentences. We, therefore, determine that the district court did not have jurisdiction to address [the defendant's] motion.

Rodriguez-Torres, 275 Neb. at 367-68, 746 N.W.2d at 689-90 (emphasis supplied).

Thus, this court clearly stated its position on the matter, and following this interpretation of § 29-1819.02, the Legislature presumptively adopted it, because it took no action to modify or amend the language of the statute. See *State v. Coble,* 299 Neb. 434, 908 N.W.2d 646 (2018). Specifically, the Legislature did not create the identified absent procedure. If the Legislature felt the *Rodriguez-Torres* interpretation was incorrect or in need of clarification, it had 6 years to act before we took such action ourselves.

Disregarding such legislative acquiescence, this court chose to create the missing procedure through a revised interpretation of this issue in *State v. Rodriguez*, 288 Neb. 714, 850 N.W.2d 788 (2014). In *Rodriguez*, this court held that by failing to use language expressly limiting the remedy to a "'prisoner in custody under sentence,'" the Legislature implicitly expressed that the scope of the remedy in § 29-1819.02 was not limited to those defendants still serving their sentence. See 288 Neb.

at 724, 850 N.W.2d at 795. This means that convicted persons can move to withdraw their pleas and vacate their convictions years or even decades after their sentences have been fully completed.

The Legislature has limited challenges brought under postconviction proceedings to periods when the term of sentence is still being served. The *Rodriguez* holding now endlessly extends the possibilities of collateral attacks on criminal convictions. I know of no other statutory postconviction remedy that is so far reaching. This unique lack of time limit on the remedy, and without specific procedures to implement this remedy, raises difficult questions. For instance, it is unclear what the statute of limitations is for charges previously dismissed pursuant to plea agreements, what the sentencing restrictions and considerations are following subsequent convictions for such charges, or how courts will address the evidentiary problems created by the passage of an extended period of time. The Legislature's failure to enact procedures addressing the questions inherent to such a remedy without a time limit—after being notified by *Rodriguez-Torres* of the necessity therefore—demonstrates that the Legislature did not actually intend to expand the remedy in the manner that we determined in *Rodriguez*.

Furthermore, there is no indication that the Legislature sought to interfere with federal law in the manner permitted by the *Rodriguez* holding. At a time when a trial court under state law would normally no longer have any jurisdiction over the criminal case, because the sentence has been fully served, it is now directed to vacate convictions for the sole purpose of preventing the imposition of federal immigration consequences upon these defendants. Setting aside criminal convictions based upon guilty or no contest pleas in such circumstances is akin to judicial clemency. This substantially interferes with the federal government's ability to impose immigration consequences under federal law. When enacting

§ 29-1819.02, the Legislature could not have intended to assist in the avoidance of federal immigration consequences for those who had completed their criminal sentences.

Criminal matters deserve finality, and the court's current interpretation of this issue, as set forth in *Rodriguez*, does not fulfill this objective. I do not believe the county court had the statutory authority to take up Garcia's motion to vacate under § 29-1819.02, brought after he had fully completed his sentence. Therefore, I agree in the court's result but respectfully disagree with its underlying legal basis in this matter.

Thomas Grady Photography, Inc., appellee, v. Amazing Vapor, Ltd., et al., appellees, and Thomas J. Anderson, appellant.

920 N.W.2d 840

Filed December 21, 2018. No. S-17-818.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County, Gregory M. Schatz, Judge, on appeal thereto from the County Court for Douglas County, Stephanie R. Hansen, Judge. Supplemental opinion: Motion of appellee for attorney fees sustained.

Thomas J. Anderson, P.C., L.L.O., pro se.

Justin A. Roberts, of Lustgarten & Roberts, P.C., L.L.O., for appellee Thomas Grady Photography, Inc.

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

Per Curiam.

Appellee, Thomas Grady Photography, Inc. (Grady Photography), has moved under Neb. Ct. R. App. P. § 2-106 (rev. 2012) for attorney fees associated with the unsuccessful appeal to this court by appellant, Thomas J. Anderson. An affidavit and itemized legal bill claims $6,866 in attorney fees for work performed by Grady Photography's attorney in connection with this appeal. Because Grady Photography is entitled to appellate attorney fees under Neb. Rev. Stat. § 25-1801

(Reissue 2016), as amended by 2018 Neb. Laws, L.B. 710, we award Grady Photography $6,866.

As recited more fully in our opinion *Thomas Grady Photography v. Amazing Vapor, ante* p. 401, 918 N.W.2d 853 (2018), Grady Photography was hired to perform photography services related to the products of Amazing Vapor, Ltd. Amazing Vapor, Manuel Guillermo Calderon, and Anderson refused to pay for the services. The unpaid bill for photography services rendered totaled $2,400. The county court at trial and the district court on appeal essentially found that Anderson breached the oral contracts for Grady Photography's services. We affirmed. *Id.*

As a general rule, attorney fees and expenses are recoverable only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *In re Estate of Graham, ante* p. 594, 919 N.W.2d 714 (2018). Section 25-1801 applies to this case where there has been an unpaid claim for payment for photography services of $2,400. Section 25-1801, as amended, provides in part:

> (1) *On any lawsuit of four thousand dollars or less*, regardless of whether the claims are liquidated or assigned, *the plaintiff may recover costs, interest, and attorney's fees in connection with each claim as provided in this section*. If, at the expiration of ninety days after each claim accrued, the claim or claims have not been paid or satisfied, the plaintiff may file a lawsuit for payment of the claim or claims. If full payment of each claim is made to the plaintiff by or on behalf of the defendant after the filing of the lawsuit, but before judgment is taken, except as otherwise agreed in writing by the plaintiff, the plaintiff shall be entitled to receive the costs of the lawsuit whether by voluntary payment or judgment. If the plaintiff secures a judgment thereon, the plaintiff shall be entitled to recover:

(a) The full amount of such judgment and all costs of the lawsuit thereon;

(b) Interest at the rate of six percent per annum. Such interest shall apply to the amount of the total claim beginning thirty days after the date each claim accrued, regardless of assignment, until paid in full; and

(c) If the plaintiff has an attorney retained, employed, or otherwise working in connection with the case, an amount for attorney's fees as provided in this section.

(2) *If the cause is taken to an appellate court and the plaintiff recovers a judgment thereon, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney's fees in such appellate court as provided in this section*, except that if the plaintiff fails to recover a judgment in excess of the amount that may have been tendered by the defendant, then the plaintiff shall not recover the attorney's fees provided by this section.

(3) *Attorney's fees shall be assessed by the court in a reasonable amount, but shall in no event be less than ten dollars when the judgment is fifty dollars or less*, *and when the judgment is over fifty dollars up to four thousand dollars, the attorney's fee shall be ten dollars plus ten percent of the judgment in excess of fifty dollars*.

(4) For purposes of this section, the date that each claim accrued means the date the services, goods, materials, labor, or money were provided, or the date the charges were incurred by the debtor, unless some different time period is expressly set forth in a written agreement between the parties.

(Emphasis supplied.)

We have described the foregoing section as follows:

> [This] section provides that a claimant with a claim amounting to less than $4,000 for, among other things, services rendered, may present that claim to the allegedly

> liable party and then, if the claim is not paid within 90 days, sue for the amount of the original claim and additional costs, interest, and attorney fees.

Thomas & Thomas Court Reporters v. Switzer, 283 Neb. 19, 29, 810 N.W.2d 677, 686 (2012).

Given the terms of § 25-1801 and the facts of this case, we determine that the appellate attorney fees incurred by Grady Photography of $6,866 are reasonable. This court sustains Grady Photography's motion and awards Grady Photography attorney fees of $6,866 to be paid by Anderson.

Motion of appellee for attorney fees sustained.

Kwami M. DeLima, appellant, v.
Anicette C. Tsevi, appellee.

921 N.W.2d 89

Filed December 21, 2018. No. S-17-1144.

1. **Child Custody: Jurisdiction: Appeal and Error.** 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.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Child Custody: Jurisdiction.** Jurisdiction over a child custody proceeding is governed by the Uniform Child Custody Jurisdiction and Enforcement Act.
4. **Child Custody: Jurisdiction: States.** For a state to have jurisdiction to make an initial child custody determination, it must either be the "home state" as defined by the Uniform Child Custody Jurisdiction and Enforcement Act or fall under the 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.
5. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.

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

Michael J. Decker for appellant.

Julie Fowler, of Fowler & Kelly Law, L.L.P., for appellee.

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

Papik, J.

Several years after the Douglas County District Court awarded custody of the child of Kwami M. DeLima (Kwami) and Anicette C. Tsevi (Anicette) to Kwami, the court determined that it did not have and never had subject matter jurisdiction to make custody determinations regarding the child and vacated all prior orders pertaining to custody or visitation. Kwami appeals. We find that the district court correctly determined that it did not have and never had subject matter jurisdiction to make custody determinations regarding the child and therefore affirm.

BACKGROUND

In 2009, Kwami filed a complaint in Douglas County District Court seeking to dissolve his marriage with Anicette. In the complaint for dissolution, he alleged that he and Anicette were lawfully married in the nation of Togo in 1999; that the marriage had produced one minor child, C.D., born in 2003; and that C.D. had resided with C.D.'s maternal grandmother, Jeanne Akouvi, in Togo since 2006. The complaint for dissolution did not ask that either party be awarded custody of or visitation with C.D. The subsequent divorce decree, which appears to be a form document with information specific to the parties supplied in handwriting, did not award either party custody of C.D. The decree does have what appears to be a handwritten checkmark next to language indicating that "[t]he defendant is awarded reasonable visitation with the parties' minor child(ren), upon reasonable notice to the plaintiff."

Over 2 years later, in July 2011, Kwami filed an application to modify the divorce decree. He alleged that there had

been a change in circumstances since the entry of the decree, in that Anicette had "taken the parties' minor child to Togo, Africa, and has refused to return the child to [Kwami]." After a hearing on the modification application in which Anicette did not appear and was not represented by counsel, the district court issued an order in June 2012 awarding Kwami sole care, custody, and control of C.D. In its order, the court found that Anicette had taken C.D. to Togo and had refused to return the child to Kwami and that C.D. was not receiving proper medical treatment.

Several years after the decree was modified to award custody to Kwami, Anicette filed her own application to modify the custody decree. She also filed a motion to vacate the decree as it pertained to child custody. In it, she contended that the court did not have and never had subject matter jurisdiction to decide custody issues concerning C.D. The court set Anicette's application to modify the custody decree for trial. Trial was held in September 2017.

Both Kwami and Anicette testified at the trial, as did other witnesses. Both parties also introduced documentary evidence. The evidence established that, in 2006, when Kwami and Anicette were still married, they agreed to send C.D. to live with Akouvi in Togo. Both Kwami and Anicette signed a document at that time stating that they gave permission to let their son travel to Togo with Akouvi. The document also purported to grant "all and every possible legal right" concerning C.D. to Akouvi. Kwami admitted that he agreed to send C.D. to Togo to live with Akouvi in 2006.

C.D. resided with Akouvi in Togo from 2006 until September 2012. During that time, he attended private school in Togo. He also received medical attention in Togo. Anicette's younger sister, who lived with Akouvi and C.D. at the time, testified that Akouvi brought C.D. to a hospital and to monthly checkups at a medical clinic there. After C.D. had been in Togo several years, Anicette gave birth to a second child in Nebraska and, shortly thereafter, traveled to Togo with that child. Anicette

stayed for several months. When she departed, she also left the second child in the care of Akouvi.

In late 2011, Anicette moved to Togo. Less than a year later, in September 2012, she and C.D. moved to Switzerland. Anicette and C.D. have resided in Switzerland with her new husband since then. C.D. has not been in the United States since 2006.

Following the trial, the district court entered an order vacating all prior orders concerning the custody of C.D. It explained that Nebraska was not the child's home state at the time custody proceedings were initiated for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2016), and that, as a result, the court did not have and never had subject matter jurisdiction over custody matters. Following the denial of his motion for a new trial, Kwami timely appealed.

ASSIGNMENT OF ERROR

Kwami assigns on appeal that the district court erred by finding it never had subject matter jurisdiction under the UCCJEA and vacating all prior custody orders on that basis.

STANDARD OF REVIEW

[1,2] 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. *In re Guardianship of S.T.*, 300 Neb. 72, 912 N.W.2d 262 (2018). Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Id.*

ANALYSIS

General Statutory Background.

The question before us is whether the district court ever acquired subject matter jurisdiction to determine the custody of C.D. We begin by summarizing the statutory

background governing subject matter jurisdiction of child custody determinations.

[3] We have previously said that subject matter jurisdiction over a child custody proceeding is governed exclusively by the UCCJEA. See, e.g., *Carter v. Carter*, 276 Neb. 840, 758 N.W.2d 1 (2008). Our use of the word "exclusively" in this context was slightly imprecise, because there are other statutes outside the UCCJEA that confer jurisdiction to decide child custody matters. See, e.g., Neb. Rev. Stat. § 42-351 (Reissue 2016). But while other statutes may confer jurisdiction generally, § 42-351 directs courts to determine whether jurisdiction exists over a specific child custody proceeding under the UCCJEA.

Section 43-1238 of the UCCJEA sets forth the circumstances under which a court of this state has jurisdiction to make an initial child custody determination, providing as follows:

> (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 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.

[4] As we have previously explained in cases involving the UCCJEA, for a state to have jurisdiction to make an initial child custody determination, it must either be the "home state" as defined by the UCCJEA or fall under the limited exceptions to the home state requirement specified by the UCCJEA. See *In re Guardianship of S.T.*, 300 Neb. 72, 912 N.W.2d 262 (2018). 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. *In re Guardianship of S.T., supra*.

Section 43-1238(a) grants jurisdiction to make an "initial child custody determination," which is defined elsewhere in the UCCJEA as the "first child custody determination concerning a particular child." § 43-1227(8). Another section of the UCCJEA provides that a court that has made an initial child custody determination consistent with § 43-1238 has "exclusive, continuing jurisdiction over the determination" unless the court makes certain findings. See § 43-1239.

Because the analysis required to determine whether a court has jurisdiction to make an initial child custody determination differs from the analysis required to determine whether a court can exercise its continuing jurisdiction after making an initial determination, an evaluation of jurisdiction under the UCCJEA will occasionally require a determination of when the initial

determination was made. That task is not so straightforward in this case.

One candidate for the initial determination is the 2009 divorce decree. While the decree did not award custody, there does appear to be a handwritten checkmark next to language in the decree indicating that the defendant, here Anicette, is awarded "reasonable visitation," the specific terms of which are to be determined by the plaintiff, here Kwami, acting in good faith. A decree providing for visitation concerning a child would ordinarily qualify as a child custody determination, see § 43-1227(3), but it is not clear that the checkmark on the decree was truly intended to provide for visitation in this case. The "visitation" language appears to presuppose that Kwami had been granted custody and thus was authorized to determine the extent of Anicette's "visitation," but, as we have noted, the decree did not actually address custody. Perhaps in recognition of the questionable nature of any visitation provided in the initial decree, Kwami's counsel characterized the decree at oral argument as containing "somewhat of a custody determination."

If the 2009 divorce decree did not include a child custody determination, the initial child custody determination for purposes of § 43-1238(a)(2) did not occur until the district court modified the decree to award Kwami custody in 2012. In the end, we find that it is unnecessary to determine when the initial determination was made, because we find that the district court did not have jurisdiction to make an initial child custody determination in either 2009 or 2012. We explain our reasons for this conclusion in more detail below.

Home State Jurisdiction.

As mentioned above, the UCCJEA generally grants jurisdiction to the child's home state. In this case, the district court did not have home state jurisdiction to make an initial child custody determination, because Nebraska was not C.D.'s home state.

The UCCJEA defines home 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." § 43-1227(7). As even Kwami concedes, the fact that C.D. was living in Togo beginning in 2006 precludes any possibility of a Nebraska court obtaining jurisdiction on the basis of home state status.

"Last Resort" Jurisdiction.

Rather than relying on § 43-1238(a)(1), Kwami argues that the court had jurisdiction to make an initial determination under § 43-1238(a)(4), a basis for jurisdiction not explicitly considered by the district court. A Nebraska court has jurisdiction to make an initial child custody determination under § 43-1238(a)(4) if "no court of any other state would have jurisdiction under the criteria specified in subdivision (a)(1), (a)(2), or (a)(3) of [§ 43-1238]." This is referred to by one court as "last resort" jurisdiction. See *Madrone v. Madrone*, 290 P.3d 478 (Colo. 2012).

Viewed on the surface, this argument might appear to have merit, because Kwami is correct that the record discloses no other state in the United States that might have jurisdiction. Left unmentioned by Kwami, however, is the fact that the UCCJEA provides that foreign countries like Togo are to be treated as if they were states of the United States unless their child custody law violates "fundamental principles of human rights." See, *Carter v. Carter*, 276 Neb. 840, 846, 758 N.W.2d 1, 7 (2008); § 43-1230(a) through (c). Because there is no suggestion that the child custody law of Togo violates fundamental human rights, jurisdiction under § 43-1238(a)(4) depends on whether a court of Togo would have had jurisdiction to make an initial child custody determination under the criteria set forth in either subdivision (a)(1), (a)(2), or (a)(3). If a court of Togo would have had such jurisdiction, it cannot be said no court of any other "state" would have jurisdiction, and therefore the district court would not have last resort

jurisdiction. See, e.g., *Gerhauser v. Van Bourgondien*, 238 N.C. App. 275, 767 S.E.2d 378 (2014) (holding that because courts in Utah or Florida would have had jurisdiction to make initial child custody determination, North Carolina court could not exercise jurisdiction under North Carolina version of § 43-1238(a)(4)).

Before proceeding to consider whether a court of Togo would have jurisdiction to make an initial determination of custody, we pause to clarify the precise nature of our inquiry. For multiple reasons, we will not explore the laws of Togo to decide whether it would have been permissible for a court in that country to make a child custody determination under the circumstances in this case. First, as a general matter, we are not authorized to take judicial notice of the laws of foreign countries and, if, as here, the law of a foreign country is not pleaded and proved like any other fact, we presume it to be the same as the law of Nebraska. See, Neb. Rev. Stat. § 25-12,105 (Reissue 2016); *Molina v. Sovereign Camp, W. O. W.*, 6 F.R.D. 385 (D. Neb. 1947); *Exstrum v. Union Casualty & Life Ins. Co.*, 167 Neb. 150, 91 N.W.2d 632 (1958).

In addition, § 43-1238(a)(4) provides for jurisdiction if "no court of any other state would have jurisdiction *under the criteria specified in subdivision (a)(1), (a)(2), or (a)(3) of* [*§ 43-1238*]." (Emphasis supplied.) Section 43-1238(a)(4) thus directs us to consider whether a court of Togo would have jurisdiction *under the UCCJEA*, as opposed to requiring us to attempt to ascertain and apply the law of Togo to the extent it might differ from the UCCJEA.

We begin our analysis as to whether a court of Togo would have had jurisdiction with the question of whether Togo qualified as C.D.'s home state under § 43-1238(a)(1). As noted above, § 43-1238(a)(1) generally authorizes the exercise of jurisdiction by a court in the home state of the child. The home state of the child is defined 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." § 43-1227(7). Since C.D. lived in Togo with Akouvi from 2006 to 2012, there is no question that he lived in Togo long enough for that to be his home state. Less clear, however, is whether Akouvi was a "person acting as a parent" for purposes of the UCCJEA.

Under § 43-1227(13) of the UCCJEA, a person acting as a parent is

> a person, other than a parent, who:
>
> (A) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and
>
> (B) has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

While the record indicates that Akouvi had the requisite physical custody of the child in order to qualify as a "person acting as a parent," under § 43-1227(13)(A), it is not clear that she would qualify under either of the legal custody prongs of § 43-1227(13)(B). There is no indication in the record that she was ever awarded legal custody of the child by a court or even "claim[ed] a right to legal custody."

If Akouvi did not qualify as a "person acting as a parent," a court of Togo could not exercise jurisdiction under § 43-1238(a)(1). However, we need not resolve whether the action could have been brought in Togo under § 43-1238(a)(1), because even if it could not, we find that the action could have been brought in Togo under one of the exceptions to home state jurisdiction.

As noted above, § 43-1238(a)(2) through (4) sets out the exceptions under which the court will have jurisdiction even if it is not the child's home state. Jurisdiction exists under § 43-1238(a)(2) if no court has jurisdiction as the child's home state and the following are true:

> (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.

This basis for jurisdiction under the UCCJEA is commonly referred to as "significant connection" jurisdiction. See, e.g., *Madrone v. Madrone*, 290 P.3d 478 (Colo. 2012).

Even if a court in Togo could not have exercised jurisdiction as C.D.'s home state, we find that it could have exercised significant connection jurisdiction, because all of the necessary elements were present to do so. First, assuming Togo could not have exercised jurisdiction as C.D.'s home state, no court would have home state jurisdiction. As we have explained, Nebraska did not qualify as C.D.'s home state.

Next, we find that both Anicette and C.D. had a significant connection to Togo. When tasked with deciding whether an individual has a significant connection to a state for purposes of this section of the UCCJEA, courts consider a wide variety of ties to the state.

> "Some factors that have been weighed in these cases are the child's relationship with extended or blended family members, enrollment in school or day care, participation in social activities, access to medical, dental or psychological care, or the availability of government assistance. Some courts will mention the parent's employment or family ties."

J.H. v. C.Y., 161 So. 3d 233, 241 (Ala. Civ. App. 2014), quoting Annot., 52 A.L.R.6th 433 (2010).

For instance, in *In re Marriage of Diaz*, 363 Ill. App. 3d 1091, 845 N.E.2d 935, 301 Ill. Dec. 70 (2006), an Illinois appellate court found that a mother and child had a significant connection to Illinois, based on the facts that the mother was married in Illinois; she and her child had periodically resided in Illinois; the mother relied upon her mother, also an Illinois resident, to care for the child; and the mother intended to

take advantage of various opportunities in Illinois. Similarly, in *Matter of Marriage of Schwartz and Battini*, 289 Or. App. 332, 410 P.3d 319 (2017), an Oregon appellate court found that a mother and a child had a significant connection to Oregon, based on the facts that the mother was from Oregon; the child was born and had a doctor there; and the child's maternal grandparents, with whom the child had spent significant time, spent half the year there. And finally, in *Breselor v. Arciniega*, 123 A.D.3d 1413, 1 N.Y.S.3d 413 (2014), a New York court found that a mother and her child had a significant connection to New York, based on the facts that the mother and child resided in New York previously, the child visited her grandparents in New York previously, and the child had relationships with her grandparents and other extended family members in New York.

Informed by the basis upon which other courts have found a significant connection, we find that both C.D. and Anicette had a significant connection to Togo. With respect to C.D., there is no doubt he had a significant connection. He resided with family members in the country continuously from 2006 to 2012 and attended school and received medical attention there. We also find that Anicette had a significant connection to Togo. She was married in Togo. And while she later moved to Nebraska, she continued to have significant connections to Togo even when she lived in Nebraska. Those connections included family living in Togo; the record indicates at least her mother and sister lived there. In addition, and perhaps most important, Anicette voluntarily sent C.D. to live in Togo with Akouvi while she remained in Nebraska. Based on all these facts, we find that Anicette had a significant connection to Togo.

Finally, it is clear from the record that substantial evidence concerning C.D.'s care, protection, training, and personal relationships was available in Togo. Indeed, given the fact that C.D. had lived in Togo from 2006 to 2012, substantial evidence on these subjects would not have been available

anywhere else. In any case, the record indicates that C.D. attended school in Togo, that he received medical attention at both a hospital and medical clinic in Togo, that he had friends in Togo, and that his primary caregiver, Akouvi, resided in Togo. On this basis, we conclude there was substantial evidence in Togo regarding C.D.'s care, protection, training, and personal relationships.

Based on the foregoing, we find that even if a court in Togo would not have had jurisdiction to make an initial custody determination under § 43-1238(a)(1), it would have had significant connection jurisdiction to make an initial child custody determination under § 43-1238(a)(2). And because a court in Togo would have had jurisdiction under § 43-1238(a)(2), the district court did not have last resort jurisdiction under § 43-1238(a)(4). See, e.g., *Gerhauser v. Van Bourgondien*, 238 N.C. App. 275, 767 S.E.2d 378 (2014).

District Court's Order Vacating All Prior Custody Orders.

At oral argument, counsel for Kwami contended that even if a child custody proceeding could have initially been brought in Togo, the district court should not have found a lack of jurisdiction, because at the time the custody proceedings were commenced, both Kwami and Anicette lived in Nebraska and chose to litigate the issues in the district court. Counsel additionally pointed out that C.D.'s custody has been litigated in the district court for 9 years but that as a result of the district court's most recent order, it has still not been resolved.

[5] All of this appears to be true, but it does not affect whether the district court acquired subject matter jurisdiction. If a court lacks subject matter jurisdiction, it lacks the power to determine the case. See *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017). Accordingly, 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. *Id.*

That the parties litigated this case in the district court for some time is thus irrelevant to whether the district court had subject matter jurisdiction. The district court's authority to decide C.D.'s custody is determined by the UCCJEA, and for reasons we have explained, the UCCJEA did not give it the power to do so. When a court acts without subject matter jurisdiction, its actions are void. See *J.S. v. Grand Island Public Schools, supra.*

So while it is certainly regrettable that the significant time and energy devoted to litigating C.D.'s custody in the district court was all for naught, upon its correct determination that it never had subject matter jurisdiction, the district court had no choice but to vacate its prior custody orders. See *In re C and M Properties, L.L.C.*, 563 F.3d 1156, 1167-68 (10th Cir. 2009) (holding that action must be dismissed for lack of subject matter jurisdiction despite court's being "loathe to add to the duration and complexity of an already overlong and overly complex matter, let alone to deliver the unwelcome news that the parties have been litigating in vain in federal court for over four years based on a mistaken premise").

CONCLUSION

Because the district court never acquired subject matter jurisdiction of the custody of C.D., any actions regarding his custody were void. The district court thus correctly vacated any orders pertaining to C.D.'s custody or visitation, and we affirm.

Affirmed.

Eagle Partners, L.L.C., doing business as Keller Williams Greater Omaha, doing business as Keller Williams Realty, a Nebraska limited liability company, appellee and cross-appellant, v. Donna L. Rook, Successor Personal Representative of the Estate of Donald H. Lienemann, appellant and cross-appellee.

921 N.W.2d 98

Filed December 21, 2018. No. S-18-058.

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. **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.
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.
5. **Judgments: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
6. **Decedents' Estates: Attorney Fees.** In probate proceedings, attorney fees are administration expenses.

7. **Decedents' Estates: Claims: Costs: Fees.** Administrative expenses are claims which may be brought under the probate claims procedure.
8. **Contracts: Intent.** When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
9. **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.
10. **Contracts.** 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. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
12. **Waiver: Estoppel.** Ordinarily, to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.
13. **Contracts: Waiver.** A party may waive a written contract in whole or in part, either directly or inferentially.
14. **Contracts: Waiver: Proof.** A party may prove the waiver by (1) a party's express declarations manifesting the intent not to claim an advantage or (2) a party's neglecting and failing to act so as to induce the belief that it intended to waive.
15. **Contracts: Intent.** A court ordinarily must use construction that gives effect to each part of a contract, and reject constructions resulting in a determination that a word or term is surplusage.
16. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.
17. **Claims: Parties.** Generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.

Appeal from the District Court for Sarpy County: William B. Zastera and Stefanie A. Martinez, Judges. Reversed and remanded with directions.

James T. Boler, P.C., L.L.O., for appellant.

W. Patrick Betterman, P.C., L.L.O., for appellee.

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

Heavican, C.J.

INTRODUCTION

Eagle Partners, L.L.C., doing business as Keller Williams Greater Omaha, doing business as Keller Williams Realty, a Nebraska limited liability company (Keller), filed suit against Donna L. Rook, successor personal representative of the estate of Donald H. Lienemann (the Estate), in the district court for Sarpy County, Nebraska. The district court granted summary judgment in Keller's favor, finding that Keller had established that the Estate breached a contract involving the sale of real property.

The district court awarded Keller damages in the amount of $97,473.60, plus prejudgment interest at the legal rate of 12 percent per annum from and after December 30, 2016. We removed this case to our docket pursuant to our authority under Neb. Rev. Stat. § 24-1106(3) (Supp. 2017). We reverse the decision of the district court and remand the cause with directions to enter summary judgment in favor of the Estate.

BACKGROUND

In late October 2012, the attorney for the Estate was contacted by John Q. Bachman offering to purchase approximately 77 acres of land owned by the Estate on behalf of his clients John C. Allen and Jerry Torczon. Bachman sought to purchase the land, legally described as "South Half (S1/2) of the Southeast Quarter (SE1/4), except ROW in 2-13- 12 (77.36 acres), commonly known as 7406 Capehart Road, Papillion, NE 68046." Ultimately, the Estate and Bachman were unable to close on the sale due to a condition allowing Allen and Torczon to "terminate this Agreement if . . . Purchaser has been unable to move the Property into the Papillion-La Vista School District from the South Sarpy School District . . . ."

On November 17, 2014, the Estate and Keller entered into a uniform commercial listing contract for sale with an attached one-page addendum (listing), allowing Keller to list and offer the property for sale. Keller was to list and offer the property for sale for $3,017,040 during the period commencing

November 17, 2014, and ending November 17, 2015. The addendum to the November 17, 2014, listing specified, under paragraph 23, that Bachman, Allen, or Torczon were "No Commission Buyers," further indicating that "Seller shall not be obligated to pay Broker any sales commission on account of a sale made to one or more of these prospective buyers." Pursuant to a January 13, 2016, addendum, the expiration of the listing was extended to January 1, 2017.

On March 20, 2015, Bachman submitted to the Estate's attorney a second written offer for the property, again on behalf of Allen and Torczon. However, the offer contained the same previously failed condition that the school district be changed. As such, the offer was rejected by the Estate.

On April 11, 2016, Bachman submitted a third offer directly to the Estate on behalf of his clients, this time for $42,000 per acre and with no school district condition, but that offer expired without being accepted. On or about April 14, however, the attorney for the Estate told Debra Carlson, Keller's agent, about this offer and recommended that Keller represent any potential purchasers. The attorney further instructed Carlson that any offer presented by Keller must not contain conditions requiring redistricting the property's school district.

On April 27, 2016, Keller submitted an offer on behalf of Cedevco, Inc., to purchase the property for $3,017,040. Contained in the offer were several conditions, including one with respect to the school district, which the Estate found unacceptable. As such, the offer was rejected.

On May 23, 2016, the Estate and Bachman signed a purchase agreement for the sale of the property. The purchase agreement, prepared by Bachman, contained a provision in paragraph 27 concerning brokers. Paragraph 27 states:

> **Brokers**. Seller represents that . . . Carlson of Keller . . . is representing Seller for this transaction. Purchaser is not represented by a real estate broker and . . . Carlson of Keller . . . shall be entitled to the real estate commission

> pursuant to a separate agreement with Seller. Each party represents to the other that no other broker, finder or intermediary is involved in the purchase and sale of the Property. Each party hereby indemnifies and agrees to hold the other party harmless from and against any and all costs arising or resulting, directly or indirectly, out of any claim by any broker or finder in connection with this transaction due to their respective acts.

The sale closed on December 30.

On December 29, 2016, Keller filed a statement of claim for its commission in the probate proceedings of the Estate pending in Sarpy County Court. In response, the Estate disallowed the claim.

Keller then filed a complaint in Sarpy County District Court seeking to enforce paragraphs 4 and 22 of the listing agreement, and seeking $90,511.20 as the commission due on the Cedevco offer that the Estate had rejected. Keller subsequently filed an amended complaint to enforce paragraph 27 of the purchase agreement and commission of $97,473.60, or 3 percent of the purchase price of $3,249,120, negotiated by Bachman and paid by Allen and Torczon.

In its answer, the Estate alleged that the district court lacked subject matter jurisdiction of an action seeking a real estate commission. It alleged that because such a commission was an expense of the administration of the Estate that resulted from a contract entered into by the personal representative of the Estate, it should be heard by the probate court.

The parties filed cross-motions for summary judgment. On September 26, 2017, the district court found that Keller had produced sufficient evidence to establish a prima facie case that by the terms of the purchase agreement, specifically paragraph 27, Keller was entitled to a commission. The court indicated that the Estate failed to offer sufficient evidence to rebut Keller's prima facie case. The district court then granted Keller's motion for summary judgment and denied the Estate's.

The Estate and Keller filed cross-motions to alter or amend the opinion and order. The Estate's motion essentially sought a reversal of the district court's decision, while Keller's motion requested that the court amend the judgment to include an award of attorney fees, costs, and litigation expenses incurred with regard to this action pursuant to Neb. Rev. Stat. § 25-824(2) (Reissue 2016). The court denied both motions.

The Estate appeals, and Keller cross-appeals.

ASSIGNMENTS OF ERROR

The Estate assigns that the district court erred in (1) finding that it had subject matter jurisdiction, (2) entering summary judgment in Keller's favor, (3) failing to grant the Estate's motion for summary judgment seeking dismissal of the amended complaint, and (4) awarding Keller interest on the judgment as an expense of administration.

On cross-appeal, Keller assigns that (1) the district court abused its discretion in denying its request for attorney fees and costs pursuant to § 25-824 and (2) Neb. Rev. Stat. § 25-2705 (Reissue 2016) violates Neb. Const. art. I, § 6, because the statute grants a right to trial by jury for cases in the county court, but fails to provide a right to demand a jury trial for "any matter arising under the Nebraska Probate Code."

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

[1] *Bixenmann v. Dickinson Land Surveyors*, 294 Neb. 407, 882 N.W.2d 910 (2016), *modified on denial of rehearing* 295 Neb. 40, 886 N.W.2d 277.

party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

[4,5] We review a district court's denial of a motion for leave to amend a complaint for an abuse of discretion.[4] A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.[5]

ANALYSIS

Subject Matter Jurisdiction Based on Statutory Interpretation.

In its first assignment of error, the Estate contends that the district court lacked subject matter jurisdiction over Keller's claim because the claim arose out of a real estate commission pursuant to the listing Keller entered into with the personal representative. The Estate argues that the case is governed by Neb. Rev. Stat. § 30-2482 (Reissue 2016), which provides:

> (1) After notice to all interested persons or on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the

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[2] *Id.*

[3] *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016).

[4] See *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007). See, also, *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011).

[5] *McCullough v. McCullough*, 299 Neb. 719, 910 N.W.2d 515 (2018).

> personal representative for his or her own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

The Estate claims § 30-2482 exclusively governs probate proceedings for review of employment and compensation of specialized agents. Keller disputes that its claim is governed by § 30-2482, and instead argues this claim arises under Neb. Rev. Stat. § 30-2486 (Reissue 2016):

> Claims against a decedent's estate may be presented as follows:
>
> (1) The claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.
>
> (2) The claimant may commence a proceeding against the personal representative in any court which has subject matter jurisdiction and the personal representative may be subjected to jurisdiction, to obtain payment of his or her claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his or her death.
>
> (3) If a claim is presented under subsection (1), no proceeding thereon may be commenced more than sixty days after the personal representative has mailed a notice of disallowance; but, in the case of a claim which is not

> presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the sixty-day period, or to avoid injustice the court, on petition, may order an extension of the sixty-day period, but in no event shall the extension run beyond the applicable statute of limitations.

Keller argues the claim was properly filed in county court pursuant to § 30-2486(1) and, upon the Estate's § 30-2486(3) disallowance, was properly contested in the district court.[6]

The Estate directs our attention to *In re Estate of Wagner*.[7] In that case, a law firm filed a claim under § 30-2486 seeking additional attorney fees following services rendered to the estate. The county court noted that the firm's claim was made under § 30-2486, but did not address the propriety of that procedure, instead concluding that there was no merit to the claim. On appeal, following affirmation of the county court's decision and reviews by the district court and the Nebraska Court of Appeals, we stated:

> In order to prevent confusion in the future, we hold prospectively that all claims for attorney fees in probate matters from the date of this opinion forward shall be reviewed by the county court pursuant to § 30-2482 and shall not be submitted as claims under the Nebraska Probate Claims statute, § 30-2486.[8]

[6,7] But the language of § 30-2482 does not preclude using the probate claims procedure established in Neb. Rev. Stat. §§ 30-2483 through 30-2498 (Reissue 2016). Those sections deal with the presentation, allowance, and payment of creditor's claims.[9] "Claim" as defined by the Nebraska Probate Code includes "liabilities of the decedent or protected person

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[6] See *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990).

[7] *In re Estate of Wagner*, 253 Neb. 498, 571 N.W.2d 76 (1997).

[8] *Id.* at 502, 571 N.W.2d at 79.

[9] *Kerrigan & Line v. Foote*, 5 Neb. App. 397, 558 N.W.2d 837 (1997).

whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and *expenses of administration.*"[10] We have traditionally held that in probate proceedings, attorney fees are administration expenses.[11] Real estate brokers, like attorneys, must be licensed in the State of Nebraska. Those seeking to act as brokers must meet the qualifications listed in Neb. Rev. Stat. § 81-885.13 (Supp. 2017) and further conform to the requirements established by the Legislature. Like attorney fees, broker's fees arising from the sale of real estate held in the course of probate proceedings are similarly an administration expense. Therefore, based on a plain reading of the relevant statutes, it appears that such administrative expenses are claims which may be brought under the probate claims procedure.

The Nebraska probate statutes are derivative of the Uniform Probate Code, which was generally adopted by the Legislature in 1974 and became effective in the state on January 1, 1977. The comment to § 3-105[12] of the Uniform Probate Code indicates that the responsibility for hearing and deciding formal petitions is to be assigned to the court of general jurisdiction of each county or district, further noting that there is "little basis for objection to the broad statement of concurrent jurisdiction of [§ 3-105]."

As adopted by the Nebraska Legislature, § 3-105, now Neb. Rev. Stat. § 30-2405 (Reissue 2016), was stripped of restrictive language regarding subject matter jurisdiction. Section 30-2405 was designed to give probate courts of limited jurisdiction broad concurrent jurisdiction with courts of general jurisdiction. We believe that is what the Nebraska Legislature

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[10] Neb. Rev. Stat. § 30-2209(4) (Reissue 2016) (emphasis supplied).

[11] See *In re Estate of Reimer*, 229 Neb. 406, 427 N.W.2d 293 (1988). See, also, *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009); *J.R. Simplot Co. v. Jelinek*, 275 Neb. 548, 748 N.W.2d 17 (2008).

[12] Unif. Probate Code § 3-105, comment, 8 (part II) U.L.A. 33-34 (2013).

did in adopting Nebraska's version of the Uniform Probate Code. In other words, §§ 30-2405 and 30-2482 are part of a scheme to give jurisdiction for the enforcement of probate claims to the county court, and that jurisdiction is concurrent with the jurisdiction of the district court to enforce such claims. To the extent that *In re Estate of Wagner* holds differently, it is dicta and disapproved.

In this case, Keller could have pursued the enforcement of its claim in either the district court or the county court. Keller chose the district court. The district court had jurisdiction to decide the validity of Keller's claim.

Constitutional Challenge to County Court's Exclusive Jurisdiction.

For the first time on appeal, Keller raises two constitutional challenges to the Estate's argument that § 30-2482 provides an exclusive grant of jurisdiction to the county court over its chancery and common-law claims. As we have found that Keller was entitled to pursue its claim in the district court, we need not address Keller's constitutional challenges.

Summary Judgment.

The Estate assigns that the district court erred in granting summary judgment in favor of Keller and in denying summary judgment in the Estate's favor. We agree.

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.

[8-10] When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.[13] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable

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[13] *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993).

but conflicting interpretations or meanings.[14] Further, 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.[15]

We turn first to the language of the listing and purchase agreements. The listing gave Carlson the right to list the property in question. If Carlson were to find a ready, willing, and able buyer for the property, she would be entitled to a 5-percent commission if the sale was made to a represented purchaser and a 3-percent commission if it was not. But paragraph 23 of the listing provided that Bachman, Allen, or Torczon were "No Commission Buyers," further indicating that "Seller shall not be obligated to pay Broker any sales commission on account of a sale made to one or more of these prospective buyers."

In the end, the property in question was sold to the "No Commission Buyers" identified in the listing. The purchase agreement for that sale, which was prepared by the purchasers, provided that the Estate "represent[ed] that . . . Carlson of Keller [was] representing Seller for this transaction. Purchaser is not represented by a real estate broker . . . ." Paragraph 27 of the purchase agreement stated that Carlson should be paid pursuant to a separate agreement. Though "separate agreement" is not explicitly defined, the record indicates that it could only mean the listing between the Estate and Keller.

The only reasonable reading of paragraph 27 of the purchase agreement in conjunction with the listing demonstrates that under paragraph 27, Keller is not entitled to a commission according to the terms of the listing. Under paragraphs 4 and 22, the Estate agreed to pay Keller a 3-percent commission if the purchaser was not represented in the purchase and a 5-percent commission if the purchaser was represented.

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[14] *In re Estate of Balvin*, 295 Neb. 346, 888 N.W.2d 499 (2016).

[15] *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994).

Specifically, the handwritten portion of paragraph 22 states, "Or 3% if seller agent broker [Carlson] is the only broker represent[ing] both seller & buyer."

However, paragraph 23, executed contemporaneously with the listing, states in relevant part, "Seller shall not be obligated to pay Broker any sales commission on account of a sale made to one or more of these prospective buyers." Just above the quoted language, the names "John Q. Bachman, Trustee"; "John C. Allen"; and "Jerry Torczon" are listed and identified as "No Commission Buyers." Reading these terms together, we find that the Estate and Bachman agreed that Keller would be paid according to the terms of the listing. The terms of the listing in turn provide that Keller, under the circumstances, is not entitled to payment.

Keller makes several arguments suggesting that contrary to the plain language of these agreements, it is entitled to a commission. Keller first contends that paragraph 27 of the purchase agreement operated as a waiver of paragraph 23, entitling them to a commission under paragraphs 4 and 22.

[11-14] A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.[16] Ordinarily, to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.[17] A party may waive a written contract in whole or in part, either directly or inferentially.[18] A party may prove the waiver by (1) a party's express declarations manifesting the intent not to claim an advantage or (2) a party's neglecting and failing to act so as to induce the belief that it intended to waive.[19]

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[16] *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010).

[17] *Id.*

[18] *Id.*

[19] *Id.*

Based on paragraph 27 of the purchase agreement, we cannot conclude that the Estate made a clear, unequivocal, and decisive act demonstrating an intent to waive paragraph 23 of the listing which identified the "No Commission Buyers." Keller's waiver argument is without merit.

In the alternative, Keller argues, it is a third-party beneficiary under the purchase agreement. Keller directs us to our decision in *Mid-Continent Properties, Inc. v. Pflug*.[20] In *Pflug*, we determined that although there was not a direct contract between a broker and landowners as contemplated by Neb. Rev. Stat. § 36-107 (Reissue 1974), a contract in which the broker is a third-party beneficiary did exist. In *Pflug*, the broker entered into an oral agreement for payment of a commission upon the sale of the landowners' property. The landowners entered into a written sales agreement that contained a payment provision for the broker's commission. When the commission was not paid, the broker initiated an action as a third-party beneficiary under the sales agreement.

Assuming arguendo that the court below relied on the theory that Keller was a third-party beneficiary, we turn to the provisions of the respective agreements and find that when read together, the purchase agreement and the listing are unambiguous in directing that no commission is due to Keller under paragraph 23. Therefore, assuming that the sale of the land triggered a commission being paid to Keller, Keller is not entitled to the commission because under the clear and unambiguous terms of paragraph 23, Keller is not entitled to a commission upon the sale of the land to Bachman or the other "No Commission Buyers."

[15] Keller also argues that "where there are two descriptions in an instrument, one of which describes the subject matter with reasonable certainty and the other that is incorrect with respect to certain additional details, the incorrect portion

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[20] *Mid-Continent Properties, Inc. v. Pflug*, 197 Neb. 429, 249 N.W.2d 476 (1977).

of the description will be rejected as surplusage."[21] However, the authority upon which Keller relies further observes that "a court ordinarily must use construction that gives effect to each part of a contract, and reject constructions resulting in a determination that a word or term is surplusage."[22]

The contract is unambiguous in this case, and Keller is not entitled to a commission under paragraph 23. Therefore, we find that the court below erred in granting summary judgment in favor of Keller and remand the cause to the district court with instructions to enter summary judgment in favor of the Estate.

Keller Seeks Equitable Estoppel.

Keller attempts to argue that in conducting negotiations for the sale of the property, the Estate misrepresented its business relationship with Keller in order to gain an advantage in negotiations with Bachman. Keller refers to the Estate's negotiation tactics as a form of fraudulent "sharp dealing."[23] Keller therefore contends that the Estate's "sharp dealing" with Bachman should be equitably estopped by enforcing the payment provision in Keller's favor. However, Keller lacks standing to make such an argument.

[16,17] Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.[24] Thus, generally, a litigant must assert the litigant's own rights and interests and cannot rest a claim on the legal rights or interests of third parties.[25] Keller has not suffered any injury as a result of the

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[21] See 17A C.J.S. *Contracts* § 418 at 310 (2011).

[22] See *id.*

[23] Brief for appellee at 34.

[24] *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

[25] *Id.*

Estate's negotiation tactics that Keller characterizes as fraudulent "sharp dealing."

Award of Interest and Attorney Fees.

Keller contends on cross-appeal that the district court erred in denying its motion for attorney fees and prejudgment interest. Because we find that the summary judgment entered in Keller's favor was entered in error, we need not address this assignment of error further.

CONCLUSION

The district court erred in granting summary judgment in favor of Keller and in denying summary judgment in favor of the Estate. We therefore reverse the decision of the district court and remand the cause with directions to enter summary judgment in favor of the Estate.

Reversed and remanded with directions.

State of Nebraska, appellee, v. Kathy A. Seckinger, appellant.

920 N.W.2d 842

Filed December 28, 2018. No. S-17-1099.

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, giving due weight to the inferences drawn from those facts by the trial judge. 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.** Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
3. ____: ____. Under the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, the ultimate touchstone is one of reasonableness.
4. **Constitutional Law: Search and Seizure: Warrantless Searches.** Pursuant to the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, searches and seizures must not be unreasonable, and searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.
5. **Search and Seizure: Warrantless Searches: Motor Vehicles.** Among the established exceptions to the warrant requirement is the automobile exception.
6. **Search and Seizure: Warrantless Searches: Probable Cause: Motor Vehicles.** The automobile exception to the warrant requirement applies when a vehicle is readily mobile and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle.

7. **Motor Vehicles: Words and Phrases.** A vehicle is readily mobile whenever it is not located on private property and is capable or apparently capable of being driven on the roads or highways.
8. **Search and Seizure: Probable Cause: Words and Phrases.** Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.
9. **Search and Seizure: 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, but appellate courts should avoid an excessively technical dissection of the factors supporting probable cause.
10. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.
11. ____: ____. The concept of probable cause, as the name implies, is based on probabilities. It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.
12. **Probable Cause: Police Officers and Sheriffs.** To find probable cause, officers are not required to rule out all innocent explanations for suspicious facts.
13. **Probable Cause: Police Officers and Sheriffs: Motor Vehicles.** Probable cause may result from any of the senses, and an officer is entitled to rely on his or her sense of smell in determining whether contraband is present in a vehicle.
14. **Search and Seizure: Probable Cause: Police Officers and Sheriffs: Motor Vehicles: Controlled Substances.** Objectively, the smell of burnt marijuana tells a reasonable officer that one or more persons in a vehicle recently possessed and used the drug. The officer need not know whether the amount possessed is more than 1 ounce in order to have probable cause to suspect criminal activity in the vehicle.
15. **Search and Seizure: Warrantless Searches: Probable Cause: Police Officers and Sheriffs: Motor Vehicles.** When an officer with sufficient training and experience detects the odor of marijuana emanating from a vehicle that is readily mobile, the odor alone furnishes probable cause to suspect contraband will be found in the vehicle and the vehicle may be lawfully searched under the automobile exception to the warrant requirement.

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

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

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

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

Stacy, J.

NATURE OF CASE

Kathy A. Seckinger appeals her felony conviction for possession of methamphetamine. She assigns error to the denial of a motion to suppress evidence seized during a warrantless search of her car and argues that the smell of marijuana coming from inside the car did not provide sufficient probable cause to support the search. We affirm the judgment of the district court.

BACKGROUND

On January 9, 2017, a Nebraska State Patrol trooper was on patrol in Gering, Nebraska, when a green car accelerated into an intersection directly in front of her. The trooper and another motorist had to brake hard to avoid an accident, and the trooper initiated a traffic stop. The stop and the events immediately preceding it were recorded on the trooper's dashboard camera.

When the trooper approached the driver's side to make contact, she noticed the odor of burnt marijuana coming from inside the car. The driver was identified as Seckinger. The trooper confronted Seckinger about the smell and asked if there was marijuana in the car. Seckinger said no, but volunteered that she had recently smoked a cigarette. The trooper repeated that she smelled marijuana and asked Seckinger if she had been around anyone smoking marijuana; Seckinger said she had not. Finally, the trooper asked if there might have been marijuana in the car previously. Seckinger again

responded no and added that she would not consent to a search.

The trooper had Seckinger step out of the car and conducted a search. No marijuana was found in the car, but the trooper discovered more than 4 grams of methamphetamine. Seckinger was placed under arrest and charged with the Class IV felony of knowingly or intentionally possessing methamphetamine. She entered a plea of not guilty and moved to suppress the evidence found during the search, arguing there was no probable cause for either the traffic stop or the search of her car.

At the hearing on the motion to suppress, the trooper and Seckinger were the only witnesses to testify. They both testified about the odor of marijuana, but their testimony differed considerably. On direct examination by her attorney, Seckinger denied there was any odor of marijuana coming from her car when it was stopped: "[Counsel:] Does the interior of your car smell like marijuana? [Seckinger:] No. Q. Did it ever smell like marijuana? A. No. Q. Why not? A. There has not been no marijuana in my vehicle at all. Q. Do you use marijuana? A. No."

In contrast, the trooper testified she noticed the distinctive odor of marijuana emanating from the car as soon as she contacted the driver. The trooper testified she received academy training on detecting the odor of marijuana and also testified about her experience detecting the smell of burnt and raw marijuana during prior traffic stops. The trooper explained that Seckinger's car was stopped because it pulled across four lanes of traffic and nearly caused an accident, and based on the trooper's experience, drivers who "do that kind of thing" are sometimes impaired by alcohol or drugs. Consequently, when the trooper smelled marijuana coming from inside the car, she decided there was probable cause to search it.

After considering the evidence, the district court overruled Seckinger's motion to suppress. The court found that both the

traffic stop and the subsequent search of the car were supported by probable cause. In finding probable cause to search the car, the court relied on our opinion in *State v. Watts*[1] for the proposition that the smell of marijuana, standing alone, has long been held to furnish probable cause for a warrantless search of a motor vehicle where there is sufficient foundation as to the expertise of the officer in recognizing the smell. The court found the trooper had expertise in detecting the odor of marijuana and found credible her testimony that she smelled marijuana coming from inside Seckinger's car during the traffic stop.

After the motion to suppress was overruled, a bench trial was held on stipulated facts. Seckinger did not renew her objection to the legality of the traffic stop, but did renew her objection to the search of her car. That objection was overruled, and Seckinger was found guilty of possession of methamphetamine. She was sentenced to 2 years' probation and ordered to pay court costs. Seckinger filed a timely appeal, and we moved the case to our docket on our own motion.[2]

ASSIGNMENT OF ERROR

Seckinger assigns error to the overruling of her motion to suppress, arguing the odor of marijuana standing alone no longer provides probable cause to search a vehicle.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[3] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, giving due weight to the

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[1] *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981).

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

[3] *State v. Thalken*, 299 Neb. 857, 911 N.W.2d 562 (2018).

inferences drawn from those facts by the trial judge.[4] But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[5]

ANALYSIS

On appeal, Seckinger does not challenge the legality of the stop, the duration of the investigation, or the scope of the subsequent search. Nor does she challenge the trial court's factual finding that, during the investigation, the trooper detected the odor of marijuana emanating from inside Seckinger's car. The sole issue on appeal is whether the odor of marijuana, standing alone, furnished probable cause to support the warrantless search of Seckinger's car. We limit our analysis accordingly, and begin with a review of the governing constitutional principles.

[2-5] Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.[6] The ultimate touchstone is one of reasonableness.[7] Searches and seizures must not be unreasonable, and searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.[8] Among the established exceptions to the warrant requirement is the "'automobile exception.'"[9]

[6,7] The automobile exception to the warrant requirement applies when a vehicle is readily mobile and there is

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[4] See, *id.*; *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017).

[5] *Thalken, supra* note 3.

[6] See, *State v. Barbeau, ante* p. 293, 917 N.W.2d 913 (2018); *State v. Dalland*, 287 Neb. 231, 842 N.W.2d 92 (2014).

[7] See *Rocha, supra* note 4.

[8] *Id.*

[9] *Id.* at 746, 890 N.W.2d at 202. Accord *California v. Carney*, 471 U.S. 386, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985).

probable cause to believe that contraband or evidence of a crime will be found in the vehicle.[10] A vehicle is readily mobile whenever it is not located on private property and "is capable or apparently capable of being driven on the roads or highways."[11]

[8-12] Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.[12] An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances, but appellate courts should avoid an excessively technical dissection of the factors supporting probable cause.[13] Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.[14] The concept of probable cause, as the name implies, is based on probabilities.[15] It "'requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.'"[16] Thus, to find probable cause, officers are not required to rule out all innocent explanations for suspicious facts.[17]

For decades, this court has consistently held that officers with sufficient training and experience who detect the odor of marijuana emanating from a vehicle have probable cause on that basis alone to search the vehicle under the automobile

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[10] See *Rocha, supra* note 4.

[11] *Id.* at 755, 890 N.W.2d at 207.

[12] *J.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013).

[13] *State v. Botts*, 299 Neb. 806, 910 N.W.2d 779 (2018).

[14] See *id.*

[15] See *Illinois v. Gates*, 462 U.S. 213, 231, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) ("'[i]n dealing with probable cause . . . as the very name implies, we deal with probabilities'").

[16] *District of Columbia v. Wesby*, 583 U.S. 48, 138 S. Ct. 577, 586, 199 L. Ed. 2d 453 (2018).

[17] See *Botts, supra* note 13 (citing *Wesby, supra* note 16).

exception to the warrant requirement.[18] We first articulated this rule in the 1977 case *State v. Benson*.[19]

In *Benson*, a van pulling a trailer was stopped after troopers noticed an irregularity on the van's license plate. During the investigation, one trooper detected the strong smell of marijuana coming from the trailer. The trooper asked the van's driver to open the trailer, but the driver claimed not to know the lock combination. The trooper called the county attorney's office to obtain a search warrant and was told no warrant was needed. The trooper then searched the trailer and discovered 119 pounds of marijuana. We upheld the constitutionality of the warrantless search, reasoning that "[t]he great majority of courts which have currently passed upon the issue have held that the smell of marijuana was alone sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to expertise."[20]

[13] A few years later in *State v. Daly*,[21] we reiterated the rule that the odor of marijuana coming from a vehicle is sufficient standing alone to furnish probable cause to search the vehicle. In *Daly*, a pickup was stopped by a trooper for speeding. While walking around the pickup, the trooper smelled the odor of marijuana coming from the bed of the pickup, which was covered by a fiberglass shell. The trooper confronted the driver about the marijuana smell, but the driver denied there was marijuana in the pickup and declined consent to search. A warrantless search revealed 582 pounds of marijuana in

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[18] See, e.g., *Watts, supra* note 1; *State v. Ruzicka*, 202 Neb. 257, 274 N.W.2d 873 (1979); *State v. Daly*, 202 Neb. 217, 274 N.W.2d 557 (1979); *State v. Kretchmar*, 201 Neb. 308, 267 N.W.2d 740 (1978), *overruled on other grounds* 203 Neb. 663, 280 N.W.2d 46 (1979); *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977). Accord *State v. Reha*, 12 Neb. App. 767, 686 N.W.2d 80 (2004).

[19] *Benson, supra* note 18.

[20] *Id.* at 18, 251 N.W.2d at 661-62.

[21] *Daly, supra* note 18.

the rear of the pickup. In affirming the trial court's finding of probable cause to search the pickup, we noted the trooper had received basic training on detecting the smell of marijuana and had arrested more than 50 drivers for possession of marijuana after smelling it during a traffic stop. We quoted our holding in *Benson* and emphasized that probable cause may result from any of the senses and that an officer is entitled to rely on his or her sense of smell in determining whether contraband is present in a vehicle.[22]

We adhered to this reasoning in *State v. Ruzicka*.[23] There, a truck was stopped by a trooper for a broken taillight. While standing at the driver's window, the trooper noticed the smell of burnt marijuana coming from the driver's compartment. The trooper asked permission to search, and the driver refused. A warrantless search of the truck revealed marijuana, methamphetamine, and LSD. On appeal, the driver argued the smell of burnt marijuana coming from the driver's compartment was not sufficient to provide probable cause to search the entire truck. We upheld the constitutionality of the search, observing that "[i]n a number of cases we have held that the odor of marijuana coming from a vehicle is sufficient to furnish probable cause for a search of the vehicle."[24] We expressly rejected the suggestion that smelling burnt marijuana in the driver's compartment should have limited the scope of the search, explaining, "We know of no reason why there should be a distinction between the odor of burned and unburned marijuana in this type of situation."[25]

In *State v. Watts*,[26] a driver was stopped by a trooper for speeding. While standing outside the open driver's window, the trooper detected the smell of burnt marijuana. The trooper

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[22] *Id.*

[23] *Ruzicka, supra* note 18.

[24] *Id.* at 258, 274 N.W.2d at 875.

[25] *Id.* at 258-59, 274 N.W.2d at 875.

[26] *Watts, supra* note 1.

asked whether there was marijuana in the vehicle, and the driver answered there was not. The trooper asked permission to search the vehicle, and the driver declined. The trooper then looked into the back seat of the vehicle and observed in plain view a plastic bag of marijuana. The driver was arrested, and the rest of the vehicle was searched. In the trunk, the trooper discovered three large trash bags containing a total of 60 pounds of marijuana. On appeal, we upheld the constitutionality of the warrantless search. We began our analysis by discussing the U.S. Supreme Court cases recognizing the automobile exception to the warrant requirement. We then discussed our prior holdings on the smell of marijuana emanating from automobiles, stating:

> We have constantly held that the smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where, as here, there was sufficient foundation as to the expertise of the officer. . . . We have further held the odor of burned marijuana coming from the driver's compartment of a truck was sufficient probable cause to search the truck.[27]

The driver in *Watts* conceded that under our prior cases, the trooper had probable cause to search the vehicle, but he argued that once the trooper discovered the small bag of marijuana in plain view in the back seat, he could search no further without additional facts to suggest marijuana might be found in the trunk. We soundly rejected this argument, reasoning:

> [I]t [is] just as logical to conclude that the finding of the small amount of marijuana in the passenger compartment, after being told by the defendant that none existed, simply served to substantiate the officer's suspicions and furnish additional probable cause to make a complete search of the automobile. Having found a quantity of illicit drugs in one part of the automobile does not

[27] *Id.* at 374, 307 N.W.2d at 819.

sensibly suggest the probability that no more such substance is present.[28]

In the instant appeal, Seckinger asks us to revisit this line of cases. Her primary contention is that the legalization of marijuana in Colorado has eroded the legal premise of our precedent because, she contends, the odor of marijuana standing alone no longer suggests criminal activity. Thus, the question presented here is a narrow one: Does the odor of marijuana coming from a vehicle, standing alone, still provide probable cause to search the vehicle? We conclude it does.

Before explaining our reasoning, we pause to observe that much of Seckinger's brief is devoted to suggesting there could have been several noncriminal explanations for the odor of marijuana in her car. But none of the suggested explanations are supported by the record. Indeed, when the trooper confronted her about smelling marijuana, Seckinger offered no explanation at all—legal or otherwise—and simply denied the odor was present. But regardless of the explanation given to the trooper, we are unpersuaded by Seckinger's legal argument on appeal. We find no merit to her suggestion that recent changes in Colorado's marijuana laws compel a change in Nebraska's settled jurisprudence.

First, we state the obvious: Marijuana remains a controlled substance under both federal law[29] and Nebraska law.[30] Because of marijuana's legal status as contraband, a trained officer who detects the odor of marijuana emanating from a vehicle in Nebraska has firsthand information that provides an objectively reasonable basis to suspect contraband will be found in the vehicle. Assuming the vehicle is readily mobile, the odor of marijuana alone provides probable cause to search

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[28] *Id.*

[29] See, 21 U.S.C. § 812(c) (2012); *Gonzales v. Raich*, 545 U.S. 1, 27, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (recognizing federal law "designates marijuana as contraband for *any* purpose").

[30] See Neb. Rev. Stat. §§ 28-405(c)(7) and 28-416(11) through (13) (Supp. 2017).

the vehicle under the automobile exception to the warrant requirement.[31] And while there may be innocent explanations for the odor of marijuana inside a vehicle, the concept of probable cause is based on probabilities[32] and does not require officers to rule out all innocent explanations for suspicious facts.[33]

Moreover, similar to Nebraska courts, most state and federal courts agree that the odor of marijuana alone furnishes probable cause for a warrantless search of the vehicle from which the odor emanates.[34] Even among states that have passed laws allowing medical or recreational marijuana use, many courts continue to recognize that marijuana is contraband and that the odor of marijuana can provide probable cause to search a vehicle.[35]

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[31] See *Watts, supra* note 1.

[32] See *Gates, supra* note 15.

[33] See *Botts, supra* note 13.

[34] See, Annot., 114 A.L.R. 5th 173, §§ 5, 7, and 9 (2003) (and cases cited therein); Annot., 188 A.L.R. Fed. 487, § 7 (2003) (and cases cited therein). Accord 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.6(b) (5th ed. 2012) (recognizing it is generally accepted that smell of marijuana, whether raw or burnt, is sufficiently distinctive to afford probable cause to search particular place from which odor emanates).

[35] See, e.g., *Robinson, Williams & Spriggs v. State*, 451 Md. 94, 152 A.3d 661 (2017) (despite decriminalization of less than 10 grams of marijuana, marijuana remains contraband and odor of marijuana emanating from vehicle provides probable cause to search vehicle); *State v. Cheatham*, 240 Ariz. 1, 375 P.3d 66 (2016) (although Arizona Medical Marijuana Act created limited exception to laws proscribing marijuana, odor of marijuana alone supports probable cause to search car unless totality of circumstances suggest marijuana possession complies with act); *People v. Zuniga*, 372 P.3d 1052 (Colo. 2016) (despite California's legalization of 1 ounce or less of marijuana, odor of marijuana still relevant to totality of circumstances test and can contribute to probable cause determination); *United States v. White*, 732 Fed. Appx. 597 (9th Cir. 2018) (despite Nevada's legalization of medical marijuana, smell of marijuana emanating from vehicle still provides probable cause for warrantless search because nonmedical marijuana remains contraband).

[14] Finally, Seckinger's argument is similar to one we recently rejected in *State v. Perry*.[36] In *Perry*, we were concerned with whether there was probable cause to arrest the occupants of the vehicle and not whether there was probable cause to search the vehicle. But similar to Seckinger's argument, the defendant's argument in *Perry* was that our line of cases analyzing probable cause based on the odor of marijuana was no longer good precedent. In *Perry*, the defendant argued the cases analyzing the odor of marijuana had been decided at a time when the possession of any amount of marijuana was a crime; because possession of less than an ounce of marijuana is now an infraction under Nebraska law,[37] the defendant in *Perry* suggested the smell of marijuana alone no longer furnished probable cause to suspect criminal activity in the vehicle. We rejected this argument and concluded the change in penalty was immaterial to our probable cause jurisprudence, reasoning:

> Objectively, the smell of burnt marijuana tells a reasonable officer that one or more persons in the vehicle recently possessed and used the drug. The officer need not know whether the amount possessed is more than 1 ounce in order to have probable cause to suspect criminal activity in the vehicle.[38]

[15] Similarly, we reject Seckinger's suggestion that a change in other states' criminal laws regarding marijuana are material to the probable cause holdings announced in *Benson*, *Daly*, *Ruzicka*, and *Watts*. We instead adhere to these holdings and reiterate the general rule that when an officer with sufficient training and experience detects the odor of marijuana emanating from a vehicle that is readily mobile, the odor alone furnishes probable cause to suspect contraband will be found in the vehicle and the vehicle may be lawfully searched under the automobile exception to the warrant requirement.

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[36] *State v. Perry*, 292 Neb. 708, 874 N.W.2d 36 (2016).

[37] See § 28-416(13).

[38] *Perry, supra* note 36, 292 Neb. at 722, 874 N.W.2d at 46.

Here, the trooper testified credibly that she smelled marijuana emanating from inside Seckinger's car during a traffic stop. The trooper had training and experience in detecting the odor of marijuana, and Seckinger's car was readily mobile when it was searched. On this record, we agree with the district court that the odor of marijuana coming from inside the car furnished probable cause to suspect contraband would be found in the car, and we conclude the warrantless search of the car was lawful under the automobile exception to the warrant requirement. Seckinger's motion to suppress was properly overruled.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

Stephanie A. Sparks, Personal Representative of the Estate of Gary W. Isom, deceased, et al., appellants and cross-appellees, v. M&D Trucking, L.L.C., appellee and cross-appellant.

921 N.W.2d 110

Filed December 28, 2018. No. S-17-1209.

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. **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.
4. **Summary Judgment.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
5. **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.
6. **Contracts: Parties: Words and Phrases.** By stating "where the inference is clear," the Nebraska Supreme Court means that there can be no dispute as to pertinent facts pertaining to the contract and the relationship of the parties involved and only one reasonable inference can be drawn therefrom.

7. **Employer and Employee: Independent Contractor.** A determination of a party's status as an employee or an independent contractor is determined from all the facts in the case and depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties.
8. ____: ____. No single test exists for determining whether one performs services for another as an employee or as an independent contractor, and the following 10 factors must be considered: (1) the extent of control which, by the agreement, the potential employer may exercise over the details of the work; (2) whether the one potentially 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 potential employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the potential employer or the one potentially 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 potentially 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 potential employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the potential employer is or is not in business.
9. ____: ____. The extent of control is the chief factor distinguishing an employment relationship from that of an independent contractor.
10. ____: ____. In examining the extent of a potential employer's control over the worker, it is important to distinguish control over the means and methods of the assignment from control over the end product of the work to be performed.
11. **Independent Contractor: Words and Phrases.** An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the means or methods used.
12. **Independent Contractor: Contracts.** Even the party contracting with an independent contractor may, without changing the status, exercise such control as is necessary to assure performance of the contract in accordance with its terms.
13. **Negligence: Liability: Contractors and Subcontractors.** Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or its servants.
14. ____: ____: ____. A party contracting with an independent contractor can be liable for physical harm caused to another if (1) the contracting

party retains control over the contractor's work, (2) the contracting party is in possession and control of premises, (3) a statute or rule imposes a specific duty on the contracting party, or (4) the contractor's work involves special risks or dangers. Courts often refer to the latter three exceptions as involving nondelegable duties.

15. **Negligence: Liability: Contractors and Subcontractors: Words and Phrases.** A nondelegable duty means that a contracting party to an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed.
16. **Contractors and Subcontractors: Liability.** To fall within the control exception to the general rule of nonliability, the contracting party's involvement in overseeing the work must be substantial.
17. ____: ____. To fall within the control exception to the general rule of nonliability, control must directly relate to the work that caused the injury.
18. ____: ____. The key element of control must exist with respect to the very thing from which the injury arose.
19. ____: ____. To impose liability, the contracting party must have (1) supervised the work that caused the injury, (2) actual or constructive knowledge of the danger that ultimately caused the injury, and (3) the opportunity to prevent the injury.
20. **Negligence: Contractors and Subcontractors.** Having the right to control and supervise the work implies having the ability to oversee and direct the manner in which the work which caused the injury is carried out.
21. **Federal Acts: Motor Carriers: Judgments: Proof.** The federal Motor Carrier Safety Improvement Act of 1999 and the Federal Motor Carrier Safety Regulations generally require that a commercial motor carrier operate only if registered and that such registration requires proof of financial responsibility in order to ensure collectability of a judgment against the motor carrier.
22. **Federal Acts: Motor Carriers: Intent.** The federal Motor Carrier Safety Improvement Act of 1999 and the Federal Motor Carrier Safety Regulations protect the public and provide financial responsibility for motor carrier accidents by creating a legal right and a duty to control vehicles operated for the regulated motor carrier's benefit.
23. **Motor Carriers: Brokers: Liability.** When distinguishing between a motor carrier and a broker, the determinative question is whether the disputed party accepted legal responsibility to transport the shipment.
24. **Motor Carriers: Brokers.** A transportation company may have authority to act as a shipper, broker, or carrier, and a court must focus on the

specific transaction at issue—not on whether the transportation company acts as a motor carrier in other transactions.

25. **Negligence: Liability: Employer and Employee: Independent Contractor.** An employer is subject to liability for physical harm to third persons caused by the employer's failure to exercise reasonable care in selecting an employee, even if such employee is an independent contractor.
26. **Federal Acts: Motor Carriers: Records.** The federal Motor Carrier Safety Improvement Act of 1999 and the Federal Motor Carrier Safety Regulations require motor carriers to obtain and maintain records on each of the drivers they employ, such as driving and medical records.

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

Patrick R. Turner, Steven G. Emerson, Thomas H. Davis, and Bradley J. Yeretsky, of Stinson, Leonard & Street, L.L.P., for appellants.

Thomas A. Grennan and Adam J. Wachal, of Gross & Welch, P.C., L.L.O., for appellee.

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

Funke, J.

Stephanie A. Sparks, as personal representative of the estate of Gary W. Isom and as temporary guardian of Justin W. Isom; Melanie Crosby, as personal representative of the estate of Tiffany R. Isom; and Nancy Ragains, as personal representative of the estate of Susan G. Isom (appellants), appeal the district court's order granting the motion for summary judgment of M&D Trucking, L.L.C. (M&D). M&D cross-appeals. For the reasons set forth herein, we affirm.

I. BACKGROUND

1. Facts

Around 5 a.m. on August 28, 2014, Kenneth Bryan Johnson was driving a truck and trailer and failed to stop at a stop sign,

striking a vehicle carrying members of the Isom family: Gary, Susan, their son Justin, and Gary's adult daughter Tiffany. Gary, Susan, and Tiffany died as a result of the collision, and Justin was seriously injured. Johnson had been driving longer than permitted under applicable law, and Johnson had consumed alcohol less than 4 hours before going on service. Johnson had a criminal history relating to the operation of motor vehicles, including driving on a suspended license, driving without a license, and driving under the influence of alcohol.

Johnson contracted with Turbo Turtle Logistics LLC (Turbo Turtle) and was driving a truck and trailer with Turbo Turtle signage on the date of the accident. According to deposition testimony from Turbo Turtle president Robert Brackett, Turbo Turtle is a logistics and brokerage company; logistics meaning the physical transportation of products, and brokerage meaning the arranging of transportation of freight by others. At the time of the accident, Turbo Turtle was a motor carrier. At all relevant times, Brackett testified that he was the only employee of Turbo Turtle and that the drivers were independent contractors. Brackett explained Johnson had been one of Turbo Turtle's independent contractor drivers approximately 30 days prior to the accident and that he leased a truck and trailer from Turbo Turtle during that time. Johnson was not allowed to use Turbo Turtle's equipment for any work that was not dispatched through Turbo Turtle or M&D, the company which was hired to transport the load Johnson carried during the accident.

Turbo Turtle had had a business relationship with M&D since Turbo Turtle's creation in 2012. Brackett testified that Turbo Turtle got involved with M&D because Turbo Turtle was trying to add trucks and did not have time to look for work. Brackett opined that, likely, M&D worked with Turbo Turtle to add to its capacity in using Turbo Turtle's drivers, trucks, and trailers. From its inception until the end of its relationship with M&D, Brackett explained that about 98 percent of Turbo Turtle's work came from M&D.

M&D operates as a brokerage and trucking company. M&D did not have an ownership interest in Turbo Turtle. At the time of the accident, Michael Plambeck was the manager and Dan Rudnick assisted. According to Plambeck, through its trucking division, M&D employed four to five drivers who drove trucks and trailers owned by M&D. Through its brokerage division, M&D got orders from customers and then sent the load information out to M&D drivers or other carriers. According to Rudnick, M&D's customers did not know which loads would be assigned to M&D drivers and which would be assigned to other carriers. The customers would be billed the same amount regardless of which type of driver was used. While not separate companies, M&D had separate licensing for its brokerage and trucking services and separate insurance plans.

M&D and Turbo Turtle signed a contract detailing the relationship between the companies titled "Contract for Dispatch Services at Reduced Rate With Mutual Non-Competition Upon Early Termination by Either Party." The contract provided that M&D would be the exclusive dispatch servicer for Turbo Turtle with an exception for summer and fall harvesttime in South Dakota. As to Turbo Turtle's drivers, the contract stated, "[Turbo Turtle] will assure that at least 42 weeks of the yearly hauling in total for all of the [independent contractors] under contract with [Turbo Turtle] results from M&D dispatch services"; "[Turbo Turtle] will maintain at least one [independent contractor] under dispatch by M&D at all times"; and "this contract does not require the dedication by [Turbo Turtle] of a particular [independent contractor] to dispatch by M&D." It additionally applied a 2-year, noncompetition agreement should the parties prematurely break the contract. By operation of this contract, Brackett claimed M&D was leasing his four Turbo Turtle trucks. Plambeck, in turn, asserted that any drivers arranged through Turbo Turtle were Turbo Turtle employees or contractors and, as such, M&D never conducted background checks, criminal history background checks, review of a driver's driving record or traffic violations, or

review of the performance of Turbo Turtle's drivers. Instead, Plambeck testified, M&D requested and received from Turbo Turtle various legal forms necessary for work between a broker and carrier, including a "DOT motor carrier number" saying Turbo Turtle is legally allowed to haul freight, insurance verification, and W-9 forms for tax purposes. Brackett alleged the contract between M&D and Turbo Turtle was in effect at the time of the accident. Plambeck claimed that M&D terminated the contract on August 28, 2014, once they became aware that Turbo Turtle hauled a load for a different company, while Brackett opined that the contract was terminated in connection with the accident.

Brackett, Plambeck, and Rudnick explained the general procedure between M&D and Turbo Turtle for assigning and transporting hired loads. Plambeck described that a customer would communicate the details of a load to M&D; M&D would document the information on a "load sheet" with the load number, pickup location, destination, telephone numbers, and load quantity; M&D would communicate to Turbo Turtle or a specific driver the load information; and the driver would receive a paper at the pickup and destination and that paper would be sent to M&D for billing purposes. Brackett explained M&D would communicate the load information to Turbo Turtle by sending the individual drivers text messages and Turbo Turtle a copy of those messages. According to Brackett, Turbo Turtle would have no knowledge of who the actual customers were. For payment on loads carried by Turbo Turtle drivers, M&D would charge the customer the same amount as it would have if it used its own driver, M&D would keep a percentage of the total and pay the rest to Turbo Turtle, and Turbo Turtle would keep a percentage of the amount provided by M&D and pay the rest to the driver.

Specifically, on the facts surrounding the accident at issue, M&D had a telephone conversation with Northern Ag Service, Inc., now known as NORAG LLC (Northern Ag), about picking up fracking sand from Genoa, Nebraska, to transport to

Blackwell, Oklahoma. Northern Ag is a freight broker, meaning vendors call Northern Ag about moving various loads and Northern Ag then matches the vendor with a carrier or, sometimes, with another broker who contacts another carrier. M&D did not tell Northern Ag which of the ordered loads would be handled by M&D and which would be handled by outside drivers.

Plambeck testified that Northern Ag was fully aware that M&D was a brokerage and trucking company and that it used its own company drivers as well as drivers from other companies to haul loads for Northern Ag. However, there was no written contract in place detailing the relationship between M&D and Northern Ag, and a manager for Northern Ag testified during a deposition that M&D never informed Northern Ag that it was working with outside drivers. He explained that he believed Northern Ag thought it was dealing only with M&D, not knowing Turbo Turtle was handling some of its loads, and that Northern Ag hired M&D to be the carrier. In various records of pickup and destination locations created by Northern Ag for its use, Northern Ag repeatedly listed M&D as the carrier. In the origin ticket/origin bill of lading created by Northern Ag for the load carried during the accident, M&D was listed as the carrier on the pickup.

On August 27 and 28, 2014, M&D, Turbo Turtle, and Johnson had various cell phone communications. Plambeck testified that around 11 p.m., someone from M&D text messaged either Turbo Turtle or Johnson about carrying one of the Northern Ag loads. Rudnick explained that he had contact with either Turbo Turtle or Johnson that night, because a load number did not work and Rudnick had to provide a new number. Plambeck testified Johnson was not required to call M&D once he picked up the load. From information obtained from Johnson's cell phone, the following communications occurred:

- At 9:01 a.m. on August 27, 2014, M&D text messaged Johnson and canceled a load that he was carrying for M&D due to rain.

- Approximately 30 minutes later, M&D text messaged Johnson and dispatched him and his truck to transport a load of sand from Genoa, Nebraska, to Waterford City, North Dakota.
- At 10:47 a.m., Johnson made a short telephone call to M&D.
- At 10:53 a.m., Johnson text messaged Turbo Turtle and informed it that M&D had dispatched him on a load from Genoa to Waterford City.
- At 11:43 p.m., Johnson received a text message from Turbo Turtle stating, "Genoa, NE Sand to Blackwell, OK."
- At 12:09 a.m. on August 28, 2014, Johnson received a telephone call from M&D lasting approximately 1 minute 41 seconds.
- At 12:41 a.m., Johnson received a telephone call from M&D lasting approximately 8 minutes 41 seconds.
- From 12:54 a.m. to 12:58 a.m., Johnson and Turbo Turtle exchanged six text messages, including discussions about truckstops available en route to Blackwell.

The accident between the Isom family and Johnson occurred around 5 a.m. on August 28, 2014. A police report from the accident listed Turbo Turtle as the motor carrier.

2. Appellants' Claims

Appellants brought the instant action against Turbo Turtle, Johnson, and M&D. Pursuant to a stipulation and joint motion, the court dismissed the claims against Turbo Turtle and Johnson. On the claims against M&D, the stipulation and motion to dismiss provided: "This Dismissal does not involve any other defendant or potential tortfeasor. The Plaintiffs reserve all claims against M&D . . . and the claims against it remain pending and are not dismissed." The order dismissing the claims against Turbo Turtle and Johnson confirmed: "This Dismissal does not extend to M&D . . . . The Plaintiffs' claims against M&D [remain] pending . . . ."

As to M&D, appellants alleged that (1) Johnson was an agent of M&D, and M&D was liable for his negligence through the doctrine of respondeat superior; (2) M&D was negligent in hiring, training, or supervising Johnson given Johnson's unfitness

to operate motor vehicles on public roads and a criminal history regarding the operation of motor vehicles; and (3) M&D was negligent per se in that M&D was the operator and/or statutory lessee of the truck and trailer driven by Johnson under the federal Motor Carrier Safety Improvement Act of 1999 (FMCSA) and Federal Motor Carrier Safety Regulations (FMCSR) and, thus, liable for Johnson's and its own negligence.

3. Summary Judgment

M&D filed a motion for summary judgment claiming there was no genuine issue of material fact and that M&D was entitled to summary judgment as a matter of law. In support of the motion, M&D asserted Johnson was not an employee of M&D, Johnson was an independent contractor of Turbo Turtle who was in turn an independent contractor of M&D, and M&D did not have sufficient control over Johnson to be vicariously liable.

Following a hearing on the motion, the district court granted M&D summary judgment as to all three claims. On the claim of respondeat superior, the court first determined appellants' claim is not barred by the prior settlement with Turbo Turtle and Johnson through operation of Neb. Rev. Stat. § 25-21,185.11(1) (Reissue 2016) ("[a] release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides"). The court then determined that Johnson was not an employee of M&D and that M&D did not exert sufficient control over Johnson to establish appellants' claim of respondeat superior. On the claim of negligent hiring, training, or supervising, the court determined M&D complied with its reasonable duty of care as a broker in that the record did not support a finding that M&D knew or should have known Turbo Turtle had an inadequate safety record or that Turbo Turtle hired an unsafe driver in Johnson. Finally, the court noted that negligence per se is not recognized as a separate cause of action in Nebraska for a violation of FMCSA and FMCSR.

II. ASSIGNMENTS OF ERROR

Appellants assign, restated, that the district court erred in granting summary judgment, because there was a genuine issue of material fact of (1) whether M&D was Johnson's common-law or statutory employer and (2) whether M&D negligently hired, trained, or supervised Johnson.

On cross-appeal, M&D assigns, restated, that the district court erred in finding that appellants' decision to settle with Turbo Turtle and Johnson does not operate as a release of M&D in the event that Turbo Turtle or Johnson are deemed agents of M&D.

III. STANDARD OF REVIEW

[1-3] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from 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] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

IV. ANALYSIS

1. Employee Versus Independent Contractor

Appellants first assign the district court erred in its determination that Johnson was an independent contractor and not M&D's employee. Appellants claim there is substantial

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[1] *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017).

[2] *Id.*

[3] *Id.*

evidence that M&D controlled Johnson's work, as well as other relevant factors to create a question of fact as to whether M&D was Johnson's common-law employer.

[4-6] On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.[4] Ordinarily, a party's status as an employee or an independent contractor is a question of fact.[5] 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.[6] By stating "where the inference is clear," this court means that there can be no dispute as to pertinent facts pertaining to the contract and the relationship of the parties involved and only one reasonable inference can be drawn therefrom.[7]

In this matter, the material facts are not in dispute. Rather, the parties argue about the inferences to be drawn from those facts concerning the legal relationships of the parties. We determine these inferences are clear and can be determined as a matter of law.

[7,8] A determination of whether Johnson was M&D's employee or an independent contractor is determined from all the facts in the case and depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties.[8] No single test exists for determining whether one performs services for another as an employee or as an independent contractor, and the following 10 factors must be considered: (1) the extent of control which, by the agreement, the potential employer may exercise over the details of the work; (2) whether the one potentially employed is engaged in a distinct occupation or business; (3) the type of

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[4] *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] See *id.*

occupation, with reference to whether, in the locality, the work is usually done under the direction of the potential employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the potential employer or the one potentially 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 potentially 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 potential employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the potential employer is or is not in business.[9]

(a) Extent of Control

[9-12] The extent of control is the chief factor distinguishing an employment relationship from that of an independent contractor.[10] In examining the extent of the potential employer's control over the worker in this context, it is important to distinguish control over the means and methods of the assignment from control over the end product of the work to be performed.[11] An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the means or methods used.[12] Even the party contracting with an independent contractor may, without changing the status, exercise such control as is necessary to assure performance of the contract in accordance with its terms.[13]

Appellants contend several facts support a finding that M&D exerted sufficient control over Johnson for a determination that

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[9] See *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

[10] See *Kime, supra* note 4.

[11] *Id.*

[12] *Id.*

[13] See *id.*

the relationship went beyond that of an independent contractor to an employer-employee. Specifically, appellants point to the text messages and cell phone calls between M&D, Turbo Turtle, and Johnson representatives on August 27 and 28, 2014; the contract between M&D and Turbo Turtle which provided M&D would be the exclusive dispatch servicer for Turbo Turtle; and the agreement between Turbo Turtle and Johnson that Johnson could not drive the leased equipment for loads outside those for M&D and Turbo Turtle.

However, these factual allegations do not lead to a determination that M&D and Johnson's relationship went beyond that of an independent contractor. The text messages cited by appellants show that M&D canceled a load due to rain at 9:01 a.m. on August 27, 2014; that M&D provided Johnson load information for a different load to North Dakota 30 minutes later; and that Turbo Turtle provided load information to Johnson about the Northern Ag load at 11:43 p.m. By providing only the pickup and destination locations, these messages go to the result of the work and not the means or methods used.[14] Additionally, the fact that M&D text messaged Johnson the North Dakota load information directly rather than Turbo Turtle is not at odds with an independent contractor relationship. M&D and Turbo Turtle had a history of M&D's making direct communications with Turbo Turtle's drivers; Turbo Turtle was informed of the North Dakota load by Johnson; and M&D communicated with Turbo Turtle directly about the Northern Ag load, which Turbo Turtle then communicated to Johnson. Through the text messages, the record demonstrates only that M&D was controlling Johnson as to the end product of the work to be performed and did so pursuant to its agreement with Turbo Turtle.

The cell phone calls also do not provide sufficient support that M&D controlled Johnson's actions as to the means and methods to be used. Appellants argue the timing of these calls

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[14] See *id*.

implies M&D was directing Johnson on the routes to take or the means in which to haul the load, because they occurred after he had the load information, but there is no evidence in the record as to the subject or content of the cell phone calls. Instead, the only information available about the content of the calls is from M&D representatives who testified that, while they do not remember the content of these specific calls, they contacted Johnson only concerning load information. Additionally, it is not a clear inference from the timing of these calls that they were instructing Johnson on the routes to take or the means to haul the load. These cell phone calls occurred relatively soon after Turbo Turtle text messaged Johnson the Northern Ag load information which could imply the conversations were merely communications expanding on the load information. The conversations could also have been concerning the status of other loads or a variety of other topics. Without further evidence on the subject of the calls, there is no clear implication that, as appellants suggest, the calls were M&D's instructing Johnson on the means or methods in which to drive the load.

As to the contract between M&D and Turbo Turtle and the agreement between Turbo Turtle and Johnson, appellants argue these agreements lead to the conclusion that Johnson was permitted to drive only M&D's loads, which was evidence that M&D exercised control over Johnson under an employer-employee relationship. However, the record does not lead to such conclusion. Johnson never contracted with M&D; instead, Turbo Turtle contracted with M&D and Turbo Turtle contracted with Johnson. According to the contract between M&D and Turbo Turtle, M&D was to provide exclusive dispatch services to Turbo Turtle with an exception for periods in which Turbo Turtle was carrying loads related to harvesttime. While the contract required at least one of Turbo Turtle's drivers be available for dispatch by M&D, the contract stated that it did not "require the dedication by [Turbo Turtle] of a particular [independent contractor] to dispatch by M&D." Johnson's

agreement with Turbo Turtle, in turn, provided that Johnson could not drive Turbo Turtle's equipment for any load other than those issued by Turbo Turtle or M&D but did not prevent Johnson from using other equipment to carry outside loads. There is also nothing in the record that the agreement prohibited Johnson from carrying loads for Turbo Turtle that were unrelated to M&D, and Turbo Turtle was permitted under the M&D contract to assign non-M&D loads during harvesttime. Therefore, appellants' contention that Johnson could carry only M&D loads is refuted by the record.

In consideration of all of the above and in review of the record, there is insufficient evidence to create a genuine issue of material fact that M&D exerted the extent of control necessary over Johnson for a determination that the relationship went beyond that of an independent contractor to an employer-employee.

(b) Other Factors

Appellants contend additional factors weigh toward a determination that Johnson and M&D had an employer-employee relationship: whether the one potentially employed is engaged in a distinct occupation or business, the length of time for which the one potentially employed is engaged, whether the work is part of the regular business of the potential employer, and whether the potential employer is or is not in business.[15] To support this contention, appellants note M&D, Turbo Turtle, and Johnson were engaged in the same business of transporting goods; M&D was hired to transport the load in question by Northern Ag, which believed M&D would be the sole carrier of the loads; and M&D's own drivers were transporting other loads in the same order for Northern Ag. Appellants claim these factors, when added to the cell phone calls and text messages between M&D and Johnson and the exclusive language of the Turbo Turtle agreements with M&D and Johnson, create an issue of fact as to whether Johnson was an employee of M&D.

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[15] See *Mays, supra* note 9.

However, along with the analysis in the previous section, these additional factors do not determine Johnson was M&D's employee. The fact that M&D had a trucking division as well as a brokerage division is not determinative of an employer-employee relationship. Johnson was in a distinct business from M&D in that M&D operated a brokerage division within its company utilizing outside drivers; Johnson was not exclusively bound to M&D's shipments and could take other work from Turbo Turtle, including during harvesttime; and Johnson did not use M&D's equipment and leased the equipment from Turbo Turtle instead. Johnson contracted with Turbo Turtle and not M&D and had driven for Turbo Turtle for only approximately 30 days prior to the accident, a relatively short amount of time. Additionally, while M&D did drive some of the Northern Ag loads utilizing its own drivers, it was also common for M&D to dispatch outside companies and drivers for the Northern Ag loads.

Considering all of the above, the record is insufficient to create a genuine issue of material fact that the relationship went beyond that of an independent contractor to an employer-employee.

2. Liability as Independent Contractor

Appellants next argue M&D would be liable for Johnson's negligence, even if Johnson were an independent contractor.

[13-15] Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or its servants.[16] Our case law has recognized four exceptions to the general rule.[17] Specifically, a party contracting with an independent contractor can be liable for physical harm caused to another if (1) the contracting party retains control over the contractor's work, (2) the contracting party is in possession and control of premises,

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[16] *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014).

[17] *Id.*

(3) a statute or rule imposes a specific duty on the contracting party, or (4) the contractor's work involves special risks or dangers.[18] We often refer to the latter three exceptions as involving nondelegable duties.[19] A nondelegable duty means that a contracting party to an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed.[20]

(a) Retention of Control

While M&D did not retain sufficient control over Johnson's work to subject M&D to liability for Johnson's negligence as an agent or employee, appellants allege that M&D retained some control over the relevant work and that M&D is therefore liable for a failure to exercise reasonable care in the use of that control.[21]

[16-19] To fall within this exception to the general rule of nonliability, the contracting party's involvement in overseeing the work must be substantial.[22] Furthermore, that control must directly relate to the work that caused the injury.[23] In other words, the key element of control must exist with respect to the very thing from which the injury arose.[24] To impose liability, the contracting party must have (1) supervised the work that caused the injury, (2) actual or constructive knowledge of the danger that ultimately caused the injury, and (3) the opportunity to prevent the injury.[25]

Appellants argue M&D acted in a supervisory role when it assigned Johnson the load from Northern Ag, had actual

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[18] See *id.*

[19] See *id.*

[20] See *id.*

[21] See Restatement (Second) of Torts § 414 (1965).

[22] See *Gaytan, supra* note 16.

[23] See *id.*

[24] See *Cutlip v. Lucky Stores*, 22 Md. App. 673, 325 A.2d 432 (1974).

[25] See *Gaytan, supra* note 16.

and/or constructive knowledge that Johnson was unavailable for driving under the hours-of-service requirements of FMCSA and FMCSR,[26] and had the opportunity to use a different driver who was not in violation of those requirements but failed to do so. Specifically, appellants point to the communication between M&D and Johnson on August 27, 2014, where M&D text messaged to cancel a load Johnson was carrying at 9:01 a.m., text messaged to dispatch him on a load from Nebraska to North Dakota 30 minutes later, and communicated with Turbo Turtle to dispatch Johnson on the load carried during the accident at 11:43 p.m.

[20] The record does not support appellants' contention that M&D had sufficient supervision of Johnson's work. Having the right to control and supervise the work in this context implies having the ability to oversee and direct the manner in which the work that caused the injury is carried out.[27] As we have already concluded, M&D did not have control of the method or means in which Johnson performed his work. Furthermore, concerning the Northern Ag load specifically, the text messages indicate that Johnson was provided, at that time, with only the pickup, destination, and content details of the load. The messages did not direct Johnson on the timing of the load, the route, and what stops to make. Without more, nothing in the record indicates that Johnson was required to drive beyond the hours-of-service restriction and that M&D had control and supervision of Johnson to direct him to make such a violation.

(b) Control of Premises

Appellants argue M&D is liable as the party in possession and control of premises where physical harm is caused.

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[26] See 49 C.F.R. § 395.3(2) (2017).

[27] *Kime, supra* note 4. See, also, *Harris v. Velichkov*, 860 F. Supp. 2d 970 (D. Neb. 2012), *affirmed sub nom. Harris v. FedEx Nat. LTL, Inc.*, 760 F.3d 780 (8th Cir. 2014); *Gaytan, supra* note 16.

Appellants allege M&D had a lease agreement with Turbo Turtle and, as a result, was in control of Johnson and the truck and trailer.

Under 49 C.F.R. § 376.2(e) (2016), a "lease" is defined as "[A] contract or arrangement in which the owner grants the use of equipment, with or without [a] driver, for a specified period to an authorized carrier for use in the regulated transportation of property, in exchange for compensation." In addition, 49 C.F.R. §§ 376.12 and 376.22 (2017) require that a lease contain the following provisions: provide the lessee exclusive possession, control, and use of the equipment for the duration of the lease and the lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease; clearly specify the legal obligation of the lessee to maintain insurance coverage for the protection of the public; and provide that control and responsibility for the operation of the equipment shall be that of the lessee from the time possession is taken until possession is returned. Further, 49 C.F.R. §§ 376.11 and 376.22 (2017) provide specific requirements for the operation of a lease, including that receipts are to be provided from the lessee to the lessor when possession is taken, the equipment must be identified as being operated by the lessee, and the equipment must carry a copy of the lease.

This contract was not a lease agreement whereby M&D was leasing Turbo Turtle's drivers, trucks, and trailers when it communicated a job. Here, Turbo Turtle and Johnson maintained control over the use of the truck and trailer. Turbo Turtle was responsible for the equipment's upkeep, insurance, and signage, as well as the hiring of the drivers, and Johnson and Turbo Turtle were free to coordinate the means and manner in which they accomplished the loads M&D provided to them. Moreover, there was no evidence in the record that either Turbo Turtle or Johnson received receipts when M&D allegedly took possession of the equipment, that the equipment displayed any identifying information that it was

being operated by M&D, or that Johnson carried a copy of the contract.

Appellants cite to Plambeck's deposition for the proposition that the contract was a lease. During that deposition, Plambeck made two comments regarding a lease agreement and indicated that prior to the contract, M&D had two other agreements with Turbo Turtle. The first contract he described as a "lease agreement that M&D . . . used as a standard lease agreement for any companies that [M&D] brokered loads to." The second contract he described as a "trailer lease" which allowed Turbo Turtle to pull one of M&D's trailers.

The record before us is void of the first contract of which Plambeck testified. As a result, we cannot determine the terms or conditions of that agreement and whether it would qualify as a lease under FMCSA and FMCSR. Upon a question as to whether the trailer lease was still in effect in 2014, Plambeck stated that "I would call [the contract] a lease agreement too, so which one do you mean?" Plambeck then testified that Turbo Turtle's right to lease a trailer from M&D continued on an as-needed basis. The contract itself authorized Turbo Turtle to lease one of M&D's trailers. However, later in his deposition, Plambeck testified that none of the equipment involved in the accident was being leased from M&D. Noting the failure of the contract to comply with FMCSA and FMCSR requirements for a lease, Plambeck's statement, without more, does not imply that M&D treated the contract as a lease agreement for Turbo Turtle's drivers and equipment, nor does it make the contract such a lease agreement.

(c) Statute or Rule

(i) Statutory Employer-Employee Under FMCSA and FMCSR

Appellants argue FMCSA and FMCSR impose liability on M&D, because Johnson was a driver being controlled exclusively by M&D at the time of the accident and, as such, Johnson was M&D's statutory employee.

In support of their argument, appellants cite to several definitions within the FMCSR. Specifically, 49 C.F.R. § 376.2(d)(2) which defines "owner" as someone "who, without title, has the right to exclusive use of equipment," and 49 C.F.R. § 390.5 (2017) which defines an "employer" as someone "who owns or leases a commercial motor vehicle in connection with [a business affecting interstate commerce]" and "employee" as someone "employed by an employer" and can include "an independent contractor while in the course of operating a commercial motor vehicle." Appellants claim M&D had the right to exclusive use of Johnson and his equipment, M&D had this right to exclusive use in connection with its interstate trucking business, and, thus, Johnson was an M&D employee under FMCSR, even if considered an independent contractor.

However, appellants are incorrect in their claim that M&D was the owner of the equipment. As analyzed above, Johnson and his equipment were not exclusively controlled by M&D at the time of the accident, Johnson's equipment was owned by Turbo Turtle who was responsible for its maintenance and insurance, and the contract between M&D and Turbo Turtle was not a lease agreement for that equipment. Because M&D was not the owner of Johnson's equipment and did not lease Johnson's equipment, M&D does not meet the definition of employer and Johnson does not meet the definition of employee under FMCSA and FMCSR.

(ii) Motor Carrier Under FMCSA and FMCSR

Appellants argue that FMCSA and FMCSR impose liability on M&D, because M&D was the motor carrier of the Northern Ag load. M&D, in turn, argues it was acting as a broker of the load in question and, thus, did not have liability under FMCSA and FMCSR.

[21,22] FMCSA and FMCSR generally require that a commercial motor carrier operate only if registered and that such

registration requires proof of financial responsibility in order to ensure collectability of a judgment against the motor carrier.[28] This act and these regulations protect the public and provide financial responsibility for motor carrier accidents by creating a legal right and a duty to control vehicles operated for the regulated motor carrier's benefit.[29]

[23] The FMCSR, at 49 C.F.R. § 390.5, codified as Neb. Rev. Stat. § 75-362(31) (Cum. Supp. 2014), defines "motor carrier" as

> a for-hire motor carrier or a private motor carrier. The term includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories. . . . [T]his definition includes the terms *employer* and *exempt motor carrier*.

For purposes of federal interstate transportation law, a "broker" means:

> a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.[30]

The FMCSR, at 49 C.F.R. § 371.2(a) (2017), distinguishes motor carriers from brokers by stating:

> Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning

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[28] See, 49 U.S.C. §§ 13901 and 13906 (2012 & Supp. V 2017); *Harris, supra* note 27.

[29] See, e.g., 49 U.S.C. § 14102(a)(4) (2012); *Crocker v. Morales-Santana*, 854 N.W.2d 663 (N.D. 2014); *Tamez v. Southwestern Motor Transport, Inc.*, 155 S.W.3d 564 (Tex. App. 2004).

[30] 49 U.S.C. § 13102(2) (2012). See, also, 13 C.J.S. *Carriers* § 87 (2017).

> of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.

As such, when distinguishing between a motor carrier and a broker, the determinative question is whether the disputed party accepted legal responsibility to transport the shipment.[31]

In arguing M&D was acting as a motor carrier on Johnson's Northern Ag load, appellants allege M&D was a licensed motor carrier, M&D was Northern Ag's exclusive point of contact, Northern Ag identified M&D as the motor carrier on internal documents, M&D solicited the loads from Northern Ag for its own account, M&D directly dispatched Johnson, and M&D had control over Johnson and his truck and trailer.

[24] Whether M&D was also a licensed motor carrier is indeterminative to the question whether M&D was the motor carrier for purposes of liability for Johnson's negligence. Instead, this question requires inquiry into M&D's actions with regard to the particular load at issue.[32] A transportation company may have authority to act as a shipper, broker, or carrier, and a court must focus on the specific transaction at issue—not on whether the transportation company acts as a motor carrier in other transactions.[33] At the time of the accident, M&D had both a trucking and a brokerage division to its company with separate licenses and insurance plans, while Turbo Turtle was a licensed motor carrier with its own license and insurance. M&D gave the load in question to Turbo Turtle and its

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[31] See *Essex Ins. Co. v. Barrett Moving & Storage, Inc.*, 885 F.3d 1292 (11th Cir. 2018).

[32] See, e.g., *Mass v. Braswell Motor Freight Lines, Inc.*, 577 F.2d 665 (9th Cir. 1978); *Hewlett-Packard v. Brother's Trucking Enterprises*, 373 F. Supp. 2d 1349 (S.D. Fla. 2005); *Nipponkoa Ins. Co., Ltd. v. C.H. Robinson Worldwide, Inc.*, No. 09 Civ. 2365(PGG), 2011 WL 671747 (S.D.N.Y. Feb. 18, 2011) (unpublished memorandum and order).

[33] *Harris, supra* note 27.

driver. There is no evidence M&D instructed Johnson beyond providing pickup and destination information. Johnson drove Turbo Turtle's truck and trailer, and Turbo Turtle's signage and motor carrier number were displayed on the equipment. After the accident, the police report listed Turbo Turtle as the motor carrier.

The fact that M&D held itself as Northern Ag's exclusive source of contact is insufficient to convert M&D into a motor carrier under FMCSA and FMCSR.[34] There is no requirement under FMCSA and FMCSR that a broker cannot be the exclusive source of contact for a transportation customer. The record further demonstrates this is a normal practice of the trucking industry. For example, Northern Ag was a freight brokerage company that arranged loads for transport with customers to whom M&D and other of Northern Ag's brokers and carriers had no direct contact.

Appellants contend that M&D solicited the loads from Northern Ag for its own account and that, as a result, M&D was a motor carrier for the load at issue. In support of their contention, appellants rely on *Schramm v. Foster*[35] for the holding that an entity may be treated as a motor carrier, as opposed to a broker, if it engages in solicitation for its own account. However, there was no evidence that M&D was contractually obligated to transport the Northern Ag loads exclusively and there was no evidence that M&D conveyed to Northern Ag that it would be transporting the load itself. In fact, a Northern Ag manager testified that on behalf of Northern Ag, he solicited brokers as well as carriers to fill shipping orders. In addition, Plambeck testified that Northern Ag was aware that M&D was a brokerage company and that M&D was using M&D drivers and also using brokered carriers for Northern Ag loads. Plambeck also testified that M&D

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[34] See *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004).

[35] *Id*.

never told Northern Ag that it would haul all of the offered loads through M&D's trucking division. As a result, there is no evidence that M&D solicited the Northern Ag loads as a motor carrier for its own account.

M&D did not directly dispatch Johnson on the load in question. Instead, Northern Ag contacted M&D with the load information, M&D communicated that information to Turbo Turtle, and Turbo Turtle communicated that information to Johnson. Johnson's cell phone records indicate Turbo Turtle was the one who contacted Johnson about the Northern Ag load, while M&D had directly dispatched Johnson on a previous North Dakota load. Johnson communicated with Turbo Turtle about routes and stops but there was no evidence in the record establishing that Johnson communicated with M&D about the means and method of the load. However, even if M&D had directly dispatched Johnson on the Northern Ag load, such an action would not determine M&D was a motor carrier. The text messages in which M&D instructed Johnson on the North Dakota load and the text messages in which Turbo Turtle instructed Johnson on the Northern Ag load provided only pickup and destination information. The provision of such information is consistent with the role of a third-party logistics company with the responsibility of coordinating shipment of the freight relative to the customer's needs.[36]

While relevant to the question of whether M&D legally bound themselves to transport the Northern Ag loads, Northern Ag listing M&D on the bill of lading and other pickup/dropoff records is not dispositive evidence M&D was acting as the motor carrier. The identification of a transportation company as the "carrier" on the bill of lading does not prove that the transportation company was in fact the carrier in this transaction. In *Schramm*, the court found that a bill of lading prepared by a third party, which identified the defendant as the

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[36] See *id.*

"carrier" of the load was insufficient to establish the defendant's carrier status, because the defendant played no role in its preparation.[37]

In the instant matter, the record indicates that typically two different documents were generated for each load shipped: one by the customer when the load was picked up and one by Northern Ag when the load was dropped off. Nothing in the record indicates that M&D had any involvement in preparing either document. For the load involved in the accident, only the pickup document was generated, because the load was not dropped off. The pickup document listed M&D as the carrier and was created by the customer. However, as discussed above, when the load was picked up, the truck and trailer displayed Turbo Turtle's signage and carrier number. M&D's signage and carrier number were not displayed on the truck and trailer, and there is no evidence in the record indicating that Johnson was carrying any sort of lease agreement for M&D to use Turbo Turtle's truck. As such, Turbo Turtle's involvement with the shipment would have been readily apparent to the customer at the pickup location. Similarly, the Northern Ag manager's testimony that Northern Ag had no knowledge M&D was assigning loads to Turbo Turtle does not account for this readily apparent information from the dropoff locations. When considering these factors in the context of the entire record, Northern Ag's internal records and its manager's testimony listing M&D as the motor carrier are insufficient on their own to lead a reasonable trier of fact to determine M&D was the carrier.

Appellants' contention that M&D had control over Johnson and his equipment fails to support a finding that M&D was a motor carrier for the load in question. The record on appeal does not indicate that M&D had exclusive control over Johnson and his equipment. As analyzed above, the contract between M&D and Turbo Turtle did not create or operate as a lease

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[37] *Schramm, supra* note 34.

agreement, Turbo Turtle was not required to make specific drivers available to M&D, Johnson did not directly contract with M&D, Johnson's agreement with Turbo Turtle was that he could drive only Turbo Turtle's equipment for loads issued by Turbo Turtle or M&D but there was no such restriction if Johnson used other equipment, there was an exception in the M&D and Turbo Turtle contract where Turbo Turtle could drive outside loads for harvesttime, and Turbo Turtle owned and was responsible for maintenance and insurance on the equipment.

Based upon our review of the record, all of the above factors indicate that there is insufficient evidence to present a genuine issue of material fact that M&D was the motor carrier of the load at issue.

3. Negligent Hiring, Training, or Supervision

Appellants argue that the district court erred in dismissing their claim that M&D negligently hired, trained, or supervised Johnson. Under this assignment, appellants contend that the district court's reasoning was tainted by its incorrect determination that M&D was a broker and not a motor carrier.

[25] We have previously held that an employer is subject to liability for physical harm to third persons caused by the employer's failure to exercise reasonable care in selecting an employee, even if such employee is an independent contractor.[38] However, as we determined above, the record fails to provide sufficient evidence to present a genuine issue of material fact that Johnson was M&D's employee or that M&D negligently hired, trained, or supervised Johnson.

[26] FMCSA and FMCSR require motor carriers to obtain and maintain records on each of the drivers they employ, such as driving and medical records.[39] However, as we determined

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[38] *Kime, supra* note 4.

[39] See 49 C.F.R. §§ 391.25 (2017) and 391.51(a) (2014).

above, the record also fails to provide sufficient evidence to present a genuine issue of material fact that M&D was the motor carrier of the load at issue and instead demonstrates M&D was acting as a broker.

Thus, the district court did not err in dismissing appellants' claim that M&D negligently hired, trained, or supervised Johnson.

4. Cross-Appeal

Because we determine the district court did not err in granting M&D's motion for summary judgment and dismissing appellants' claims, we need not address M&D's cross-appeal that the district court erred in failing to find appellants' claim of respondeat superior was barred by the settlement between appellants, Turbo Turtle, and Johnson.

V. CONCLUSION

For the reasons stated above, there are no genuine issues of material fact. M&D is entitled to a judgment as a matter of law, because Johnson's relationship with M&D was that of an independent contractor; M&D did not have liability under that independent contractor relationship for Johnson's negligence; and M&D was a broker of the load at issue and not a motor carrier responsible for Johnson's hiring, training, or supervision. Thus, the district court did not err in granting M&D's motion for summary judgment and dismissing appellants' claims.

Affirmed.

State of Nebraska, appellee, v. Marvin D. Sundquist, appellant.

921 N.W.2d 131

Filed January 4, 2019. No. S-17-1297.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
2. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
3. **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.
4. **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.
5. **Appeal and Error.** An appellate court independently reviews questions of law in appeals from the county court.
6. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
7. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
8. **Effectiveness of Counsel: Proof: Appeal and Error.** When an ineffective assistance of counsel claim is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.

9. ____: ____: ____. General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal and thereby preserve the issue for later review.
10. **Effectiveness of Counsel: Records: Appeal and Error.** An ineffective assistance of counsel claim made on direct appeal can be found to be without merit if the record establishes that trial counsel's performance was not deficient or that the appellant could not establish prejudice.
11. **Actions: Waiver: Appeal and Error.** Under the law-of-the-case doctrine, a well-recognized waiver rule has emerged: A decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision.

Appeal from the District Court for Dodge County, Geoffrey C. Hall and Timothy P. Burns, Judges, on appeal thereto from the County Court for Dodge County, Kenneth J. Vampola, Judge. Judgment of District Court affirmed.

Marvin D. Sundquist, pro se.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Heavican, C.J.

I. INTRODUCTION

This is an appeal from the district court for Dodge County, Nebraska. Following a retrial in the county court for Dodge County, a jury convicted Marvin D. Sundquist of driving under the influence (DUI), second offense aggravated. Sundquist was sentenced to 18 months' probation. The district court affirmed. Sundquist appeals. We affirm.

II. BACKGROUND

At approximately midnight on November 17, 2014, Officer Anthony Gartner conducted a traffic stop on a vehicle for

speeding. Sundquist was the driver and only person present in the vehicle. After making contact with Sundquist, Gartner smelled the odor of alcoholic beverage coming from inside the vehicle and noticed that Sundquist's eyes were watery and bloodshot. Sundquist also admitted to drinking.

Gartner asked Sundquist to perform certain field sobriety tests, as well as a preliminary breath test. The results of this testing indicated that Sundquist was impaired. Sundquist was arrested and submitted to a chemical breath test performed in accordance with all relevant regulations. The chemical breath test was completed using a machine commonly referred to as a "DataMaster," a machine that utilizes infrared spectrophotometry, or an infrared light beam, to measure the alcohol content in a person's breath. The result of the chemical breath test showed Sundquist's breath alcohol content to be .160 of 1 gram of alcohol per 210 liters of breath.

1. Pretrial Proceedings

The State charged Sundquist with DUI, second offense aggravated, under Neb. Rev. Stat. §§ 60-6,196 (Reissue 2010) and 60-6,197.03(5) (Cum. Supp. 2014), a Class I misdemeanor. At a hearing on January 13, 2015, the State offered to drop the aggravated portion of the charge as part of a plea agreement in exchange for Sundquist's pleading guilty or no contest. Sundquist, acting pro se, rejected the offer and sought a jury trial. At the insistence of the court, Sundquist was given the opportunity to reconsider his decision and to seek counsel. Though the order of events is not entirely clear from the record, it appears that Sundquist was eventually appointed counsel, but still rejected the offered plea agreement.

2. First Trial

Trial was held on April 9, 2015. Sundquist, by this time represented by counsel, objected to Gartner's testimony regarding the results of Sundquist's breath test. Sundquist's objection was based on the State's failure to disclose "the appropriate

certification" to establish Gartner as qualified to operate the DataMaster. Sundquist argued that "his entire defense was based on the State's failure to disclose the correct permit and that . . . he had prepared no alternative strategy or defense." After hearing from the parties, the county court overruled Sundquist's objection. The jury found Sundguist guilty, and the county court found Sundquist's conviction to be a second offense.

Several days later, Sundquist's counsel moved for a new trial. Sundquist, acting pro se, moved to withdraw the motion and further asked that new counsel be appointed. In response, Sundquist's trial counsel withdrew and new counsel was appointed. Sundquist was subsequently sentenced to 18 months' probation.

3. First Appeal

On June 16, 2015, Sundquist appealed his conviction to the district court. In that appeal, Sundquist argued, among other things, that the county court erred in allowing the arresting officer "to provide testimony in regard to the results of the test as his certification to operate the testing device was not previously provided to [Sundquist] and his counsel." After hearing from the parties, the district court agreed that the county court had erred. The district court further concluded that the error was not harmless. Accordingly, the district court reversed the county court's judgment and remanded the case for further proceedings.

On February 26, 2016, Sundquist appealed to the Nebraska Court of Appeals, arguing that the Double Jeopardy Clause forbade a retrial. On July 29, in case No. A-16-213, the Court of Appeals rejected that argument and summarily affirmed.

4. Second Trial

A second trial was held on April 20, 2017. Sundquist filed multiple pretrial motions. First, Sundquist moved for discharge on speedy trial grounds, which the county court denied. Second,

once the State made clear that it would not offer Sundquist a plea agreement as it had initially done prior to the first trial, Sundquist moved to dismiss on the grounds of prosecutorial misconduct and prosecutorial vindictiveness. That motion was also denied.

At trial, the State again called Gartner to testify. His testimony was consistent with his prior testimony and covered the traffic stop, the on-the-scene investigation, and the chemical breath test at the police station. The State also called the maintenance officer for the breath test machine to testify. The officer's testimony encompassed the chemical breath test machine, the various maintenance protocols, and the relevant margin of error. Specifically, he testified that the machine was working properly on the day in question.

A jury found Sundquist guilty, and the county court again determined that Sundquist's conviction was a second offense. Sundquist was again sentenced to 18 months' probation.

5. Second Appeal

On May 30, 2017, Sundquist, represented by counsel, appealed his conviction to the district court. Counsel did not file a statement of errors on Sundquist's behalf before that court. Despite this, the district court addressed the issue raised at the appeal hearing: that Sundquist was entitled to a reoffer of the earlier plea agreement that the State proposed before the first trial and the State's failure to do so was improper. The district court affirmed the county court's judgment and conviction, noting that the court found no error. Sundquist appeals.

III. ASSIGNMENTS OF ERROR

Sundquist assigns, consolidated and restated, that (1) his counsel was ineffective in various ways, (2) both counsel were ineffective and Sundquist's due process rights were violated with respect to the State's only offered plea agreement, and (3) his constitutional rights were violated by various actions of the State and the trial court.

IV. STANDARD OF REVIEW

[1,2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[1] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[2] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[3] an appellate court reviews such legal determinations independently of the lower court's decision.[4]

[3-5] 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] But an appellate court independently reviews questions of law in appeals from the county court.[7]

V. ANALYSIS

1. Ineffective Assistance of Counsel

Sundquist contends that he received ineffective assistance of counsel during the course of his representation. First, he argues that he was, in effect, denied an appeal to the district court because (1) he received ineffective assistance of counsel in that his attorney (a) failed to file a statement of errors, (b) failed to make "persuasive" arguments, (c) failed to

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[1] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[2] *Id.*

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

[4] *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

[5] *State v. Avey*, 288 Neb. 233, 846 N.W.2d 662 (2014).

[6] *Id.*

[7] *Id.*

adequately challenge the chemical breath test, and (d) failed to argue that his performance on the field sobriety tests was inconsistent with the level of intoxication as indicated by the chemical breath test, and (2) the court prevented him from arguing in his own behalf. Sundquist next claims his counsel was ineffective by not adequately communicating with Sundquist. Finally, Sundquist argues that the State interfered with his right to effective assistance of counsel in the first trial by not disclosing that Gartner was qualified to operate the chemical breath test machine, which Sundquist argues interfered with his counsel's ability to advise him during plea negotiations.

[6-9] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[8] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.[9] When the claim is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.[10] General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal and thereby preserve the issue for later review.[11]

[10] Appellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims

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

[9] *Id.*

[10] *Id.*

[11] *Id.*

were without merit, or in the rare case where trial counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was a fundamentally unfair trial. An ineffective assistance of counsel claim made on direct appeal can be found to be without merit if the record establishes that trial counsel's performance was not deficient or that the appellant could not establish prejudice.[12]

As we have previously stated, an appellant is required to specifically assign and argue his or her trial counsel's allegedly deficient conduct.[13] This arises from a fundamental rule of appellate practice. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[14] A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.[15] Similarly, an argument that does little more than restate an assignment of error does not support the assignment, and an appellate court will not address it.[16]

It naturally follows that on direct appeal, 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.[17] An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal.[18]

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[12] *Id.*

[13] *State v. Filholm, supra* note 1.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

(a) Failure to File Statement of Errors

Sundquist assigns that his counsel failed to file a statement of errors in his appeal to the district court. The State concedes that counsel did not file a statement of errors, but argues that Sundquist suffered no prejudice, because the district court addressed Sundquist's challenges on appeal despite counsel's deficient performance. We note that the district court considered the argument advanced by Sundquist in his appeal to that court. The district court found no merit to Sundquist's argument as to the filing of a statement of errors. We agree.

The district court considered the argument advanced by Sundquist in his appeal to that court, despite the absence of a statement of errors. At the close of arguments, the district court stated, "I don't find any error that occurred at the County Court level. As I just indicated to your plea offer argument, is — I would say it's frivolous. . . . The State is under no obligation to re-offer you any type of plea agreement once you rejected it." The court's statement at the close of argument indicates that the court addressed the argument raised by Sundquist despite the fact that the alleged error—the refusal to require the State to reoffer a previously rejected plea agreement—had not been assigned in a statement of errors to the court. Furthermore, as we conclude below, Sundquist was not entitled to a reoffer of the plea agreement. As such, Sundquist was not prejudiced by his counsel's inadequate performance.

This case is reminiscent of *State v. Stubbendick*,[19] a case heard by the Court of Appeals. In *Stubbendick*, the defendant's attorney likewise failed to file a statement of errors, leaving the district court to limit its review to plain error. The defendant argued that had counsel properly filed a statement of errors which challenged the probable cause findings regarding his operation of a vehicle on a public roadway and the sufficiency of the evidence, the district court may have

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[19] *State v. Stubbendick*, No. A-14-232, 2014 WL 4825375 (Neb. App. Sept. 30, 2014) (selected for posting to court website).

found in his favor on these issues. The Court of Appeals applied *Strickland*, finding that the defendant's arguments did not demonstrate a reasonable probability that but for his counsel's allegedly deficient performance, the result of the proceeding would have been different. The result is the same in this case.

As such, there is no merit to Sundquist's argument as to the filing of a statement of errors.

(b) Failure to Make "Persuasive" Arguments

Sundquist argues that he suffered ineffective assistance of counsel at his second trial on April 20, 2017, where he claims his counsel failed to make "persuasive" arguments to both the county court and the district court on appeal concerning the margin of error of the DataMaster.

First, Sundquist argues that his trial counsel should have attacked either the admissibility or the accuracy of the DataMaster results, or vigorously attacked the margin of error of the DataMaster. Sundquist contends that at trial, his counsel "made a half-hearted attempt at questioning the margin of error."[20] Sundquist claims that his attorney should have questioned the accuracy of the DataMaster and the difference between a 5-percent margin of error allowed in a controlled environment, as compared to the margin of error in an uncontrolled environment. We observe, however, that counsel raised the issue of the DataMaster's accuracy and the margin of error. As such, counsel's conduct was not deficient.

Sundquist next argues that on appeal to the district court, his attorney failed to effectively argue in support of his position that the State was required to reoffer the original plea agreement. Again, we note the record demonstrates that counsel raised the issue. Despite lacking legal authority for the position, counsel nevertheless argued that the State should have

[20] Brief for appellant at 8.

been required to reoffer the rejected plea agreement, because the State failed to provide Gartner's DataMaster certification at the time the plea agreement was offered.

It is important to note that the district court properly observed that under *State v. Obermier*,[21] the State is not required to enter the certification into evidence. Despite counsel's effort, the district court denied the appeal, further noting that it was, in the opinion of the court, "frivolous." Counsel cannot be deficient in raising the very issue Sundquist now complains about, and as such, there is no merit to Sundquist's allegation.

As for the argument that the State was required to reoffer the previously rejected plea agreement, the record shows that despite being aware that case law did not support the position that the State must reoffer the prior plea agreement, Sundquist's counsel argued that the State was required to reoffer the previously rejected plea agreement. Counsel based that request on the State's action in failing to disclose the officer's chemical test machine certification. Because Sundquist does not explain precisely what counsel should have argued in an effort to prevail on this point, and because counsel clearly raised the issue of the prior plea agreement, counsel's conduct was not deficient.

Sundquist also argues that the court erred and caused him to have ineffective assistance of counsel when it declined to allow Sundquist to be heard following the court's ruling on the reoffer of the plea agreement. The court observed that Sundquist was represented by counsel and not entitled to address the court at that time due to the presence of counsel on his behalf. We find no error in the court's ruling. We have noted that a defendant does not have a right to any type of "hybrid representation," and it is within the trial court's discretion whether to allow such representation.[22] The trial court did not err in refusing to

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[21] *State v. Obermier*, 241 Neb. 802, 490 N.W.2d 693 (1992).

[22] *State v. Wilson*, 252 Neb. 637, 652, 564 N.W.2d 241, 253 (1997).

allow Sundquist to be heard at a time when he was represented by counsel.

There is no merit to these allegations.

(c) Failure to Argue Sundquist's Performance on Field Sobriety Tests Was Inconsistent With Level of Intoxication Indicated by Chemical Breath Test

Sundquist assigns that counsel was inadequate for failing to challenge that Sundquist's performance on the field sobriety tests was inconsistent with the results of the chemical breath test indicating the level of intoxication. We have combined these assignments as they are indistinguishable. The record demonstrates that Sundquist's counsel had no grounds to argue that Sundquist's performance on the field sobriety tests and lack of video evidence were inconsistent with the level of intoxication shown by the chemical breath test results. Gartner's testimony indicated that Sundquist showed signs of impairment on the field sobriety tests in that Sundquist was unable to complete maneuvers, could not maintain his balance, and failed to follow directions, all of which are consistent with intoxication and none of which can be used to establish that Sundquist was below a .150 breath alcohol content level.

(d) Failure to Adequately Communicate With Sundquist

Sundquist next alleges that counsel failed to adequately communicate with him. Sundquist alleges that prior to his second trial, he requested that counsel hire an expert witness to determine the margin of error for the chemical breath test machine. Sundquist claims he was unaware that counsel had failed to obtain an expert until a week prior to trial. Further, Sundquist alleges that he never discussed trial strategy with his attorney. However, Sundquist fails to demonstrate how an expert would have meaningfully contributed to his margin of error claim

beyond the cross-examination of the State's witnesses concerning the particular DataMaster unit's margin of error. Further, as to Sundquist's claim that counsel failed to communicate trial strategy, the record contradicts Sundquist's claims.

At the district court appeal, counsel is on record stating, "I've communicated all pleas to my client since I was appointed. No pleas were ever offered, Judge, at the lower case in County Court." Further, Sundquist's counsel followed the trial strategy of highlighting the margin of error of the breath test machine, a strategy that Sundquist was clearly aware of as, by his own admission, he sought to hire an expert to lend credibility to the argument regarding the margin of error. Additionally, counsel clearly argued that Sundquist "wish[ed] that he had the opportunity to plead to the lower charge," a statement that is accurate and was effectively communicated to both Sundquist's counsel and the court. Ultimately, however, Sundquist failed to sufficiently allege facts that demonstrate deficient performance. Further, the evidence against Sundquist was overwhelming and better communication would not have changed the weight of the evidence.

There is no merit to this allegation.

(e) Sundquist Claims State Interfered With Right to Effective Assistance of Counsel in First Trial by Not Disclosing Gartner's Certification

Sundquist also argues that the State interfered with his counsel's communication by withholding information about Gartner's chemical breath test machine certification at the time of the plea offer. Additionally, Sundquist contends that his due process rights were violated when he was denied the opportunity to make a knowing and voluntary decision regarding the initial plea offer.

We turn first to whether Sundquist waived his right to appeal the issue regarding the plea agreement. The State correctly asserts that Sundquist's claim regarding the prosecution's failure to disclose information during a plea offer is not

properly before the court. The State, relying on *Pennfield Oil Co. v. Winstrom*,[23] grounds its argument on the fact that in the first appeal, Sundquist had the opportunity and the incentive to raise the claim regarding the plea agreement, noting that Sundquist waived the issue by failing to raise the claim on his first appeal.

[11] In *Pennfield Oil Co.*, we noted that under the law-of-the-case doctrine, a well-recognized waiver rule has emerged: A decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision, for it would be absurd that a party who has chosen not to argue a point on a first appeal should stand better with regard to the law of the case than one who had argued and lost.

The State also relies on *U.S. v. Henry*,[24] in support of its argument. In *Henry*, the U.S. Court of Appeals for the District of Columbia Circuit stated, "It is well-settled that 'where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.'"[25]

Here, Sundquist had the opportunity and the incentive to raise the claim regarding the plea agreement during his original appeal following his first trial and conviction. Sundquist failed to do so and is therefore bound by the law-of-the-case doctrine.

Sundquist waived this claim by failing to appeal it during the initial appeal that followed his first trial and conviction.

2. Claims of Constitutional Violations

Sundquist next contends that his constitutional rights were violated in various ways. First, Sundquist argues that the

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[23] *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

[24] *U.S. v. Henry*, 472 F.3d 910 (D.C. Cir. 2007).

[25] *Id.* at 913.

State's refusal to reoffer the same plea agreement at his second trial, which he had rejected at his first trial, amounted to vindictive prosecution, a due process violation. Sundquist also assigns that he is being punished for "something other than the crime he was charged with." Next, Sundquist argues that his second conviction and sentence violated the Double Jeopardy Clause. Lastly, Sundquist argues that his right to a speedy trial was violated.

(a) Vindictive Prosecution

Sundquist alleges that the State engaged in vindictive prosecution by refusing to reoffer the previously rejected plea agreement once the case had been remanded for a new trial. Specifically, Sundquist points to a statement made by the State during the second trial, noting that "'[a]s an office policy, after a jury trial, we don't make plea offers.'"[26] Sundquist relies on *Blackledge v. Perry*[27] to support this claim.

We begin by observing that Sundquist is, of course, correct that punishing a person because he has done what the law plainly allows him to do—in this case appeal his conviction—is a due process violation "of the most basic sort."[28] The U.S. Supreme Court has noted that while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.

But the Court went on to note that the imposition of punishment is the very purpose of criminal proceedings. Therefore, the presence of a punitive motivation does not provide an adequate basis for distinguishing governmental action that is justified as a legitimate response to criminal conduct from governmental action that is an impermissible response to a protected activity. The Court, in establishing the presumption

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[26] Brief for appellant at 13.

[27] *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974).

[28] *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

of a vindictive motive, specifically noted that it had done so only in cases in which a "*reasonable likelihood of vindictiveness exists*."[29]

Moreover, Sundquist misunderstands *Blackledge* and its implications on his case. In *Blackledge*, the U.S. Supreme Court affirmed the issuance of a writ of habeas corpus because the State charged a greater offense for the same conduct for which the defendant had sought a de novo retrial of a lower court conviction, finding that the State's higher charge had a potential vindictive nature.

In this case, Sundquist was not charged with a greater offense than what he had previously appealed, nor was his resulting sentence greater than that of his first trial. Sundquist argues that because he was not reoffered a plea agreement, his due process rights were violated. We disagree.

In *United States v. Osif*,[30] the U.S. Court of Appeals for the Ninth Circuit noted that "a defendant does not have a constitutional right to a plea bargain . . . nor, when he rejects a plea, can he later object to the government's decision to proceed to trial on the counts originally charged." Further, the Ninth Circuit indicated that the vindictive prosecution doctrine does not apply when neither the charge's severity nor the sentence is increased.

The factual background of *Osif* is on point in this case. The defendant appealed from his conviction for second degree murder pursuant to a plea agreement that provided for a 15-year sentence. Before entering the plea, the defendant was tried and convicted of first degree murder, but that conviction was reversed on appeal. Prior to the initial trial, the government offered a plea agreement with a 10-year sentence for second degree murder, which the defendant rejected. On appeal, he argued that the government's refusal to reoffer the earlier, more beneficial, plea agreement on remand amounted to vindictive

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[29] *United States v. Goodwin*, 457 U.S. 368, 373, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) (emphasis supplied).

[30] *United States v. Osif*, 789 F.2d 1404, 1405 (9th Cir. 1986).

prosecution. The Ninth Circuit disagreed, noting that not only is there no constitutional right to a plea bargain, but that "vindictiveness is not present if there are independent reasons or intervening circumstances to justify the prosecutor's action."[31]

Here, neither Sundquist's charge nor his sentence was increased; rather, the State merely refused to reoffer, after an intervening conviction on the original charge, the same plea offer that was previously rejected by Sundquist before the initial trial. Additionally, the State had already xpended the resources to prepare and try the case. Further, the State had obtained a conviction, giving it confidence that a second conviction was likely.

There is no merit to the allegation.

(b) Sundquist's Claim That He Is Being Punished for Something Other Than Crime With Which He Was Charged

Assigned separately, but inextricably intertwined with Sundquist's prosecutorial vindictiveness claim, is Sundquist's claim that he is being punished for something other than the crime for which he was charged. Sundquist attempts to ground this argument in the fact that the State originally believed it appropriate to allow him to plead to nonaggravated DUI, a plea he rejected. He further argues that because his breath alcohol content was less than 10 percent over a .150 breath alcohol content, there was no reason to believe the trial court would not have accepted the plea.

Sundquist can provide no legal or factual authority on which he can ground this assignment of error. Further, his sentence was within limits established for the crime for which he was convicted. Therefore, this argument is without merit.

(c) Double Jeopardy Clause

Next, Sundquist argues that his conviction and sentence violate the Double Jeopardy Clause. The State contends that

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[31] *Id.*

Sundquist did not properly present the argument to the district court and that the district court did not consider it; thus, the argument was not preserved on appeal. The State cites to *State v. Lavalleur*[32] to support its contention that on Sundquist's first appeal, the issue of double jeopardy was decided by the Court of Appeals, and that the issue may not now be relitigated on a subsequent appeal as it is now the law of the case.

We agree and find that the Court of Appeals' decision is the law of the case. Therefore, Sundquist's assignment of error is without merit.

(d) Speedy Trial

Finally, Sundquist argues that the State violated his right to a speedy trial. The State again argues that while Sundquist raised the issue in the county court following remand, he did not present the issue to the district court on appeal, thus preventing the district court from considering the issue and allowing only a review for plain error.

Sundquist maintains that had the State provided him with the information concerning Gartner's certification, he would have agreed to the original plea agreement offered and pled guilty to nonaggravated DUI. Sundquist argues that the State's failure required him to proceed through two trials. But the State was not required to present the officer's permit, nor was the State required, at initial plea negotiations, to share the status of the officer's certification. Sundquist freely chose to take on a risky defense strategy, and the State does not bear the responsibility for that failed strategy.

Sundquist's final assignment of error is without merit.

VI. CONCLUSION

The district court, sitting as an appellate court, did not err in denying Sundquist's appeal and affirming his conviction for

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[32] *State v. Lavalleur*, 298 Neb. 237, 903 N.W.2d 464 (2017).

DUI, second offense aggravated, as well as his sentence of 18 months' probation. We affirm.

Affirmed.

Freudenberg, J., not participating.

Cassel, J., concurring.

I write separately to emphasize the duty of effective appellate counsel to file a statement of errors in an appeal of a county court criminal case to the district court.

Sundquist was entitled to effective appellate counsel on his appeal from county court to district court. A criminal defendant has the right to the effective assistance of appellate counsel in his or her first appeal as of right.[1] In a Nebraska criminal case tried in the county court, that first appeal runs to the district court.[2] Thus, Sundquist's appeal to the district court was his only appeal subject to the Sixth Amendment right to counsel.

To prevail on a claim of ineffective assistance of counsel under the *Strickland v. Washington*[3] analysis, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[4] Here, the State conceded that Sundquist's appellate counsel's failure to file a statement of errors was deficient performance (that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law[5]). This court agrees, and I agree with the court.

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[1] See, *Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

[2] See *State v. Hughan*, 13 Neb. App. 862, 703 N.W.2d 263 (2005).

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

[4] *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017).

[5] *State v. Allen, ante* p. 560, 919 N.W.2d 500 (2018).

This court's opinion concludes that there was no prejudice shown here. Again, I agree. Two reasons persuade me. First, at the appeal hearing before the district court, Sundquist's appellate counsel advanced the very argument that Sundquist, now without counsel, urged to this court. Second, the record, which the court's opinion quotes, demonstrates that despite the failure to file the statement of errors, the district court considered the merits of Sundquist's argument. In other words, the district court did not apply the rule permitting it to review only for plain error.[6]

But as I see this appeal, those two facts were the only reasons not to apply a presumption of prejudice. *United States v. Cronic*[7] provides narrow exceptions to the *Strickland* analysis, where the reliability of the adversarial process is in such doubt that prejudice to the defendant will be presumed, resulting in a conclusion of ineffective assistance of counsel.[8] Two of the three *Cronic* exceptions are (1) where the accused is completely denied counsel at a critical stage of the proceedings and (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.[9] Obviously, Sundquist's one and only counseled appeal as of right is a critical stage of the proceedings against him. Although Sundquist's appellate counsel failed to file the required statement of errors, at least he advanced the proposition Sundquist urges to this court. And the district court considered whether it constituted prejudicial error, which presents a much lower threshold than plain error.[10]

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[6] See *State v. Nielsen, ante* p. 88, 917 N.W.2d 159 (2018).

[7] *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[8] *State v. Jedlicka, supra* note 4.

[9] See *id*.

[10] See *State v. Torres*, 300 Neb. 694, 915 N.W.2d 596 (2018) (plain error is error, plainly evident from record, which prejudicially affects litigant's substantial right and, if uncorrected, would result in damage to integrity, reputation, and fairness of judicial process).

But it seems to me that it is only a short distance from the situation here to the equivalent of a complete denial of counsel on appeal. If appellate counsel files no statement of errors and advances no arguments for reversal, which results in a cursory review by the district court for plain error, it would be difficult to avoid having to apply one or both of the *Cronic* exceptions recited above.

This in turn could easily result in a reversal of the district court's decision on appeal and a remand for a new direct appeal with new counsel. And it also implicates very basic ethical duties of Nebraska lawyers.[11] These potential consequences dictate that defendants' counsel in criminal case appeals from county court to district court should always file a timely statement of errors.

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

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[11] See Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (rev. 2017) (competence) and 3-501.3 (diligence).

State of Nebraska, appellee, v. Gabriel Ralios, appellant.

921 N.W.2d 362

Filed January 4, 2019. No. S-18-126.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion 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.
4. **Statutes: Legislature: Intent.** The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.
5. **Criminal Law: Statutes: Legislature: Intent.** In reading a penal statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Licenses and Permits: Revocation: Proof.** Proof of reinstatement of a suspended operator's license under Neb. Rev. Stat. § 60-4,108(2) (Supp. 2017) requires that a driver with a previously suspended license show that his or her license is no longer suspended *and* that his or her license validly and effectively allows the holder to operate a motor vehicle.
7. **Sentences: Appeal and Error.** When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown.
8. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or

record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.

9. ____. 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 Thurston County, John E. Samson, Judge, on appeal thereto from the County Court for Thurston County, Douglas L. Luebe, Judge. Judgment of District Court affirmed.

Erika Y. Buenrostro, of Castrejon & Buenrostro, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, Nathan A. Liss, Derek Bral, Senior Certified Law Student, and, on brief, Sarah E. Marfisi.

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

Freudenberg, J.

NATURE OF CASE

Pursuant to a plea agreement with the State, Gabriel Ralios pled guilty to operating a motor vehicle during a time of suspension, a Class III misdemeanor, and speeding. On November 2, 2017, the county court accepted Ralios' pleas and, after hearing argument on sentencing, the court sentenced him to 75 days in jail pursuant to Neb. Rev. Stat. § 60-4,108(2) (Supp. 2017). Ralios appealed his sentence to the district court sitting as an intermediate court of appeal, assigning that the county court erred in sentencing Ralios to 75 days in jail instead of a fine of $100 under § 60-4,108(2). The district court affirmed the county court's sentence. The central issue on appeal is whether Ralios showed "proof of reinstatement of his . . . suspended operator's license" under § 60-4,108(2).

BACKGROUND

On July 4, 2017, a Thurston County deputy sheriff clocked Ralios' car traveling over 80 m.p.h. in a 60-m.p.h. zone. Upon stopping the vehicle, the deputy determined Ralios' license was suspended in the State of Missouri. He was charged with speeding and with operating a motor vehicle during a time of suspension.

On November 2, 2017, Ralios entered into a plea agreement. The State agreed to stand silent at sentencing in exchange for Ralios' pleas on both counts. The court accepted Ralios' pleas and proceeded immediately to sentencing.

During the sentencing hearing, Ralios presented a letter from the Missouri Driver License Bureau stating that Ralios was "not currently suspended or revoked in the state of Missouri" as of October 3, 2017. He argued that this letter was sufficient to establish that his license was reinstated and that therefore, the maximum punishment authorized by statute was a $100 fine under § 60-4,108(2). Ralios conceded, however, that he was not able to drive legally in Missouri at the time of sentencing.

Section 60-4,108(2) states in relevant part:

> [A]ny person so offending shall be guilty of a Class III misdemeanor, and the court may, as a part of the judgment of conviction, order such person not to operate any motor vehicle for any purpose for a period of one year from the date ordered by the court, *except that if the person at the time of sentencing shows proof of reinstatement of his or her suspended operator's license*, proof of issuance of a new license, or proof of return of the impounded license, *the person shall only be fined in an amount not to exceed one hundred dollars*.

(Emphasis supplied.) Under Neb. Rev. Stat. § 28-106 (Reissue 2016), a Class III misdemeanor is generally punishable by a maximum of 3 months' imprisonment, a fine of $500, or both, with no minimum.

The court concluded that Ralios did not present sufficient evidence to show that his license had been reinstated in

the State of Missouri. No evidence was presented to the court regarding Ralios' prior convictions at the sentencing hearing, but the county court considered Ralios' prior convictions for driving without an operator's license in Dodge County, Nebraska, which the court found on Nebraska's online trial court case management system, known as JUSTICE. Considering the prior convictions and the evidence presented, the county court sentenced Ralios to 75 days in jail.

Ralios appealed his sentence to the district court for Thurston County, and a hearing was held on January 10, 2018. Ralios argued that the sentence was not authorized by statute, because he had presented sufficient evidence to warrant the statutory sentence requiring a reduction to only a $100 fine, and the county court abused its discretion by imposing an excessive sentence of 75 days in jail. The State did not submit a brief or argue. The district court affirmed the judgment and sentence of the county court. Ralios appeals.

ASSIGNMENTS OF ERROR

Ralios assigns that the district court erred in affirming the county court's sentence of 75 days in jail instead of a fine of $100 or less under § 60-4,108(2) and in abusing its discretion by ordering Ralios to serve an excessive sentence.

STANDARD OF REVIEW

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

[2,3] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.[2] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are

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

[2] *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[3]

ANALYSIS

Ralios asserts on appeal that the district court erred in affirming the county court's sentence of 75 days in jail instead of a fine of $100 or less under § 60-4,108(2) and in abusing its discretion by ordering Ralios to serve an excessive sentence. We first address the issue of the interpretation of § 60-4,108(2), with the issue regarding the excessiveness of his sentence to follow. There is no issue as to whether the evidence was sufficient to support Ralios' conviction of driving under suspension, because Ralios pled guilty to the offense and the propriety of his plea and conviction are not issues argued before this court on appeal.

Interpretation of § 60-4,108(2)

In support of his first assignment, Ralios argues that he provided the trial court with sufficient "proof of reinstatement of his or her suspended operator's license" by submitting a letter from the Missouri Driver License Bureau stating that Ralios was "not currently suspended or revoked in the state of Missouri" as of October 3, 2017. The State contends that the letter did not meet the requirement set by the statute. We agree.

The language of § 60-4,108(2) at issue in this appeal is "*proof of reinstatement of his or her suspended operator's license*, proof of issuance of a new license, or proof of return of the impounded license." (Emphasis supplied.) Ralios argues—and the State concedes—that the function of this section is to mitigate a sentence for people who show proof of their reinstatement of their suspended operators' licenses. We determine in this appeal the meaning of "proof of reinstatement

[3] *Id.*

of his or her suspended operator's license" without expressing any opinion as to whether the statute prohibits jail time for defendants who provide such proof. The meaning of "proof of reinstatement of his or her suspended operator's license" is an issue of first impression for this court.

[4,5] The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.[4] In reading a penal statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[5] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[6]

[6] We hold that "proof of reinstatement of [a] suspended operator's license" under § 60-4,108(2) requires that a driver with a previously suspended license show that his or her license is no longer suspended *and* that his or her license validly and effectively allows the holder to operate a motor vehicle. This comports with the plain meaning of "reinstate" as the restoration of the license to its previously effective state, and it is consistent with Neb. Rev. Stat. § 60-4,100.01 (Reissue 2010). Proof of "reinstatement" of an operator's license requires more than a mere showing of nonsuspension. Instead, proof of reinstatement involves proof that the individual holds an affirmatively issued license or permit to legally drive a motor vehicle.

We find no merit to Ralios' argument that the statute's plain language, read in pari materia with other definitional sections of Nebraska's operator's license laws, demonstrates that he is required only to show that he has his "privilege to drive," which he defines as the ability to obtain a license if he so chooses, "reinstated," in order to show "proof of reinstatement

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

[5] *Id.*

[6] *Id.*

of his or her suspended operator's license."[7] He argues that the statute does not require that he be in possession of a valid tangible government issued license, because the definition of "operator's license" under Neb. Rev. Stat. § 60-474 (Cum. Supp. 2016) is much broader; a privilege to drive is, according to Ralios, the ability to obtain a license. Thus, he contends that his "operator's license" was automatically "reinstated" at the conclusion of his suspension.

Section 60-474 of the Motor Vehicle Operator's License Act[8] defines "[o]perator's or driver's license" as

> [A]ny license or permit to operate a motor vehicle issued under the laws of this state, including:
>
> (1) Any replacement license or instruction permit;
>
> (2) *The privilege of any person to drive a motor vehicle whether such person holds a valid license*;
>
> (3) Any nonresident's operating privilege which shall mean the privilege conferred upon a nonresident by the laws of this state pertaining to the operation of a motor vehicle in this state by such person or the use in this state of a vehicle owned by such person;
>
> (4) An employment driving permit issued as provided by sections 60-4,129 and 60-4,130; and
>
> (5) A medical hardship driving permit issued as provided by sections 60-4,130.01 and 60-4,130.02.

(Emphasis supplied.) Focusing on § 60-474(2) and the language "privilege . . . to drive a motor vehicle whether such person holds a valid license," Ralios argues that "operator's license" includes situations where no government agency has issued a license to an individual, but the individual has the legal right to obtain a license. He argues that this is the "privilege" that would fall within the scope of the definition of "operator's license." Because he provided proof that his

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[7] See brief for appellant at 10.

[8] Neb. Rev. Stat. §§ 60-462 to 60-4,189 (Reissue 2010, Cum. Supp. 2016 & Supp. 2017).

license was no longer suspended in Missouri, he asserts that he effectively showed that his driving privilege, or "operator's license" under § 60-474, was "reinstated."

Ralios is incorrect that an "operator's license," for reinstatement purposes, includes the mere legal ability to obtain a driver's license. Looking at the act as a whole, the Legislature consistently uses the phrase "operator's license" in contexts where the term refers to an affirmatively issued license or permit to legally drive—not to the concept of potential privileges for unlicensed drivers. For example, § 60-484(1) states that "no resident of the State of Nebraska shall operate a motor vehicle upon the alleys or highways of this state until the person has obtained an operator's license for that purpose." Section 60-488(2)(a) of the act extends driving privileges to nonresidents so long as "[s]uch nonresident shall be duly licensed under the motor vehicle laws of the state of his or her residence . . . ." These provisions would make little sense if the term "operator's license" were strained to encompass persons who merely had the *option* to obtain a license or permit.

On the day of sentencing, Ralios conceded that he (1) was not able to drive in the State of Missouri legally at that time, (2) did not have a current driver's license, and (3) was told by the State of Missouri that he could obtain a new license but never obtained one. As evidence of proof of reinstatement, he provided only the clearance letter from Missouri. Because this letter did not affirmatively show that Ralios had a current valid operator's license in the State of Missouri, we find that it was insufficient to warrant the reduction of his sentence to a $100 fine under § 60-4,108(2).

Excessive Sentence

By determining that Ralios' clearance letter was insufficient to warrant the reduction of his sentence to a $100 fine under § 60-4,108(2), we now must determine whether the imposition of his 75-day jail sentence was excessive and thus an abuse of discretion by the lower court.

[7] When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown.[9] As § 60-4,108(2) states, a person who violates that section is guilty of a Class III misdemeanor. Under § 28-106, a Class III misdemeanor is generally punishable by a maximum of 3 months' imprisonment, a fine of $500, or both, with no minimum. Here, Ralios was sentenced to 75 days in jail, and his sentence was clearly within the statutory guidelines. Therefore, Ralios' sentence will only be disturbed if there was a judicial abuse of discretion by the sentencing court.

[8,9] 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.[10] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[11] 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.[12] Generally, the 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.[13]

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[9] *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[10] *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016).

[11] *State v. Huff, supra* note 9.

[12] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

[13] *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

Ralios argues, first, that the sentencing court acted contrary to its role by considering Ralios' prior convictions and criminal history that the court independently found on Nebraska's online trial court case management system, known as JUSTICE. However, there is nothing in the record to show that the sentencing court's consideration of these materials were objected to below. A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.[14]

Second, Ralios argues that the court did not properly consider mitigating factors in imposing the 75-day jail sentence. Based on the record before us, the sentencing court did not consider any inappropriate or unreasonable factors in determining the sentence. We find that the court did not make its decision based upon reasons that are untenable or unreasonable, nor was its action clearly against justice or conscience, reason, and evidence.

CONCLUSION

For the reasons set forth above, we affirm the district court's affirmance of the county court's sentence.

Affirmed.

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[14] *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

Roy J. Rouse, appellant, v. State of Nebraska et al., appellees.

921 N.W.2d 355

Filed January 4, 2019. No. S-18-129.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Constitutional Law: Immunity: Waiver.** Under the 11th Amendment, a nonconsenting state is generally immune from suit unless the state has waived its immunity.
4. **Tort Claims Act: Legislature: Immunity: Waiver.** The Legislature has provided limited waivers of the State's sovereign immunity through the State Tort Claims Act, subject to statutory exceptions.
5. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes: Immunity: Waiver.** Statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver.
7. **Immunity: Waiver.** To strictly construe against a waiver of sovereign immunity, courts broadly read exceptions to a waiver of sovereign immunity.
8. **Statutes: Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.

9. **Constitutional Law: Tort Claims Act: Immunity: Appeal and Error.** An appellate court must determine whether the constitution and statutes provide sovereign immunity by reference to the nature of the underlying dispute. Where the facts are undisputed, whether an exception to immunity under the State Tort Claims Act precludes suit is a question of law.
10. **Tort Claims Act: Federal Acts.** Nebraska's State Tort Claims Act is patterned after the Federal Tort Claims Act.
11. **Tort Claims Act: Police Officers and Sheriffs.** The structure and text of Neb. Rev. Stat. § 81-8,219(2) (Reissue 2014) demonstrate that the broad phrase "any law enforcement officer" covers all law enforcement officers, including correctional officers.

Appeal from the District Court for Lancaster County: Kevin R. McManaman, Judge. Affirmed.

Roy J. Rouse, pro se.

Douglas J. Peterson, Attorney General, and David A. Lopez for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Roy J. Rouse is an inmate in the custody of the Nebraska Department of Correctional Services (DCS) who filed suit against various defendants in the district court for Lancaster County under the State Tort Claims Act (STCA), alleging that his personal property was seized and improperly disposed of by DCS personnel. In an order filed January 12, 2018, the district court granted all defendants' motions to dismiss. In its order, the district court determined that Rouse's claims against the individual defendants were barred by qualified immunity. The district court also determined that the claim against the State arose with respect to the detention of goods by DCS personnel who are law enforcement officers and was barred under Neb. Rev. Stat. § 81-8,219(2) (Reissue 2014), because the claim was an exception to the STCA's waiver of sovereign

immunity. Section 81-8,219(2) provides that the State does not waive sovereign immunity for claims "arising with respect to the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer." Rouse appeals from the portion of the order which dismissed his action against the State. We affirm.

STATEMENT OF FACTS

Rouse was an inmate housed at the Lincoln Correctional Center at the time of the events that gave rise to this action. Rouse brought this action under the STCA, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2014). He sued the State and various individuals by name. He alleged that when he was assigned to segregation on July 24, 2015, DCS personnel searched his cell and seized and negligently disposed of some of his personal property, including reference books, irreplaceable photographs, personal items, clothing, a sewing kit, and a compact disc player. Rouse attached exhibits to his complaint related to his claimed missing property, including letters denying his claims made through the grievance procedure, photographs of the missing items from the evidence file, and an itemized valuation of his property totaling $1,059.87.

All defendants moved to dismiss Rouse's claim. In a consolidated order, the district court granted all defendants' motions to dismiss. The district court determined that the claims against the individual defendants were barred by qualified immunity. Rouse does not assign error to this portion of the district court's order. The district court next considered whether the STCA's detention of goods exception, which provides that the waiver of immunity under the STCA shall not apply to "'[a]ny claim arising with respect to the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer,'" bars Rouse's claim. See § 81-8,219(2).

The district court found that under § 81-8,219(2), corrections officers are "'any law enforcement officers'" and that the loss

of Rouse's personal property was a "'detention of any goods or merchandise'" by such officers under that statute. The district court ultimately concluded that Rouse's claim was within the exception to the State's waiver of sovereign immunity under § 81-8,219(2) and that thus, his action was barred by sovereign immunity. The district court dismissed Rouse's action.

Rouse appealed.

ASSIGNMENTS OF ERROR

Rouse claims, summarized and restated, that the district court erred when it dismissed his claims against the State. He specifically contends that the State should not have been protected by sovereign immunity under the STCA detention of goods exception, § 81-8,219(2), because DCS personnel who detained his property are not "law enforcement officer[s]."

STANDARDS 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. *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018).

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id*.

ANALYSIS

This appeal presents the issue of whether exceptions to the STCA's limited waiver of immunity in § 81-8,219 relating to "the detention of any goods or merchandise by any law enforcement officer" protects the State from Rouse's claim that DCS personnel mishandled his inmate property. Rouse contends that the portion of the STCA at issue should not shield the State from his claims, because DCS personnel are not "law enforcement officer[s]."

The applicable exception to the waiver of sovereign immunity is § 81-8,219, which provides: "The State Tort Claims Act

shall not apply to: . . . (2) Any claim arising with respect to the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer." For purposes of this opinion, we assume without deciding that DCS personnel "detained" Rouse's property and thus satisfy § 81-8,219(2)'s "arising with respect to . . . the detention" requirement.

Statutory Waivers of Immunity and Exceptions to Waiver Are Construed in Favor of the Sovereign.

[3-5] Under the 11th Amendment, a nonconsenting state is generally immune from suit unless the state has waived its immunity. U.S. Const. amend. XI; *Amend v. Nebraska Pub. Serv. Comm., supra*. Nebraska Const. art. V, § 22, provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." The Legislature has provided limited waivers of the State's sovereign immunity through the STCA, subject to statutory exceptions. See § 81-8,219. Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Amend v. Nebraska Pub. Serv. Comm., supra*.

[6-8] Statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver. *Id*. To strictly construe against a waiver of sovereign immunity, we broadly read exceptions to a waiver of sovereign immunity. See *id*. A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction. *Id*.

[9] An appellate court must determine whether the constitution and statutes provide sovereign immunity by reference to the nature of the underlying dispute. See *id*. Where the facts are undisputed, whether an exception to immunity under the STCA precludes suit is a question of law. *Id*.

"[A]ny law enforcement officer" in § 81-8,219(2) Includes DCS Correctional Officers.

As noted, § 81-8,219(2) provides that the State does not waive sovereign immunity for claims "arising with respect to . . . the detention of any goods or merchandise by any law enforcement officer." If this exception to the STCA's limited waiver of immunity applies to Rouse's claims, his case was barred and properly dismissed. Rouse contends that the district court erred, because the exception to the State's waiver of immunity for acts related to "the detention of any goods or merchandise by any law enforcement officer" does not apply to correctional officers. He also refers to other statutes in support of his contention. In contrast, the State asserts that Rouse's action is barred by the language of § 81-8,219(2) and that such reading is supported by other Nebraska statutes. We agree with the State that § 81-8,219(2) bars Rouse's action.

[10] The leading case relied upon by the district court and the State interpreted a provision of the Federal Tort Claims Act which is similar to § 81-8,219(2). See *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008). The Federal Tort Claims Act, at 28 U.S.C. § 2680(c) (2012), provides that sovereign immunity for torts committed by federal officers shall not apply to "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer . . . ." We have recognized that Nebraska's STCA is patterned after the Federal Tort Claims Act. *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005). Because Nebraska law is limited, we can look to federeal law for additional guidance. *Id*.

In *Ali*, a majority of the U.S. Supreme Court held that the federal statutory exception to the waiver of immunity contained in 28 U.S.C. § 2680(c) for acts related to "the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer"

was clear and unambiguous and encompassed acts by Federal Bureau of Prisons officers. The Court reasoned that the phrase "'*any* other law enforcement officer' . . . suggests a broad meaning." *Ali v. Federal Bureau of Prisons*, 552 U.S. at 218-19 (emphasis in original).

Rouse distinguishes *Ali* by noting differences between Nebraska's statutory STCA detention of goods provision and that of its federal counterpart. But he also finds similarities between the Nebraska and federal statutes. Finally, Rouse proposes that we adopt the reasoning of the dissenting justices in *Ali* and urges us to hold that § 81-8,219(2) applies only to law enforcement officers who detain goods or merchandise as part of the assessment or collection of taxes or fees. We decline to adopt the reasoning suggested by Rouse.

As noted above, we give statutory language its plain and ordinary meaning and we must broadly read exceptions to a waiver of sovereign immunity. *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018). Like the Federal Tort Claims Act, Nebraska's STCA contains "[n]othing in the statutory context [which] requires a narrowing construction . . . ." *Ali v. Federal Bureau of Prisons*, 552 U.S. at 227. To the contrary, we read Nebraska's exception for "any law enforcement officer" more broadly than the Federal Tort Claims Act, which is limited to "any other" law enforcement officer. Thus, we interpret § 81-8,219(2) as encompassing acts by DCS personnel.

[11] We believe the text of § 81-8,219(2) indicates that the Legislature intended to preserve immunity from claims arising from the detention of property, and there is no indication of any intent that immunity from those claims turns on the type of official enforcing the law. The structure and text of § 81-8,219(2) demonstrate that the broad phrase "any law enforcement officer" covers all law enforcement officers, including correctional officers. Referring to the word "any" in *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008), the Court reasoned that

read naturally, the word "any" has an expansive meaning that is "'"one or some indiscriminately of whatever kind,"'" quoting *United States v. Gonzales*, 520 U.S. 1, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997). We agree with the reasoning in *Ali*, and applying it to Nebraska's statute, we conclude that DCS personnel are "any law enforcement officer[s]" covered by the exception to the waiver of sovereign immunity outlined in § 81-8,219(2), and therefore, the State remains immune from claims such as that filed by Rouse. We observe that other states' appellate courts have adopted the reasoning in *Ali* and have concluded that correctional officers are "any law enforcement officer[s]" under similar state tort claims statutes. See, e.g., *Mason v. Department of Correction*, 75 Mass. App. 1111 (2009) (unpublished disposition listed in table of "Summary Dispositions" at 916 N.E.2d 423).

For completeness, we note that both Rouse and the State refer to numerous Nebraska statutes not repeated here as well as other sources in an effort to convince us of the meaning of § 81-8,219(2) in general and "any law enforcement officer" in particular. None of these authorities are definitive or particularly convincing. Instead, we believe our interpretation of the language of § 81-8,219(2) itself provides the most coherent reading of the statute in question.

CONCLUSION

Rouse, an inmate, claimed money damages for property detained by DCS personnel while he was housed in segregation. Because the DCS personnel are "law enforcement officer[s]" covered by the exception to the waiver of sovereign immunity contained in § 81-8,219(2), the State has not waived sovereign immunity from Rouse's claims. The district court did not err when it concluded that Rouse's claims were barred by the State's sovereign immunity and dismissed Rouse's action.

Affirmed.

Eulalia Miguel Francisco, appellant, v. Sergio Remigio De Leon Gonzalez, appellee.

921 N.W.2d 350

Filed January 4, 2019. No. S-18-329.

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. **Jurisdiction: Service of Process: Waiver.** Proper service, or a waiver by voluntary appearance, is necessary to acquire personal jurisdiction over a defendant.
3. **Jurisdiction: Service of Process.** Where a party serves by publication but fails to comply with Neb. Rev. Stat. § 25-520.01 (Reissue 2016), the district court lacks personal jurisdiction over the defendant.
4. **Judgments: Jurisdiction.** A judgment entered without personal jurisdiction is void.
5. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** A void order is a nullity which cannot constitute a judgment or final order that confers appellate jurisdiction on this court.
6. **Judgments: Jurisdiction: Appeal and Error.** An appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Vacated and dismissed.

David V. Chipman, of Monzón Guerra & Associates, and Dorian E. Rojas, of Immigrant Legal Center, an affiliate of the Justice for Our Neighbors Network, for appellant.

No appearance for appellee.

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

Papik, J.

A Nebraska statute, Neb. Rev. Stat. § 25-520.01 (Reissue 2016), requires a party providing service by publication to mail a copy of the published notice to those individuals having an interest in the action whose name and post office address are known. The same statute requires the party serving by publication to file an affidavit stating that the party and his or her attorney, "after diligent investigation and inquiry," were unable to ascertain and do not know the address of any parties having an interest who were not mailed a copy of the published notice. In this case, Eulalia Miguel Francisco (Eulalia) sought paternity and custody determinations concerning two children. The district court made such determinations concerning one child, but declined to do so with respect to the other child, because it found that Eulalia failed to comply with § 25-520.01. On appeal, we find that Eulalia did not comply with § 25-520.01 and that thus, the district court lacked jurisdiction to enter any of the relief sought. As a result, we vacate the district court's orders and dismiss the appeal.

BACKGROUND

Eulalia brought this action against Sergio Remigio De Leon Gonzalez (Sergio). In Eulalia's complaint, she alleged that Sergio was the father of both of her children: Christopher Darinel De Leon Miguel, born in 2010, and Yamileth Lizbeth De Leon Miguel, born in 2016. She asked that Sergio be declared the father of the children and that she be awarded sole physical and legal custody.

She also asked that the court make certain specific findings. She asked that the court find that reunification with Sergio was not viable due to abandonment and neglect and that it was not in the children's best interests to return to Guatemala. Eulalia moved from Guatemala to Omaha, Nebraska, while pregnant with Yamileth. The specific findings Eulalia requested would

have allowed for an application for special immigrant juvenile status under federal law. See *In re Guardianship of Carlos D.*, 300 Neb. 646, 915 N.W.2d 581 (2018).

Eulalia filed a motion requesting that she be allowed to serve Sergio by publication. In support of the motion, Eulalia submitted an affidavit which stated that she had not had contact with Sergio in nearly 2 years, that she did not know of any friends or family that knew Sergio's whereabouts, and that she knew of no other way to locate him. The district court granted the motion for service by publication, and thereafter, notice was published in The Daily Record of Omaha, a legal newspaper in Douglas County.

After a hearing on the matter at which Eulalia appeared with counsel and testified and Sergio did not appear and was not represented, the district court entered an order declaring Sergio to be the father of the children and awarding Eulalia sole physical and legal custody of the children. The district court declined to find that it was in the children's best interests to remain in the United States and not to return to Guatemala.

Desiring the specific findings the district court declined to make, Eulalia filed a timely motion to alter or amend. But, after another hearing, the district court again declined to make the requested findings. Additionally, the district court found that its earlier order establishing paternity and awarding Eulalia custody of Christopher should be vacated under Neb. Rev. Stat. § 43-1411 (Reissue 2016), because the proceeding to establish paternity was not filed within 4 years of Christopher's birth.

Eulalia then filed another motion to alter or amend, this time requesting that the district court declare Sergio to be the father of Christopher and award Eulalia custody of Christopher. It also again requested the specific finding that it was in the children's best interests to remain in the United States and not to return to Guatemala.

The district court denied Eulalia's second motion to alter or amend. In its written order, the court stated that while Eulalia

obtained leave to serve Sergio by publication, she did not comply with a Nebraska statute "by mailing a copy of the published notice to the defendant's last known place of residence, or filing an affidavit required by that statute." While the statute cited by the district court, Neb. Rev. Stat. § 25-512.01 (Reissue 2016), pertains to service on a partnership, the context suggests that the district court found that Eulalia failed to comply with § 25-520.01.

The district court determined that because Eulalia failed to constructively serve Sergio, it did not have personal jurisdiction over him. In addition, the district court stated that because Sergio was not provided with notice that was reasonably calculated to inform him of this action, any orders against him would not comport with procedural due process.

Eulalia filed a timely appeal.

ASSIGNMENTS OF ERROR

Eulalia assigns the following errors by the district court: (1) finding that Eulalia did not properly serve Sergio, (2) finding that it lacked jurisdiction to establish paternity and award custody with respect to Christopher, and (3) failing to find that it was in the children's best interests to remain in the United States and not return to Guatemala.

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. *State on behalf of Marcelo K. & Rycki K. v. Ricky K.*, 300 Neb. 179, 912 N.W.2d 747 (2018).

ANALYSIS

[2,3] The district court ultimately refused to grant Eulalia the relief she sought in her final motion to alter or amend because it found that Eulalia had not complied with the statutory requirements for service by publication set forth in § 25-520.01. Proper service, or a waiver by voluntary appearance, is necessary to acquire personal jurisdiction over a

defendant. *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011). Where a party serves by publication but fails to comply with § 25-520.01, the district court lacks personal jurisdiction over the defendant. See, *Farmers Co-op. Mercantile Co. v. Sidner*, 175 Neb. 94, 120 N.W.2d 537 (1963); *In re Adoption of Leslie P.*, 8 Neb. App. 954, 604 N.W.2d 853 (2000).

[4] A judgment entered without personal jurisdiction is void. *Johnson v. Johnson, supra*. Because the district court's power to order any of the substantive relief Eulalia contends it should have turns on whether service was proper, we begin our analysis there.

Compliance With § 25-520.01.

Service by publication, while constitutionally permitted in some circumstances, is a poor bet to provide actual notice to a party of an action that affects his or her rights. As the U.S. Supreme Court observed in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1950):

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

Based on the recognition that notice by publication is unlikely to provide actual notice, the Court held in *Mullane* that it was inconsistent with due process for known beneficiaries of a trust with a known place of residence to receive only notice by publication of an action affecting their rights.

Enacted within a decade of *Mullane*, § 25-520.01 requires a party providing notice by publication to also take steps beyond publication. Section 25-520.01 provides:

> In any action or proceeding of any kind or nature . . . where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall

> within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post office address are known to him. Proof by affidavit of the mailing of such notice shall be made by the party or his attorney and shall be filed with the officer with whom filings are required to be made in such action or proceeding within ten days after mailing of such notice. Such affidavit of mailing of notice shall further be required to state that such party and his attorney, after diligent investigation and inquiry, were unable to ascertain and do not know the post office address of any other party appearing to have a direct legal interest in such action or proceeding other than those to whom notice has been mailed in writing.

Eulalia does not dispute that for purposes of § 25-520.01, Sergio has a "direct legal interest" in this proceeding. Because Sergio has such an interest, § 25-520.01 required Eulalia to mail Sergio a copy of the published notice if his address was "known to [her]." This language has been interpreted to require that notice be sent to the "last known address" of persons with an interest in the proceeding. See *In re Adoption of Leslie P.*, 8 Neb. App. at 960, 604 N.W.2d at 858. At oral argument, Eulalia's counsel conceded that Eulalia would have known Sergio's address at the time she departed Guatemala. Eulalia did not, however, mail a copy of the published notice to Sergio's last known address.

Despite not sending notice to Sergio's last known address, Eulalia argues that the district court erred by concluding that she failed to comply with § 25-520.01. She contends that because she did not know Sergio's whereabouts at the time of publication, she was not required to mail a copy of the published notice. Section 25-520.01 contemplates that there may be situations in which the location of parties having an interest in a proceeding is not known. In such cases, however,

under § 25-520.01, the party relying on service by publication must file an affidavit stating that "such party and his attorney, after diligent investigation and inquiry, were unable to ascertain and do not know the post office address" of any parties having an interest who were not mailed a copy of the published notice.

Eulalia argues that she filed an affidavit that excuses her from not mailing a copy of the published notice to Sergio and satisfies § 25-520.01. The affidavit Eulalia points to is the affidavit she filed in support of her motion to serve by publication. As noted above, the affidavit stated only that she had not had contact with Sergio in nearly 2 years, that she did not know any friends or family who knew his whereabouts, and that she did not know of any other way to locate him. Even though § 25-520.01 seems to require the filing of a separate affidavit after publication, Eulalia argues that her affidavit filed beforehand contains the content required by § 25-520.01 and that she should thus not be required to file an additional affidavit after publication.

Even if we were to assume that an affidavit filed in support of a motion to serve by publication could satisfy § 25-520.01, we find that Eulalia's affidavit does not do so for a number of reasons. Section 25-520.01 requires that the affidavit state that both the party *and her attorney* were unable to ascertain the address after "diligent investigation and inquiry." Eulalia's affidavit makes no reference at all to Eulalia's attorney, let alone to diligent efforts her attorney conducted to attempt to locate Sergio.

Neither does the affidavit refer to any investigation or inquiry of Sergio's whereabouts undertaken by Eulalia. It simply states that she does not know where he is or how to locate him. Eulalia contends this is sufficient, apparently taking the position that there was nothing she could possibly do to locate Sergio. As noted above, however, Eulalia knew where Sergio lived prior to her departure from Guatemala. Because Eulalia's affidavit provides no indication that she or

her attorney attempted to determine whether Sergio still lived where Eulalia once knew him to live, we cannot say she demonstrated a reasonably diligent investigation and inquiry. See *In re Interest of A.W.*, 224 Neb. 764, 768, 401 N.W.2d 477, 480 (1987) ("a search which makes no effort to determine where the subject of the search was last known to be and which makes no effort to check whether the subject is still there cannot be considered reasonably diligent").

Compliance with § 25-520.01 would not have guaranteed that Sergio would receive actual notice of this proceeding. Sergio may no longer live at the same address. A diligent search to locate him may have proved fruitless. Even so, in § 25-520.01, the Legislature required that a person seeking to accomplish service by publication take measures in addition to publication in an attempt to provide actual notice. Because Eulalia failed to comply with § 25-520.01, her constructive service was improper and the district court lacked personal jurisdiction over Sergio.

Proper Disposition of Appeal.

While the district court denied Eulalia the relief she sought concerning Christopher because it determined it lacked personal jurisdiction over Sergio, it did not vacate its earlier order determining paternity and custody as to Yamileth. As Eulalia correctly points out, the district court could not have had personal jurisdiction over Sergio for purposes of one child and lack it for the other child. Eulalia is incorrect, however, to the extent that she suggests that this incongruence in the district court's orders allows us to ignore the lack of personal jurisdiction over Sergio and proceed to the merits of the relief Eulalia seeks.

[5,6] In fact, the lack of personal jurisdiction over Sergio requires just the opposite. As noted above, an order entered by a court without personal jurisdiction is void. *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011). And a void order is a nullity which cannot constitute a judgment or final

order that confers appellate jurisdiction on this court. *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011). Even when appellate jurisdiction is lacking, however, an appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions. *Id.*

CONCLUSION

In light of the foregoing, and because the orders of the district court that purported to determine paternity and award custody of Yamileth were made without personal jurisdiction and were thus void, Eulalia has not appealed from a final order or judgment. We therefore vacate the orders entered by the district court as to Yamileth and dismiss the appeal for lack of jurisdiction.

Vacated and dismissed.

HEADNOTES
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HEADNOTES

HEADNOTES